

## Agencies Should Ignore Distant-Future Generations

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A theme of many of the papers is that we need to distinguish the notion of intertemporal equity on the one hand and intertemporal efficiency on the other hand. Intertemporal equity refers to the degree to which the current generation should weight the interests of future generations. Intertemporal egalitarianism, for example, holds that the interests of a person living in the future should receive the same weight as the interests of a person living today. Intertemporal efficiency refers to the means by which the current generation should implement the obligations imposed by intertemporal equity. The two distinct ideas are frequently confused in the legal literature; the confusion is embodied by the notion that discounting future costs and benefits entails a rejection of intertemporal egalitarianism. As Louis Kaplow, Dexter Samida and David Weisbach, and Cass Sunstein and Arden Rowell show, an intertemporal egalitarian should endorse discounting so that the choice among projects designed to benefit the future is not distorted—so that one does not choose a regulatory project that transfers wealth to the future less efficiently than saving does.<sup>1</sup> Indeed, for the sake of argument, Samida and Weisbach assume intertemporal egalitarianism in the course of reaching their conclusion “that discounting by the opportunity cost of capital is generally appropriate and Pareto dominates any other decision procedure.”<sup>2</sup>

However, the actual discount rate used by regulatory agencies should almost certainly be higher than the opportunity cost of capital. The latter provides only the ethically appropriate *floor* for the actual discount rate that ought to be used by agencies. Indeed, beyond a few generations the effective discount rate should be infinity—that is, regu-

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<sup>1</sup> See Louis Kaplow, *Discounting Dollars, Discounting Lives: Intergenerational Distributive Justice and Efficiency*, 74 U Chi L Rev 79, 81 (2007) (arguing that intergenerational discounting “does not depend on the appropriate rate of discount on lives”); Dexter Samida and David A. Weisbach, *Paretian Intergenerational Discounting*, 74 U Chi L Rev 145, 146 (2007) (“[D]iscounting is appropriate, and, in fact, required by any moral theory that accepts the Pareto principle.”); Cass R. Sunstein and Arden Rowell, *On Discounting Regulatory Benefits: Risk, Money, and Intergenerational Equity*, 74 U Chi L Rev 171, 208 (2007) (claiming that “the problem of intergenerational equity . . . should not be conflated with the question of discounting”).

<sup>2</sup> Samida and Weisbach, 74 U Chi L Rev at 152, 170 (cited in note 1) (noting that “many of the discussions of discounting implicitly use this premise” of intergenerational egalitarianism).

latory agencies should attach no weight to the interests of what I will call “distant-future generations” even if it would be ethically appropriate to attach equal weight to the interests of these future generations.

How can this be? The answer is that agencies act within a thick institutional and political environment that bars them from directly implementing moral precepts—or that would result in perverse outcomes if agencies did try to directly implement moral precepts. The discount rate that agencies should use is not the theoretically ideal discount rate but the discount rate that generates the best outcomes in a world in which agencies do not have complete freedom of action.

This argument rests on the basic distinction between moral goals and decision procedures,<sup>3</sup> a distinction from which all of the authors under consideration abstract. Suppose, for the sake of argument, that the government’s proper goal is maximization of social welfare, where the social welfare function includes future generations as well as the current generation and weights the utility of all individuals equally, regardless of when they live. It follows from the arguments discussed by Kaplow and others that the government should use a discount rate based on the opportunity cost of capital. This ensures that the marginal utility of individuals will be equalized regardless of when they live. A benevolent dictator—that is, a government that acts in the morally perfect way—would do just this.

