

- Edited Transcript -



HUDSON INSTITUTE'S
BRADLEY CENTER
FOR PHILANTHROPY AND CIVIC RENEWAL
presents

DAWN OF THE DEAD?

A DISCUSSION OF “IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD”

Tuesday, May 18, 2010 ▪ 12:00 to 2:00 p.m.

Hudson Institute ▪ Betsy and Walter Stern Conference Center ▪ 1015 15th Street, NW ▪ Suite 600

A donor may set up a charitable foundation in perpetuity, and the foundation's trustees are obligated to carry out the donor's intent. These two defining features of the American legal system afford donors a form of immortality, writes Boston College law professor **Ray Madoff** in her new book, *Immortality and the Law: The Rising Power of the American Dead* (Yale University Press). But when current needs are effectively surrendered to the “dead hand” of the past, and when that trend is driven not by the wishes of the dead so much as by the living who stand to benefit the most – trustees, bankers, and financial services companies, society and the donor himself or herself ultimately lose, Madoff argues.

On May 18, Hudson Institute's Bradley Center gathered a panel of experts to discuss the issues raised in Madoff's book: Is it impossible to prevent donor intent from being corrupted? To what extent should it be honored after a donor's death? Who should decide? Panelists included author **Ray Madoff** herself, as well as **Suzanne Garment** of Indiana University's Center on Philanthropy, GuideStar International's **Arthur “Buzz” Schmidt** and **Jeffrey Cooper** of Quinnipiac University School of Law. The Bradley Center's **William Schambra** moderated the discussion.

Program and Panel

12:00 p.m. – Welcome by Hudson Institute's **William Schambra**

12:10 – Panel Discussion

Ray Madoff, Boston College

Jeffrey Cooper, Quinnipiac University School of Law

Arthur “Buzz” Schmidt, GuideStar International

Suzanne Garment, Center on Philanthropy, Indiana University

1:10 – Question and answer session

2:00 – Adjournment

FURTHER INFORMATION

This transcript was prepared the Federal News Service and edited by Kristen McIntyre. To request further information on this event or the Bradley Center, please visit our web site at <http://pcr.hudson.org>, contact Hudson Institute at (202) 974-2424, or send an e-mail to Kristen McIntyre at Kmcintyre@hudson.org.

Panel Biographies

Jeffrey A. Cooper is an associate professor of law and teaches coursework related to estate planning, wills and trusts, and related areas of taxation. Prior to joining the Quinnipiac faculty, he was a principal in the Private Clients Group of the law firm of Cummings & Lockwood, where he was noted for his dedication to the training and development of the firm's junior attorneys. Cooper received his BA in government from Harvard College in 1990. He also holds a JD from Yale Law School and an LLM in taxation from New York University School of Law. Cooper served as a vice president and senior estate planner for the United States Trust Company, and as a visiting lecturer at Yale Law School. A frequent lecturer, Cooper also has authored numerous articles on various topics relating to estate planning, probate and taxation. He is admitted to practice in Connecticut, New York, and Massachusetts, as well as before the United States Tax Court and the Internal Revenue Service. He is a member of the Executive Committee of the Estates and Probate Section of the Connecticut Bar Association and previously served as a member of the Greenwich RTM.

Suzanne Garment is a visiting scholar at the Center on Philanthropy at Indiana University, where she is writing, with Leslie Lenkowsky, a book on the politics of American philanthropy. She currently serves as special counsel to New York Lieutenant Governor Richard Ravitch. She has practiced tax law for ten years. Prior to her law practice, she was a resident scholar at the American Enterprise Institute. She was also associate editor of the editorial page of *The Wall Street Journal*, where she wrote the weekly column "Capital Chronicle." Garment served in government as special assistant to U.S. Ambassador to the United Nations Daniel P. Moynihan. She has taught politics and public policy at Harvard University and Yale University. Garment is the author of *Scandal: The Culture of Mistrust in American Politics* and *Decision to Prosecute: Organization and Public Policy in the U.S. Antitrust Division*, as well as numerous articles, op-eds, and reviews. She earned a BA at Radcliffe College, an MA at the University of Sussex in the United Kingdom, a PhD in political science at Harvard University, and a JD and LLM in taxation at Georgetown University Law Center.

Ray Madoff is a professor at Boston College Law School where she teaches trusts and estates, estate and gift, tax, estate planning, and a seminar on immortality and the law. She is the lead author of *Practical Guide to Estate Planning* (CCH), and has written in a wide variety of areas involving property and death. Her current project is a book exploring the legal treatment of the dead, called *Immortality and the Law: The Rising Power of the American Dead* (Yale University Press). Prior to teaching, she was a practicing attorney in New York and Boston. Professor Madoff is a member of the American Law Institute, an academic fellow of the American College of Trusts and Estates Counsel and past chair of the Trusts and Estates Section of the American Association of Law Schools. She also serves on the board of directors of the ACTEC Foundation.

Arthur "Buzz" Schmidt is chief executive of GuideStar International. He founded GuideStar in the United States in 1994, GuideStar UK in 2003 and GuideStar International in 2004. A graduate of Princeton and Stanford graduate schools of business and education, Schmidt has spent decades working in both the private and nonprofit sectors and serves on advisory boards of several national and local nonprofit organizations, including the Institute for Philanthropy, FB Heron Foundation, Association for the Preservation of Virginia Antiquity, Friends of New Philanthropy Capital, and GuideStar Data Services, CIC as well as the International Committee of Independent Sector. *The Nonprofit Times* named him Nonprofit Executive of the Year for 1999 and one of the 50 Most Influential People in the nonprofit sector for 2000, 2001, and 2002. In November 2001, *TIME* Magazine recognized Schmidt as one of the seven innovators in philanthropy, with the Time 100, the next wave of American innovators for the new century.

Proceedings

WILLIAM SCHAMBRA: Good afternoon. My name is Bill Schambra and I'm director of Hudson Institute's Bradley Center for Philanthropy and Civic Renewal. Krista Shaffer and I welcome you to today's panel, entitled, with apologies to film director George Romero, "Dawn of the Dead." A discussion of a terrific new book by Professor Ray Madoff of Boston College Law School, entitled *Immortality in the Law: The Rising Power of the American Dead*.

Although our conversation today will necessarily have a legal cast to it – three of our four panelists are attorneys, and I'll leave to you to guess which ones – the central question Professor Madoff raises in her book – how much control should the wishes of the dead exercise over the living – is in fact a rich and provocative theme for some of our tradition's great literary works. Consider, for instance, the novels of George Eliot.

Who can forget the experience of outrage and injustice we feel when we discover, as we read her great classic *Middlemarch*, that the narrow and pedantic scholar Casaubon has left an incredibly mean-spirited provision in his will, namely that his patient and long-suffering wife Dorothea will lose her inheritance should she marry his young cousin, Will Ladislaw?

And yet as we learn in the book, *Immortality and the Law*, such provisions, imprisoning the future of the living and the will of the dead, are not uncommon in American law and may in fact be increasing. Lest we tip the discussion too much in Professor Madoff's direction, however, consider the fate of another Eliot indenture that sought to perpetuate the work of the dead into the future.

In her far less well-known novel *Romola*, set in late 15th-century Florence, Eliot places the argument for overcoming the wishes of the dead on behalf of the freedom of the living in the mouth of Tito Melema. Tito is expected to preserve the books and statuary of his deceased father-in-law's magnificent library just as they came to him – shades of Philadelphia's Barnes Collection.

Tito, though, is a true Enlightenment scholar, free of the prejudices and shackles of tradition, and cannot see the point of obedience to that mandate. As he explains to his wife Romola, "I understand your feeling about the wishes of the dead, but wisdom puts a limit to those sentiments, else lives might be continually wasted on the sort of futile devotion, like praising deaf gods forever." He goes on, "A little philosophy should teach us to rid ourselves of these air-woven fetters that mortals hang round themselves, spending their lives in misery under the mere imagination of weight." From this encounter, however, Romola learns not what an enlightened and thoughtful philosopher her husband Tito is, but rather how coldly calculating, how utterly self-absorbed he is. For even as he makes his argument on behalf of the living, he has already sold his father-in-law's magnificent collection to the highest bidders.

Sometimes, Eliot seems to suggest reverence for and obedience to the wishes of the dead may be a powerful constraint on our all-too-consuming desire to live entirely in the present and for ourselves alone. These and other questions, no doubt, will be tackled by our distinguished panel today, which will be kicked off by Professor Madoff herself. She will then be followed by Arthur "Buzz" Schmidt, chief executive of GuideStar International. And we'll hear from Jeffrey Cooper, associate professor of law at Quinnipiac Law School, and then Suzanne Garment, visiting scholar at the Center for Philanthropy at Indiana University. Professor Madoff.

RAY MADOFF: Thank you so much. It's a tremendous pleasure for me to be here. I dare not speak to a group of philanthropy-minded people without first saying that although my name is Madoff, I am not in

fact related to that other fellow with the same name, pronounced differently. Otherwise, I always worry about my ability to get out safely and alive.

It's such a pleasure for me to return to the Bradley Center for Philanthropy because more than any group that I have known, the Bradley Center really fulfills the promise of promoting vigorous debate on the most pressing issues. They are always – I know, I trust Bill Schambra, that he always gets an extremely diverse panel to tackle these issues and I'm honored that today is no exception. We have such an esteemed panel and I'm so thrilled that they're here to discuss my book.

In other words, I am expecting a good skewering, but I'm proud to be part of it. My comments today arise out of the research for my book, *Immortality and the Law: The Rising Power of the American Dead*. The book explores the variety of ways in which the law treats interests of the dead. And it looks at American law, as well as the law of other countries and different areas. This is really a question of to what extent do we continue to provide legal protections for the wishes of those who are no longer living? So the private charitable foundations – although the book looks to a variety of different areas, including our ability to control our bodies, or our reputations and artistic creations and property for other people, like the trust that limit bequests on the condition of somebody marrying or not marrying – but charitable foundations obviously play a significant role in this area.

The great scholar Lewis Simes described charitable trusts as follows: “It gives full scope to the control of the dead hand, far beyond that which is possible anywhere else in the law. By this device, the vanity of the dead capitalist may shape the use of property forever.”¹ The names, of course – Ford, Mellon, Pew, MacArthur, as well as many, many others – are known to us because these are the names of benefactors of some of the largest private charitable foundations. Private charitable foundations seem to truly offer that elusive immortality that human life lacks. I find that the advertisements that I hear on the radio about the Carnegie Foundation, established to do real and permanent good in this world really capture this idea. And it's no wonder that so many donors are drawn to establish their private charitable foundations, in perpetuity.

However, in my comments today, what I'd like to focus on is that however comforting and inspirational this idea might be of charitable foundations as immutable and unchangeable, lasting for all time, it's also false. Because regardless of what we tell donors or what we tell ourselves about the permanence of their charitable creations, it turns out that the charitable world is really just like the rest of the world, where the only thing that's truly constant is change. And so what I'd like to do today is just talk about some of the changes that have occurred in our history of treatment of private charitable foundations.

The first change, and one that I was really surprised to learn about, is the changes in the legal treatment of private charitable foundations. Private charitable foundations are so ubiquitous – they're such a part of our landscape – that it's hard to believe that for most of the 19th century – many states had rules where individuals were not allowed to establish private charitable foundations. It was thought to be poor policy to allow people to commit property in perpetuity for a particular purpose, regardless of if it was charitable. And lots of cases said that individuals do not have the power to create a perpetuity for whatever purpose they might think good. In contrast, today, a little more than a century later, charitable trusts are not only allowed for a wide variety of purposes, but they're also heavily subsidized by the tax code, making the U.S. taxpayer a financial partner in every charitable trust established by the wealthy.

Thus, while many might have been disappointed by Leona Helmsley's decision to direct her billions of dollars to the care of dogs, nobody challenged whether it was her right to do so or whether she should

¹ Lewis M. Simes, *Public Policy and the Dead Hand* (Ann Arbor: University of Michigan Law School, 1955), 111.

have to pay any taxes on that wealth. It was well-accepted in our laws today that that was well within her right and fully entitled to the charitable deduction.

Over our history, we've also seen changes in notions of what constitutes a charitable bequest. And there's an interesting comparison. In 1865, there was a case where the Massachusetts Supreme Court ruled that a bequest to trustees – two of whom were Susan B. Anthony and Lucy Stone – to secure women the right to vote – was not charitable. And the reason was because its purpose could not be accomplished without changing laws. Just about a hundred years later, another court ruled that a trust to help further passage of the Equal Rights Amendment did have a charitable purpose. And so here we have almost identical trusts. At one time it's found to be a charitable purpose; at one point it's another.

Sometimes these are as a result of other changes in mores. And the case involving Sen. Augustus Bacon, I think, is particularly illustrative. Sen. Bacon wrote a will in 1911 and he gave a large tract of land in Macon, Georgia, to establish a park to be named Baconsfield in the memory of his sons. And it was to be for the sole, perpetual and unending use, benefit and enjoyment of white women, white girls, white boys and white children. Sen. Bacon explained this bequest in his will as follows: "I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes or colored people. On the contrary, I have for them the kindest feeling, and for many of them, esteem and regard, while for some of them I have sincere personal affection. I am, however, without hesitation in the opinion that in their social relations, white and Negro should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed together in common."

Now, the time that this was written was 1911, so it was an extremely different time as today. As lawyers in the crowd will remember from law school, this will was the subject of much case law, including two Supreme Court cases. And although a racially segregated park in Macon, Georgia was hardly worth notice in 1911, less than 50 years later the racial restriction was no longer acceptable as a valid charitable entity.

The courts, as it went up and down the cases, ultimately decided that in figuring out what to do – so it was agreed that this could no longer be operated on a racially segregated way, but then the question is, what's to be done? Well, instead of looking to what's good for society or anything else, the court instead decided to say, what would Sen. Bacon have wanted? And the court decided that he was really more interested in his bigotry than he was in his charitable bequest, and therefore returned the land to his heirs, who sold it to developers. Today, Baconsfield is an office park and millions of law students remember Sen. Bacon for being a racist.

A third common change in the world that we've seen is a change in circumstances. And I'd like to just touch base here about the trust that was set up by the father of the American chocolate bar, Milton Hershey. He set up a trust with his wife Catherine for the establishment of an orphanage. And again, this was set up in the early part of the 20th century, but very quickly all sorts of changes of circumstances occurred. Most notably, orphanages were no longer the preferred method for dealing with parentless children. It seemed to be much better to use foster care or other ways. And so some of these were addressed through the doctrine of *cy-près*², which is a legal doctrine that allows for trusts to be modified to still fulfill their purpose.

However, another problem could not be so easily addressed. The trust was originally funded with the Hershey stock. And at the time of its funding, it was quite valuable. It was \$60 million. However valuable that might have seemed, though, it pales in comparison to what it grew to, and by 2008, this had

² Translates to "as near as may be" or "as near as possible."

grown to more than \$8 billion. I checked my GuideStar to see where it was now and it was maybe \$6 or \$7 billion today. But that's still a lot of money. That money is all, entirely devoted to a school of less than 2,000 students. Now, you can imagine that how many things you buy – laptop computers, other things – it's quite difficult to spend that money. And in the late '90s, a reserve had built up of over \$850 million, sitting there, that they couldn't figure out how to spend. So a proposal was made to the court to spend \$25 million to create an institute to train teachers in educating at-risk children.

However, in denying the request, the court ruled that our discretion is not unfettered, and if exercised, must be within the limit approximating the dominant intent of Hershey. Okay, so here is yet another example where we see, even in trying to offer – you will exist in perpetuity; it'll be just as you want – in fact, things often turn out very different than how one imagines.

In addition to the specific problems outlined above, there are more pervasive problems as well. For trusts that end up being too small, we have the problem of orphaned trust. And the *New York Times* ran a very good series about these orphan trusts, where the donor's intent has been completely abandoned and the person who has the management of them tends to give it to their alma mater or favorite pet charity. So that can happen to the really small trusts.

However bad that is, it's even worse for the trusts that are really large, right? Because here we have problems like the Bishop Trust in Hawaii, one of the largest trusts and one of the most corrupt, as everybody – all of the trustees – were taking huge amounts of money, huge amounts of self-dealing. In Philadelphia, the Barnes case involved such a valuable collection of artwork that everyone wanted it for themselves.

There's also the issue of mission drift; there's a common movement away from donor intent. And Martin Wooster has explored this in a monograph published by the Bradley Center.³ Even poor Leona Helmsley, ultimately, has not had her wish fulfilled, as trustees have decided not to devote the resources to the care of dogs and instead have moved towards giving bequests that technically fit within the more general language of the trust, but arguably don't really fit within her wishes.

So as we face the world that really shows how much change is really pervasive in this area of private charitable trusts, it brings us the question what should we do? What should our response be? I think, as a society, we need to seriously rethink whether we want to continue to perpetrate this myth of perpetual charitable foundations carrying out the donor's wishes in perpetuity. Perhaps it's time that we abandoned perpetual private charitable foundations and require that they spend out their assets within a certain time period after their death. In the meanwhile, I certainly think that donors and their estate planners should think seriously before adopting perpetual life. If 50 years post-death is good enough for Gates and Buffett, perhaps it can do work for other foundations as well.

ARTHUR SCHMIDT: Thanks very much. It's a pleasure to be here at the Bradley Center. I wear another hat, beyond the GuideStar one, from whence my interest in this subject really comes more strongly. And that's as chairman of a foundation in New York, the F.B. Heron Foundation, which has been very active in promoting the creative deployment of the corpus of the foundation, partially to mitigate some of the issues that Professor Madoff enunciated more specifically in her book and some other of her writings.

And I'm happy to talk about some of my perspectives from where I sit. I hadn't really looked at the issues of the fiscal structure of these organizations, the perpetual private foundation, from the donor-intent point of view specifically, but I'm going to try to – given the subject and some of the language that Bill

³ Martin Morse Wooster, *Great Philanthropic Mistakes*. Washington, DC: Hudson Institute, 2006.

(Schambra) put into the flyer – I'm going to try to merge, to see how my thinking might merge with the donor-intent issue.

And so I will go from there. I would highly recommend this book, Professor Madoff's book. I did read it. I'm the only panelist that did not bring it with me. (Laughter.) I'm also the only non-attorney, so I don't know if there's a connection, maybe it's just a coincidence, but they got theirs autographed and so I'm regretting it. But mine is so marked up that I think any first edition value would have already dissipated. So I'll have to get another copy and get that one autographed.

I think that – in the final analysis, it's not possible to prevent donor intent from being corrupted in the private foundation business, simply not possible. And that intrinsic donor intent is really subverted even before a foundation is created. And I think that's because intent is an elusive idea. The idea of intent being perpetual is an oxymoron.

The idea of people starting foundations, being advised by tax attorneys, accountants, investment professionals and best practitioners of the current legacy foundation model is problematic and it'd be very difficult to – for a perspective donor to a foundation to really come up with any other model than a private foundation model, given the advice that they're getting from the experts. But what they're not told when they create a private foundation, which I think would go very much to their calculation of intent or their development of intent is if there are really five inevitabilities that are relevant here in the development of a foundation.

One is the inevitability, as Professor Madoff says, of the changes in circumstances surrounding any issue, any subject of largesse is going to be different, is going to change, is going to disappear, is going to have greater opportunities, lesser opportunities. But that all is not anticipated in a strong donor intent case.

Second inevitability is the propensity of human beings plays in subsequent control of the assets to have a point of view and to have power. And there's an inevitable tension. It could seem like a small one or a large one, but you know, where does donor intent end and somebody else's intent begin? Who knows?

The third one is the propensity of endowment-driven foundations to become hardened silos. If a donor's creating a foundation and not expecting a large one in particular, it's this foundation to become a hardened silo, they're not dealing with reality. By hardened silo, I mean that there is no influence – external influence that's going to drive good behavior, excellent grant-making, anything else by that institution. There are no shareholders – unlike any other institution or society, there's nobody in the outside except for the attorney generals who are looking for malfeasance. But there's nobody on the outside who's driving good performance by foundations.

Similarly, another inevitability is that there's no internal accountability, that the program officers of foundations know that they'll have 5 percent to spend every year, regardless of how well they do. So in creating a foundation, do I really intend to create conditions where there's no external or internal accountability for the institution I have set up? I don't think so.

And then finally, another inevitability is that the value of the foundation will dissipate over time. It will be eroded by the social cost of capital of waiting to give money away. So if a donor of a foundation is really cognizant of these liabilities, these chronic inevitabilities in the foundation, I doubt very much that they would intend to develop perpetual private foundations in the model that we have come across. We've just kind of happened into it.

So you think about the population of private foundations. Do you think donors intended to create 20, 30, 40,000 – pick a number – nearly identical, despite different sizes, philanthropic institutions that have 60

percent of their assets in equity, 30 percent of their assets in debt, 10 percent in esoterica, give four to 5 percent away every year? It's incredible. These are our social venture capitalists, right? This is our wellspring of individual capital for the civil society. They're all the same. How can this be? Do donors really intend for that to happen? That is the fact of the private foundation, far more than what it gives – physical restraints drive it.

So I would say that what happens is these tax advisors, attorneys, investment professionals and the best practitioners from the big foundations that you bring into advise you when you create a foundation create a perfect storm of perpetuity and it's very, very difficult for a successful businessperson or someone else who's creating a foundation to get their hands around it when everybody is there. Now, it's not that these professionals intend to impede social progress. I think it's a more inevitable collusion, not a conspiracy and it's born of their training in wealth preservation and their, you know, residual self-interest because these are great institutions to perpetuate self-employment for those very classes of advisors.

They reflexively follow philanthropic norms that we were really backed into by Congress in '69, when they tried to bring some kind of order to a set of quasi-public institutions that operated without any discernible public expectations. So they backed into this – the industry of advisors embraced it. But what did they do? In satisfaction of Congress' mandate, they, thinking of this as just another form of tax avoidance, they have set standards and best practices that promote – effectively mandate the minimal standard of generosity. So what would you do to a – if a donor was really interested in seeing his intent or her intent– unless it's memorializing himself, which I don't think Congress should mandate as a valid purpose for private foundations. I would put that over there. I just don't think that that's a valid purpose for a tax deduction.

So let's talk about real, legitimate public sentiment. What would you advise a person to do? Well, you'd advise them to get very passionate and very focused and very fast – to try to solve a problem or to engage an issue over a discrete time period, at least I would. I think that's the only way, given the institution, that you can ensure donor intent. So if perpetuity is the enemy of intent, it is also the enemy of philanthropic optimization. And this erosion in social value is really important. And so few foundations pay any attention to it, but there's a big cost in limiting a foundation's annual payout and waiting for far into the future to give away money for which a tax deduction has already been claimed.

This cost of waiting is painfully obvious to the Ugandan who is no longer eligible for AIDS drugs because the funding has run out. It certainly, at least from my point of view, painful to an earth which has to wait for funds to remediate the effects of climate change. But the same principle is active anywhere there is need. It's less expensive for society to address problems today and if you wait, the value of that corpus has to be docked, has to be discounted because it's waiting. So with respect to philanthropy, I don't think it's the hand of the dead that is the problem. I think it's the constraining professional practice that promotes but a slow trickle of philanthropy from these great fortunes over an indefinite period.

Far beyond the feasible lifespan of any legitimate donor intent, far beyond the optimal shelf life of any foundation's endowment and all the while, these practices inhibit because of these hardened silos of foundations inhibit innovation and excellence in social investment. So the private foundation is a bad vehicle for donor intent. I'm not sure it's a good vehicle for anything.

JEFFREY COOPER: Okay, good afternoon, everyone. As you can see from my biography, I spent – before I became a legal academic, I spent about 13 years as a lawyer, trust banker, where, as Buzz (Schmidt) would say, I impeded social progress. (Laughter.) So I'm glad to be here –

MR. SCHMIDT: I wouldn't have anything to talk about.

MR. COOPER: When he invited me to speak today, Bill (Schambra) reminded me that the panel was going to have two main parts. He said, first, we'd have some opening remarks. He said that and then he said, and then, we'll do some mixing it up. And he sounded so excited about the mixing it up part, I'm going to try to get there as quickly as possible to see what that's all about.

Before we get there and before I turn to the main portion of remarks, just two preliminary thoughts. First, to Bill (Schambra), to Krista (Schaffer), the Bradley Center, thanks for having us all here today. A special thanks to Bill. It takes someone of great confidence to invite someone from Quinnipiac University to speak knowing you're going to have to introduce that person and so on behalf of Quinnipiac, thank you, Bill, for pronouncing our name, one of the four or five proper ways. Best I can tell, I interchange among them.

And to Ray (Madoff), congratulations on your book. It's an excellent book. There's a lot – as someone who's taught in this field for a while – there's a lot I can add to my lectures, a lot of anecdotes, of information that I can add. I thank you for that. I thank you for autographing my book and I think maybe just for fun, I'll include a provision in my will that my book has to be passed down to the male heir – the oldest male heir in perpetuity. I think that would be a fitting use of it. I'm sure my oldest son is very excited – he will be to hear that.

So with that being said, let me stake out a position I hope will allow us to do some mixing it up and I probably mean most of what I say, although I may not mean everything of what I say here. But that will add to the fun, I think. Ray's (Madoff) book introduces us to some colorful characters. They're the dead, the possibly dead, some of whom are frozen, some of whom are not. The dead who might not really be dead, the temporarily dead – (laughter) – and I want to add another category to this and speak on their behalf just a little bit – the planning to be dead.

And it fits in with my earlier comments. Before I became an academic, I spent a long time advising the planning to be dead and I chose to no longer to do that. So maybe that says something, but you know, as a group, they have a lot of the features that Ray (Madoff) and some others say they do. They're controlling. They're sure they know what's right. They will control their descendants as long as the law allows them. Their charitable gifts are part generosity, part about self-interest, part about ensuring their own legacy and they're armed with this cadre of lawyers and accountants. They make a formidable foe for those who might see the world differently and might wish that the planning to be dead saw the world the same way. And perhaps most relevant for today, I think they're very astute observers, this planning to be dead group. They're very astute observers about how society treats the already dead.

What I mean by this is those who are planning to be dead understand that they will be an easy target at some point. They will, in fact, be dead or temporarily dead or some other variation thereon and they're aware that their view of the future, their desire for their own legacy may not be shared by others and they're very astute about structuring their affairs to minimize that risk. Again, we can argue about whether they're right, they're wrong, whether we should capitulate to them and I'll say a few things about that. But from my observation, they are very astute observers. They are willing to change lawyers and bankers and accountants on a dime to get what they want.

And so let me just give a simple example just to flesh this out. Although I think it may be self-evident, Ray's (Madoff) book talks a lot about grave robbers. That was some of my favorite portions of the book because I wasn't aware of some of the history there. But let's think about what happened if a local cemetery starts sort of allowing grave robbers to rob graves and does nothing about it, the theory being it's an old cemetery, the people who are here have been dead for 200 years. Really – it was silly to bury them with gold rings and all of those things that we could put to a much better use now. Well, I think the dead are not going to do anything in response. At least, we're not certain, but I'm going to – for

argument's sake – we'll assume they will do nothing in response. Now, will some people do things on their behalf? Perhaps. Perhaps some of their descendants will move people from one cemetery to another.

But there's no certainty of that. The dead would have to rely on their legacy for that. But what about the planning to be dead? Well, the planning to be dead, I think, would take a very robust response. I don't think that people will be buried there going forward at the same rate that they would be, at least not those who are worried about their graves being desecrated in the future. Now, so the planning to be dead are much more nimble than the dead. They're much more able to see what's happening in society and to respond accordingly. Now, I think that's a pretty simple analogy, probably an overly simple analogy for all of you, but I think it does parallel nicely, some of what we're talking about in terms of where the law should go.

Because what will the planning to be dead do in response if the institutions that we're talking about today, if the conventions, if the state laws, if the lawyers' and accountants' attitude towards some of the institutions, if the judiciary's attitude towards some of these institutions changes, what will they do in response? And I think that's my theme for today.

The state legislature that seeks to curtail use of a dynasty trust, of a trust that lasts perpetually, whether it's a private trust or whether it's a charitable trust, well, that state has to be concerned that it will be the poorly managed cemetery of states, that donors will move their funds elsewhere, that they will make sure they don't end up there. I mean this is a theme – there are a number of legal academics in the room. This is a theme that we're discussing robustly on the private trust side rather than the charitable trust, but I think it crosses over very nicely. What about the charity? It comes to be known as the charity that doesn't honor donor's intent. What's the future for that charity?

Will the marketplace, among those who are planning their affairs, will the marketplace decide the fate of that charity, maybe in a way differently than many of us in the panel might like or might intend? So this is not to say that the law must simply capitulate to these individuals, that because they're wealthy, because they're well-advised, because they're headstrong and because they want a certain legacy, we simply have to allow them to do that.

It's simply to say that we have to be aware that they can, in fact, respond as the law changes and as institutions change and those attitudes change, that individuals who are planning their affairs can respond accordingly and we may end up creating incentives we weren't aware of if we don't do this carefully, if we don't make any reform carefully.

So to stake out my position for the mixing it up session to come, I say beware of the planning to be dead and their lawyers, accountants, tax advisors and other social impeters. I don't agree with everything they stand for. I don't agree with everything my clients envisioned for their own future. I certainly don't do that and I have the luxury, now, of not having to do that. I think many of us would agree, that some of the trends we've seen are undesirable from an academic standpoint, from a societal standpoint.

But what I want to say also at the same time is be careful – be aware, as we make efforts to achieve reforms – remember that there's a whole future group of tomorrow's donors, of tomorrow's private foundations, if we have private foundations or tomorrow's dead who will respond accordingly. And if we make changes in the wrong way, in the wrong direction, there may be consequences. There may be incentives created that would produce problems that perhaps might be as great or greater than the problems we currently face. So that's my position for mixing it up and thank you all for being here.

SUZANNE GARMENT: More thank-yous. First, Bill (Schambra), thank you. As usual, you've done a terrific job of introducing us and Professor Madoff, thank you. This book does exactly what a very good book should do. It takes facts from a very wide range of areas and forces us to look at them through a new lens. And it's just wonderful. And I should point out we're talking about the philanthropic aspects of it here, but it discusses a lot of other areas in which I'm sure the people in this room will also be interested, I mean the intellectual property portion is especially interesting.

Anyway, I was especially taken with the book's discussion of the role of change and contingency in evaluating the legal framework for philanthropy. We tend to think of the privileged position of private philanthropy as a settled feature of the landscape, as if from Dartmouth College to now, we had really loved our foundations and nonprofits. And the book was a reminder that throughout the 19th century, many states had laws limiting the scope of charitable bequests precisely because this country has always been mistrustful of the dead hand of the past. It's part of the revolutionary legacy. And this strain in American thought has always been in tension with the peculiarly American desire for immortality. We view death, not as a natural practice or a natural process, but as an affront and we're going to attack it by any means possible and charitable bequests are one way.

But we finally, over the course of the 19th century, just as we finally came to terms with the necessity for a political parties, which we think of as part of the landscape and very much were not part of the landscape until after the revolutionary generation. Over time, as the book also points out, the notion of the charitable bequest changed, in part, because the nature of American society changed. Less agrarian, more commercial, more industrial and over time, we came to understand that it was not true that every generation was going to be able to take care of itself and that some things did have to last beyond the space of a single generation.

Well, we got what we wanted and now, what we also get is exactly those problems that the book points out. We deal with charitable purposes that to most people's way of thinking, are idiotic. We have very limited means of modifying those charitable purposes. For instance, that Pennsylvania court that limited the application of *cy-près* in the Hershey case really set it up for self-destruction.

And we have perversion of purposes. We have the delay in spending, the time value of money being a concept that's alien to charitable trust law. But there is – there is only, when you deal with political institutions, there's only one real question and that is compared to what?

I would note that in recent years, when the hand of the living has been interested in chopping off the hand of the dead, the hand of the living has done it really well. For instance, state attorneys general are supposed to find malfeasance in charities. They're supposed to enforce trustees' fidelity to donor intent. That isn't what attorneys general have been exclusively engaged in, in recent years with respect to charities. As was pointed out by John Tyler and Evelyn Brody, attorneys general have broad regulatory powers over charities through the *parens patriae*⁴ doctrine. And in recent years, they have been using it in a very characteristic way.

In the Hershey case, in the Barnes case, in a case involving the Ford Foundation, in a case involving Daniel Terah in Illinois. In each case, an attorney general who, surprisingly, had political ambitions, took philanthropic assets. Were they being used as well as they could have been? Not clear. And turned them into a kind of political pork.

⁴ Latin for "parent of the nation." In a legal context, it refers to the state's power to intervene against a negligent or abusive parent, informal caretaker or legal guardian. The state may then act on behalf of the child or individual that needs protection.

Were they being used better after this process began? Not clear. When we say that there's not going to be perpetuity, when we say that in every case, we should be sunseting these - foundations, hospitals, universities, it's not clear that the sunseting provisions should apply to them. But when we say this, we're saying that we're changing the locus of decision-making to what? If we're changing the locus of decision-making to public bodies, we have to ask what the record of these public bodies is in making disposition of these funds. In some cases, it's going to be better, some cases it's going to be worse.

And if it's not clear that public bodies are going to be better than private decision-makers at dispensing these assets, then maybe there's an argument for maintaining as much diversity as possible in the hardened silos. This is a massively democratic society. It is one in which the majority makes its will felt in everything from philanthropic fashion to American Idol. This is a country that has the collective attention span of a gerbil and in this circumstance, and in a circumstance in which it's not clear that public decision-making bodies have any particular distinctive competence in disposing of these assets, maybe it's a good idea to leave things the way they are.

WILLIAM SCHAMBRA: The one thing, going to Mr. Schmidt's argument about the likelihood that people would turn their attention to large problems more urgently and more immediately. On the one side, we have that possibility. On the other side, and I think that both Jeff (Cooper) and Suzy (Garment) were talking about this; you have the reality of human nature, right?

Which what we know of human nature is it does not encourage the presupposition that people will turn to concerns of social justice if they're left to their own devices without some artificial way of elevating their view - elevating their thinking. And one way by which one does that is forcing a wealthy person to think, well, what kind of legacy am I going to leave? What do I want to be in place 50 years from now and you know, possibly, the private foundation is one way of compelling that kind of longer view.

Left to their own devices, what assurance do we have that individuals won't simply say, well, there is no way to perpetuate my nobler self. Therefore, let me just indulge my selfish self and do whatever the heck I want with this money and you know, give it to my family and that sort of thing? There's a question in there. (Laughter.) Why is that not a likely outcome of the position that we should be more urgent and immediate and forget about sort of the longer term?

ARTHUR SCHMIDT: Are you asking?

WILLIAM SCHAMBRA: Yes, yeah, I am. And then of course, everyone else should feel free -

ARTHUR SCHMIDT: So get off my rhetorical thing in just a little bit here. There is certainly a case to be made for long-term retention of philanthropic assets to address long-term issues or underserved areas - geographic areas that are underserved by philanthropy over a long term. There are reasons to have it and so I would not want to see a world without private foundations entirely.

And what I guess I'm really arguing for is a - that private foundations take a close look at what they're doing and they ask themselves a fundamental question. How do I maximize the value of my assets, my human resources for the betterment of society? How do I do that? And if people - if organizations - every foundation did that, there would be a far greater differences in foundations in how they addressed social ills. Now, I think that one of the areas that's been given a short shrift by the advisors and by just kind of best practices, is the notion of different time horizons, shorter time horizons for philanthropy.

We're starting to see much more of it. We see it in Gates and Buffett talk about 50-year lives for - after their deaths - for after their involvement in foundations, in the Gates Foundation, for paying out the assets or investing the assets.

Let's develop a number of different models for this so that people can see that philanthropy isn't just uni-dimensional. Now if the alternative is to leave assets to the children, I don't think that's so bad because number one, we'll collect taxes on the transfer unless it's in perpetual trusts. And number two, rich people aren't that less philanthropic than foundations. Think about it. You know, 5 percent is not an awful lot of a corpus to give out in a year. I'm not sure that foundations are much more philanthropic than the average wealthy person.

RAY MADOFF: I guess I'd also like to add that we can do a lot by social cues in our society. The donors, just as we have that problem came about in the private side, where Congress gave an exemption and then the world took off, creating the dynasty trust. I think the Congress has a chance, on the charitable side, to do something for good.

For example, you could say, you get an unlimited deduction if your private foundation goes for 50 years. However, you get slightly less of a deduction if it goes in perpetuity. These types of things will nudge people to the right direction to do the right thing.

I think the mistake that we're doing is that we're holding out perpetuities as the norm and as the model. Every rule of law and tax rule all sets forth this idea that our ultimate goal is a perpetual entity and anything else would be a deviance from that.

SUZANNE GARMENT: I have a question that's not a rhetorical question, actually. When a foundation – I mean the idea of sunseting foundations, I find very appealing as a personal matter. When a foundation announces that it's going to sunset and has to spend a lot of money fast, does that raise philanthropic problems though? I mean is it possible to know how to spend a huge amount of money right away? I mean are these problems that people like Gates are running into?

ARTHUR SCHMIDT: Sure. Well, Gates is running into it and I cannot, for the life of me, understand why Warren Buffett put all this money through Gates. And even more, I can't understand why the other major foundations didn't say, hey, you know, I'll take some of that. I can deploy those assets effectively too.

The reason they don't is because they're in this perpetual mindset of a stagnant amount of funds, a very historically – a way of doing business, a process of doing business. They've never had to think outside of that – of that silo and – did I answer your question? I don't think I did–

SUZANNE GARMENT: We're getting there. (Laughter.)

ARTHUR SCHMIDT: Well, can you repeat it?

SUZANNE GARMENT: Yes. (Laughter.) It's a problem.

RAY MADOFF: It's hard for me to believe, though, that it's a real problem in terms of that we have too much charitable wealth and not enough problems to be addressed. I mean clearly, there's just an enormous amount of problems that aren't being addressed. And you might say, well, we need more efficient ways of addressing them, which I would agree, but it's not because well, how could we possibly spend all this money, we don't have the problems for it. We clearly do.

SUZANNE GARMENT: No, that's right. The question is whether we know how to solve them with the money.

RAY MADOFF: Well, the idea would be that we know better how to solve them with the money today, our own problems, and let future generations try to solve their problems in the future rather than committing our money to solve the problems of the future and keeping it from the problems of today.

ARTHUR SCHMIDT: Could I try it now that I remember your question – (laughter) – so the thing that’s most enticing to me, in the circumstance that you’re referencing, is that the board of this foundation, the senior staff of this foundation, all the sudden, has an issue, I mean, has a problem. There’s a reason for acuity in decision-making. They might look at other means to distribute the money, go through intermediaries, for example.

SUZANNE GARMENT: It’s like hanging? Focuses the mind.

ARTHUR SCHMIDT: Which would be – well, the fact that you have to make value out of \$100 million corpus over 20 years is going to have you make your decisions in a much different way than if you had – if you were thinking of a perpetual timeframe. And I think – and I think in a more – probably, or at least you’d see greater differences in how that was approached, more innovation and probably better decision-making.

RAY MADOFF: Can I add one more sentence to that? Which is that in our lunch beforehand, Bill (Schambra) said, “You know, I really kind of miss the Olin Foundation because they did a lot of great stuff.” And the idea, I think, of the initial comment was that it should have been around forever because then it could keep doing its great stuff. But of course, part of the reason of its effectiveness was perhaps because it was so mindful of its purpose and getting it done in a reasonable time frame.

WILLIAM SCHAMBRA: Jeff (Cooper), you want to –

JEFFREY COOPER: I’m okay.

WILLIAM SCHAMBRA: Let’s roll.

JEFFREY COOPER: Let’s roll.

WILLIAM SCHAMBRA: Okay. (Laughter.) We’re going to end this session at 1:30 today. I’m increasingly limiting the amount of time we have for our panels just to an hour-and-a-half. So why don’t we turn now to the audience. Please, Mr. Wooster, who will tell us that he wrote the book on donor intent. So I will spare you the need to say that. (Laughter.) Yes.

Q: Which Professor Madoff doesn’t cite. (Laughter.) You know, my question, first off, I wanted to say that my position isn’t that much different than Professor Madoff’s. I just think that foundations should voluntarily limit their terms rather than by state action.

My question is what about gifts of art or things rather than money and very specifically, the Barnes Foundation because with the Barnes Foundation you had a donor who could not have done a better job at making his wishes explicit, but who also, as a result of his own political beliefs, left the foundation underendowed. He didn’t want people to think he was keeping money away from the government and the endowment had to be in government bonds and railroad stocks. I don’t understand the railroad stocks.

But in any case, you have a situation where the foundation will be moved, essentially because of a hostile takeover, whereas the problems of under-endowment, it seems, could have been fixed with much smaller addition of funds and leaving the foundation where it is.

WILLIAM SCHAMBRA: Comments on that particular question? The Barnes Foundation in general?

SUZANNE GARMENT: Not surprisingly, I think the Barnes Foundation is a perfect example of the problem of this false promise that we are giving to donors. When Barnes died he rightfully, probably was resting in peace thinking that he had taken care that his wishes would be carried forth.

And if anyone who saw the movie *The Art of the Steal*, it really laid out all the different ways he tried to address it. But in fact it's just not the reality. The reality is that it absolutely was taken over in all sorts of ways that are highly questionable. So I guess my two responses to it is, yes, the Barnes Foundation: a perfect example of a case where we don't really give donor intent in perpetuity.

To me though the problem is not so much that we don't give the donor intent and perpetuity. It's more troubling that we promise him that we are going to do so. Barnes had a lot of – what seemed to motivate him was a little bit of personal – his feelings were hurt by how the Philadelphia art establishment responded to him and his foresight and connection of art.

And I question whether we want as a society to take the position that the most fabulous art collection in the world should be kept away from the public because somebody had a tiff with the art institute and they didn't appreciate him. Why should we give somebody the ability to control those resources? Not just for their lifetime or for 10 to 20 years after – but in perpetuity. Isn't that really where the problem starts?

WILLIAM SCHAMBRA: Before I let Suzy (Garment) get in I should add: the novel *Romola* is particularly interesting because one of the argument that – one of the arguments that Tito makes is that, you know, why should Florence – this petty, Italian city-state. Why should Florence be permitted to keep this wonderful collection? When in fact it should be open to all mankind and therefore distributed as commodities throughout civilized Europe? (Laughter.)

SUZANNE GARMENT: No, I agree with Ray (Madoff). I mean, it is a perfect example of changeability and how we are never going to control circumstance in the future. All we can do is think about the principles that we want to govern as change – as it inevitably will – befalls any bequest. The fact that the attorney general of Pennsylvania made this decision, essentially, gives me great pause. I mean Barnes – well the idea that he's resting in peace is the only place where I disagree with you. That man never rested in peace – (chuckles) – ever. But if what we're doing is making it easier for political officials to grab these assets then I think we should think again about the laws that are permitting them to do so.

WILLIAM SCHAMBRA: But to Jeff's (Cooper) point. Granted all of the circumstantial obstacles to maintaining donor intent – I think he would say that there is something of value to have people operating with the desire to maintain some kind of presence after they are dead. It's not just that they will run away from the states where that impulse isn't respected. There's also something, actually, kind of ennobling about that – at least on occasion.

Granted all the stupid things that have been done in the name of perpetuity, nonetheless, there was something about Barnes's desire to convey this theory of art that he had that was not a contemptible theory. It was based on John Dewey's principles of pragmatism and all this. I mean it was not just his personal desire to aggrandize himself. It was his desire to pass on this understanding of art. And at least for the period of time from his death until it moves down to the Benjamin Franklin Parkway, that intention will have been preserved. And something will have been conveyed of his intention to hundreds of students in the meantime. Jeff (Cooper)?

JEFFREY COOPER: I think you've made Mr. Barnes more noble than he needs to be – from my argument. And that's where I find my own argument difficult at times because let's not just make it about Barnes. We'll just use his name for convenience.

Let's say that it was all about his own control. And say he was completely selfish and – yes he wanted his charitable deduction. But he wanted to control this. He wanted his name on the building. He wanted every little thing his way. The problem becomes for me: well, what if we had told him when he was alive that he wasn't going to have it his way. We let him have it his way for 30 years. And after 30 years the pieces would go where everyone – where the masses could see them. And they would be hung in straight lines. (Chuckles.) What if we told them that? What would he have done? Now, there's a possibility he would have burned the art-work down while he was alive – burned the Rembrandt, Professor Langbein, right?

And he could have. I don't know whether that's arson in Pennsylvania or not. I'm not opining on that. But from a narrow property-law lens he could have done it and we couldn't have stopped him. Maybe he would have given it to one of his children who promised, 'Dad. I know what you want for the art. Give it to me. I'll put it up in my living-room that way and I'll never let any of those art critics in to see it. The ones you despise.' And maybe the son is going to honor that. Maybe this son is lying to his father and he's just going to take the art and then sell it. So all I'm saying is, if we had made it plain to Mr. Barnes – what we are now saying – he might have acted differently.

There's a fairness issue in that. But there are also lots of other Mr. Barnes's out there with artwork and they are deciding what to do with it. And I think the message we send, the way the courts resolve these cases and the way the legislatures respond - I think send a message to those future donors and will have consequences.

WILLIAM SCHAMBRA: Yes, please?

Q: I'm John Langbein – I'd like to pick up on the observation by Ms. Garment that there's something to be worried about when you have these attorneys general as enforcers. One of the strangest things about the process of enforcing charitable-trust law in the United States is that it is left to attorneys general, who are persons whose function has and whose character has changed across time from the English inheritance. The English attorney general is not elective. It's an appointive officeholder who is a specialist. But more importantly, in England since the middle of the 19th century, the enforcement of charitable trusts has been taken away from the attorney general and placed with a specialist enforcement agency, the charity commissioners.

There is something very peculiar in the United States about having the AG – I always tell students that AG stands for aspiring governor. The thing that attorneys general are most interested in is, basically, political advancement to something else. Nobody who's attorney general wants to be attorney general; they always want to do something else. And the result is that you have a problem of incentive, of misaligned incentive, in that area. You're not going to be able to get away from having some public enforcement and public control here, for the simple reason that there is a public-benefit standard in charitable-trust law.

A charitable trust to burn the Barnes will not be enforced; it's not a charity. There's a public-benefit standard and you're going to have to have public enforcement. So it's not good enough to say let's try to get away from public enforcement. We need public enforcement. But what's so peculiar is to have it with a low-visibility person whose interests are badly aligned.

WILLIAM SCHAMBRA: Is there nothing we can do about that?

RAY MADOFF: Well, there have been, as you know, various suggestions for different means of enforcement – that there should be more people given standing to enforce. I’m not an expert in the evaluation of that argument, but I’ll bet Professor Langbein is.

WILLIAM SCHAMBRA: Other questions, please.

Q: My name is Harvey Rushaka. If you follow Professor Langbein’s logic, the debate becomes then what you think is the appropriate new institution – it’s not going to be the courts – some quasi-public entity, the way we created the Fed to look at money supply, to take it outside politics, and they gave them a different term. So then the only question that Langbein’s putting forward is, how does the panel feel about this idea of creating a different entity that has quasi-public functionality that looks at and polices the cy-près doctrine as to whether or not it’s being appropriately done. It’s not going to be the courts. It’s going to be this new thing, the way the Brits have. What does Langbein –

Q: You put words to my mouth. I didn’t say, ‘not the courts.’ But I did say that the institution that enforces, which is basically the instigating role, could be other than the elected attorney general.

Q: But you still are left with two entities, right? Is it going to be a court, or is it going to be a quasi-public entity that its purpose and function is that that we then create?

Q: We will always end up in the courts, but the question is, how and by whom? That’s the question.

Q: So we’re on the same page. And then the question is how does the panel respond to that?

RAY MADOFF: And I think, of course, the other missing link in the whole thing is the Treasury, the IRS. The important reason this is such a public issue is because of the public contribution, which comes as a result of the tax deduction, the extremely generous tax deduction. And the IRS really could be doing a better job of enforcing these if, of course, they had the resources to do so.

SUZANNE GARMENT: I’m not sure – they’re an organization with a distinctive competence. I mean, this is not a problem with it in principle, but I see the way that they are moving into the governance field and I’m not sure that they are set up to do it. I’m not sure their people are trained to do a job like that.

RAY MADOFF: And if Pablo Eisenberg were here – which, unfortunately he has to be at another meeting – I know that what he would say would be that investigative journalists are the ones that have primarily taken the lead on this issue in the past. And what we need is funding for good newspaper coverage so that we can have this type of oversight that we seem to be losing somewhat.

SUZANNE GARMENT: We should always have more journalism. (Laughter.)

JEFFREY COOPER: To layer a question on top of a question, part of this, for me, would be whoever does the enforcement – on whose behalf are they acting? Because I think that’s another confusion here and I think attorneys general have taken different positions on that very question. I mean, what really is their purpose? Are they simply there to avoid malfeasance – which, I think many of us would say, that’s not enough? Well what do they do beyond that? Are they there to enforce the original gift? Are they there to advocate on behalf of the public, the modern public in general or something in between? So I think we need – to the extent we redefine this, I think that’s really a crucial element of it.

And it might be that if that were more clear – I don’t know; Professor Langbein and I haven’t talked about this – but to the extent attorneys general are often in a political posture, that might be directing their

answer to that question. And so if we came up with another mechanism for making it clear what the attorney general's role was, then they might be competent, or more competent to execute that role.

WILLIAM SCHAMBRA: Yes, other questions, please. Let's go to Aaron, then Chris.

Q: Aaron Dorfman with the National Committee for Responsive Philanthropy (www.ncrp.org). Jeffrey (Cooper) and Suzanne (Garment), I'm just curious on your thoughts. You haven't commented yet. Ray has asserted a couple of times that these are partially public dollars, or that there is a substantial public contribution due to the generous preferential tax treatment. I'm curious if you agree with that?

JEFFREY COOPER: I do agree with that. And as I've said, I have a very ambivalent relationship with my own theories on some of these things because of that, because I find myself advocating, or warning of the dangers of a certain group of clients that I made the conscious decision I didn't want to continue to represent. So there is that personal tension in my life. So I do think that is an element of it.

And all I've said is – to repeat something I said before, but if we put our foot down and say, 'if you want your charitable deduction, then you're going to have to do it this way, that way or this way versus the other' – then we have to do it well and we have to accept some of the consequences of it. If the answer is, you can't keep your artwork and hang it in the museum the way you want, but you can give it to Harvard and they can hang it in a library the way you want – and one way you'll get a charitable deduction; the other way you won't – that may lead to some unintended consequences. Fewer people from Philadelphia are going to see the artwork hanging in Widener Library at Harvard than they would at the Barnes.

SUZANNE GARMENT: As Professor Langbein said, because of the relationship with tax, as well as other things, there is a public-benefit standard throughout. Some of us would put it not that government has subsidized particular charities, but that government has subsidized the idea that some things shouldn't be done by government. But that's a larger debate and we know how that one goes.

JEFFREY COOPER: I just want to comment. I think Suzy was channeling Ronald Reagan there.

SUZANNE GARMENT: What?

JEFFREY COPPER: That's almost for –

SUZANNE GARMENT: No, I was channeling Madison, for God's sake. (Laughter.)

JEFFREY COOPER: Did Reagan ever play the role of Madison? (Chuckles.)

WILLIAM SCHAMBRA: Yes, Chris, I think. Yes?

Q: Yes, I suppose I have two quick questions on a few things. Chris Levenick. I edit [*Philanthropy Magazine*](#). The one is with respect to large public charities with enormous endowments. I haven't heard a word said about them existing in perpetuity. So Harvard University: when they once upon-a-time had a \$42 billion legendary endowment. I suspect you will say that it's an organization that has a life of its own – therefore it can continue. Then we have to draw a distinction. How is that different from an operating foundation, like the Getty Foundation? And if the Getty Foundation is an operating foundation as a listed entity – and it's an ongoing entity, and it's continuing to fund its own operations – then why not private foundations?

What is the moral distinction – qualitative distinction between these organizations where you allow these two massively endowed public charities – operating foundations to exist? But on the other side the private foundation. So can I shelf that one?

Real quickly, and then I suppose I'm curious about the legal ramifications that both Professor Madoff and Mr. Schmidt have raised with respect to the assumption that the tax deduction constitutes some sort of public buy in. You know, that's a disputable point obviously. The organization in which I'm affiliated takes a principle stand against it. I wonder, though, how you would react to funds that stayed, essentially, private. Assets that were devoted to charitable purposes but for which a deduction was never claimed? Would you still think it appropriate to institute these caps by legislative action on those assets?

SUZANNE GARMENT: First of all, let me say I really appreciate the question. And that's just the type of mixing it up that is so great here at the Bradley Center. I actually would not draw the line where you suggest that I would. I think that perpetual public charities can raise the same issue. The difference is that the public charities are supported by the public. And what I'd like to see happen is that rather having it be the case that Harvard University can keep its donations in perpetuity – only spending income. That they would be required to spend their assets on a more current basis; but that knowing that future generations would provide more contributions to them.

And if, in fact, future generations decided they no longer wanted to commit to that institution that – then it wouldn't exist. The idea that somehow a public charity should be structured to exist forever in perpetuity when we don't know what the desires of the future generations are; it just strikes me as peculiar. It is one thing to say that here we can have a certain time – the money doesn't have to all be spent out today. But I think reasonable time provisions: 50 years sounds totally reasonable to me. And then you have a moving pot of money. As to the question about the charitable deduction: I think it is very different if a charitable deduction is not claimed with respect to the money. Then I think that it's appropriate to say that it's not subject to the same types of public oversight as opposed to money that is eligible for the deduction.

ARTHUR SCHMIDT: I certainly agree on the second point. And I would encourage people to give to Harvard and not take a charitable deduction as well. (Laughter.) Harvard would probably – would make less money. (Chuckles.) And Princeton would make less money. (Chuckles.) But they would still get contributions – strangely. You know, things are driving those contributions that are beyond the rational analysis. I don't know where I draw that line either. But I do think about some institutions as being fundamentally different.

I think that if a society says it needs a repository for its cultural assets that that's a decision that it's made that requires some kind of a long-term financial commitment to it: a public museum of some kind or possibly an educational institution. But we see what's happened when this relatively small academic institution on the Charles River is dwarfed by this huge investment company that it's associated with. I mean, something has gone awry there. That's just not right to end up in that kind of condition.

JEFFREY COOPER: Well I think the question just points out some of the things that concern me on this line drawing. Because where do you draw the line? And wherever you draw the line I think it's going to have consequences for where the money goes. And certainly once you get to the issue of the grandfathering. I mean if we got to the point of – well Harvard College raised its money under a regime. Maybe it can spend it.

Those are some of the more, I think, dangers of over simplifications I hear that grandfathering would solve problems. I think grandfathering would take some of the biggest institutions we have right now and assure them that forever they would be on a different plateau than other organizations. If the choice were

between funding a small, local educational foundation and Harvard and the tax treatment were different - I think we're incentivizing more money to go to the larger established institution, which may be exactly the opposite of what many people would want. Of course it's exactly what I would want - (laughter) - but that's for personal reasons. And because I think I'm like my class chair, or something, for the Harvard College funds. (Laughter). I should have given an appropriate disclaimer. (Laughter).

SUZANNE GARMENT: I'm one of those people who went to Harvard on one of those scholarships established by one of those crazy people. (Laughter.)

JEFFREY COOPER: So you and I both have to recuse ourselves, yes.

SUZANNE GARMENT: Yes, that's right. But as Professor Langbein points out: if you took away the whole tax issue you would still have the issue of incentives and the alignment of incentives for the regulation of charities.

WILLIAM SCHAMBRA: We'll ask just one last question if there is one. No? All right, then we will thank our audience and our panel for a terrific discussion. (Applause.)

(END)