But the real government is not a benevolent dictator. It is constrained by numerous factors, of which I emphasize two. First, because officials with political power are elected, they must choose policies that at least roughly please the public or important constituents. They cannot choose morally ideal policies unless the public seeks morally ideal outcomes. The “public” here will be taken to consist of people who have the vote and thus can affect the electoral success of current government officials. Thus, the public excludes future generations.<sup>4</sup>

Second, because governance is complex, the government must divide itself into multiple institutions, each of which has jurisdiction over a different set of problems. In the U.S., regulatory agencies are gener-

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<sup>3</sup> See Matthew D. Adler and Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 *Yale L J* 165, 216–19 (1999) (arguing that the distinction “implies that the legitimacy of cost-benefit analysis is a moral problem *and* an institutional one”). For a general discussion, see Matthew D. Adler and Eric A. Posner, *New Foundations of Cost-Benefit Analysis* 7–8 (Harvard 2006) (arguing that cost-benefit analysis “is not part of the moral bedrock” but instead “is a workable proxy for something that is part of the moral bedrock—overall welfare”).

<sup>4</sup> Economists and public policy scholars have generally recognized this constraint. See, for example, Raymond J. Kopp and Paul R. Portney, *Mock Referenda for Intergenerational Decisionmaking*, in Paul R. Portney and John P. Weyant, eds, *Discounting and Intergenerational Equity* 87, 90 (Resources for the Future 1999) (contending that cost-benefit analysis “is attractive because it is based on the preferences of all those around today”).

ally required to use cost-benefit analysis to evaluate regulatory projects, but Congress lurks in the background. Agencies have some freedom of action because Congress must delegate to them if it wants to accomplish anything, but they are constrained by congressional as well as presidential oversight. If agencies attempt to achieve morally perfect outcomes that are rejected by the public or that otherwise do not account for the institutional division of labor, their choices may result in perverse rather than morally perfect outcomes.<sup>5</sup>

Congress and the president will support policies that benefit non-voting future generations only to the extent that they are supported by voting members of the current generation. Thus, intertemporal egalitarianism is possible only if voting members of the current generation weight the interests of future persons to the same extent as they weight their own interests. Intertemporal egalitarianism may be ethically correct, but it is surely false as a matter of human psychology, and hence people's choices, voting behavior, and electoral politics. If Americans today value living foreigners at about 1/2000 of an American,<sup>6</sup> it seems highly unlikely that they will value future Americans much more. Indeed, the whole idea that people living six millennia hence will be anything like us today is extremely odd. Many, if not most of them, will be descendents of the foreigners whom Americans today value so little.<sup>7</sup>

Thus, it seems clear that even if the ethically correct weight for a future person is equal to that for a current person, no democratic government would follow this ethical precept. The actual weighting for generations after three or four is probably in the 1/2000 range. Again, note the analogy to foreign aid. Democratic governments give much greater weight to the utilities of citizens than to the utilities of foreigners. The most likely reason is that citizens vote; foreigners do not. If this reason is correct, it applies with equal force to the intertemporal case. Current citizens vote for current elected officials; future citizens do not. Thus, current elected officials who want to be reelected will try their best to maximize resources for the current generation at the expense of the well-being of the future, especially the distant future.

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<sup>5</sup> See Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U Chi L Rev 1137, 1190 (2001) (“[A]gencies that refuse to comply with laws that reflect [public] concerns will surely be socked with heavy political and legal sanctions”).

<sup>6</sup> See Wojciech Kopczuk, Joel Slemrod, and Shlomo Yitzhaki, *The Limitations of Decentralized World Redistribution: An Optimal Taxation Approach*, 49 European Econ Rev 1051, 1075 (2005) (concluding that “the U.S. on average valu[es] the well-being of foreigners only 1/6 as much as an American citizen, and less than 1/2000 for the residents of the poorest of the developing economies”).

<sup>7</sup> See Thomas C. Schelling, *Intergenerational Discounting*, 23 Energy Policy 395, 396 (1995) (positing that “time may serve as a kind of measure of [cultural] ‘distance’”).

This is not to say that the current government will treat future utilities as though they were worth literally zero. Most likely, the current government weights future utilities roughly to the extent that these future utilities enter the utility functions of current citizens. So if current voters value future generations at 1/2000, then the current government will value future generations at 1/2000. This is surely why foreign aid is as generous (or stingy) as it is. Americans care a little about the well-being of foreigners, and the government responds by providing a little aid to foreigners. But if the weighting is not literally zero, it is effectively zero, and thus agencies should ignore future utilities just as they currently ignore the utilities of aliens.<sup>8</sup> I have argued that agencies should give distant-future generations a weight of zero because the voting public values them very little. This logic suggests as well that agencies should give near-future generations—the next generation and perhaps the generation after—a weight greater than zero and less than one. I suspect in practice that agencies can give them the same weight as they give the current generation without creating distortions, but this depends on empirical and institutional questions that I cannot address here.

To understand the practical danger from ignoring these constraints, imagine that the EPA is given the authority to regulate greenhouse gases.<sup>9</sup> If the EPA takes into account only the interests of the current generation of Americans, then the regulations it issues are likely to be minimal or nil. If the EPA takes into account the interests of future generations of Americans (or of foreigners, or of both), the regulations could be quite strict, resulting in an increase in the price of fossil fuels, automobile travel, and so forth. Consumers would respond by saving less and spending more at the margin; this will hurt future generations.<sup>10</sup> Further, consumers will lobby Congress to overturn the regulation; if they succeed, the EPA's efforts will have been wasted. Finally, consumers might simply demand additional government programs that transfer wealth from the future to the present—for exam-

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<sup>8</sup> This carries the very minor proviso that agencies tend to include, or at least not overtly ignore, the utilities of aliens on American soil. On the topic of agencies' valuation of foreigners, see Eric A. Posner and Cass R. Sunstein, *Dollars and Death*, 72 U Chi L Rev 537, 579–84 (2005) (arguing that agencies should value the utilities of aliens commensurately with the value of a statistical life in the alien's nation).

<sup>9</sup> See *Massachusetts v EPA*, 415 F3d 50, 61–62 (DC Cir 2005) (Tatel dissenting) (arguing that the Clean Air Act gives the EPA “no discretion to withhold regulation” of greenhouse gases), cert granted, 126 S Ct 2960 (2006).

<sup>10</sup> See Robert J. Barro, *Are Government Bonds Net Wealth?*, 82 J Pol Econ 1095, 1113–15 (1974) (claiming that individuals adjust their behavior to maintain a constant risk composition of their private balance sheets); Kaplow, 74 U Chi L Rev at 97 (cited in note 1) (noting that if the balance of political forces “remains the same, so too would the approximate extent of redistribution”).

ple, tax cuts without spending cuts and thus increased debt, or energy projects that degrade the environment in a manner outside the jurisdiction of the EPA, or disinvestment in basic research. Overall, it seems unlikely that in a democratic society the EPA could effect a substantial transfer of resources from the present to the future in defiance of public sentiment.

Let me sum up. Suppose that the opportunity cost of capital is 0.3. Then the discount rate used by agencies should be based on 0.3 for projects whose effects are felt in the near future (say, thirty or fifty years out). Beyond thirty or fifty years, the discount rate should be infinity. A simple way of putting this point is that agencies should ignore the effects, both positive and negative, of their regulations beyond fifty or one hundred years. To be sure, this implies that agencies should approve projects that destroy generations of the distant future in order to modestly improve the well-being of the present. But there are no such feasible projects at present, unless one thinks that failure to engage in greenhouse gas abatement is such a project—and in any event, and this is my point, this problem of intergenerational equity is a moral and political problem that agencies cannot resolve outside of, and prior to, a political resolution by elected officials.

The key to understanding this argument is to recognize that agencies exercise delegated powers. Implicitly, they are delegated the power to maximize the welfare of the current generation of Americans, not the welfare of all future generations of Americans, and not the welfare of the current and future population of the world. The form of cost-benefit analysis that they use must be appropriate for their delegated power. Indeed, we can again invoke the analogy to foreigners. Just as agencies have no authority to enact regulations that enhance the well-being of foreigners, they have no authority to enact regulations that enhance the well-being of future Americans independently of the preferences of current Americans. The future is another country.<sup>11</sup>

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<sup>11</sup> See L.P. Hartley, *The Go-Between* 9 (Hamish Hamilton 1956) (“The past is another country.”).

