CONGRESS AND COST-BENEFIT ANALYSIS

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There's a longstanding consensus around the use of cost-benefit analysis (CBA) to inform federal agency risk-management decisionmaking. Executive orders going back to President Reagan require agencies to conduct CBA, and agencies often exercise their statutory discretion to use CBA to help determine the appropriate stringency of regulations. Courts, too, increasingly appreciate that agency regulation requires at least some assessment of the expected costs and benefits, and they examine agency CBAs to ensure that agencies disclose and explain their scientific and policy choices. Congress's role in this CBA consensus, however, has been understudied, minimized, and often misunderstood.

This Article analyzes Congress's record on CBA over time. The analysis reveals some important and sometimes counterintuitive trends. In contexts where competing tradeoffs are most salient, such as public health crises, the legislative record suggests that Congress values the neutral and expertise-forcing substantive constraint of CBA. Similarly, the record reveals that CBA's substantive constraints are especially valuable to Congress for agencies controlled by the President. And it has often imposed CBA requirements for federal funding decisions, where agencies must make decisions on how to allocate scarce federal financial resources among competing projects.

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These findings have implications for the future of the CBA consensus, in which Congress might become a central player. The current CBA consensus is at risk from all fronts. Presidential support for CBA might evaporate, especially in light of the tool's role in restraining the Trump Administration from implementing some of its preferred policies. In addition, more than half of the Justices of the Supreme Court of the United States have signaled their willingness to reconsider the constitutional contours of the nondelegation doctrine, which could call into question the validity of the broad statutory language that currently supports some agency use of CBA. And an increasing number of scholars are questioning the legitimacy of searching judicial review of agency decisionmaking.

In the traditional narrative, Congress is at best ambivalent about agency CBA and might potentially reinforce its demise. The examination of the Congressional Record, however, reveals a more complicated relationship between Congress and CBA. In many cases, Congress appears to trade off some of its control in exchange for application of agency expertise revealed through CBA. The examination also helps explain why Congress has failed to pass statutes such as the Regulatory Accountability Act or has failed to extend CBA requirements to independent agencies. In light of Congress's record to date, the Article proposes congressional actions that might be more successful in protecting the future of the CBA consensus.

INTRODUCTION

In 1991, the U.S. Court of Appeals for the Fifth Circuit invalidated an attempt by the Environmental Protection Agency (EPA) to ban asbestos under

the Toxic Substances Control Act (TSCA).[1] Congress had directed EPA to adopt the least burdensome approach to regulating a chemical after considering both benefits and costs.[2] Although the agency conducted a CBA to support its ban, the Court found that the analysis did not adequately evaluate the tradeoffs involved and was methodologically flawed.[3] The Court vacated the regulation and remanded to the agency for further analysis.[4] After the Fifth Circuit's sharp rebuke in *Corrosion Proof Fittings v. EPA*,[5] the agency altogether abandoned its efforts to ban asbestos.[6] In fact, EPA barely used its authority under TSCA to ban any chemical over the next twenty-five years. Many blamed this inactivity on the CBA requirement.[7]

In response, Congress, under pressure from both environmental groups and the chemical industry, passed the Frank R. Lautenberg Chemical Safety Act with bipartisan support.[8] The Act, which amended TSCA, removed the requirement that the agency consider costs when deciding whether to regulate, but it retained the requirement that the agency consider benefits

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1. Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1229–30 (5th Cir. 1991).

2. Toxic Substances Control Act, 15 U.S.C. § 2605 (1994).

3. *Corrosion Proof Fittings*, 947 F.2d at 1215–17. For example, the cost-benefit analysis (CBA) neglected to evaluate important effects of the ban, such as whether known alternatives to asbestos would present greater health risks. *Id.* at 1221–224.

4. *Id.* at 1230.

5. 947 F.2d 1201 (5th Cir. 1991).

6. *See H.R. 2576, The TSCA Modernization Act of 2015: Hearing Before the Subcomm. on Env't & the Econ. of the H. Comm. on Energy & Com.*, 114th Cong. 10 (2015) (statement of James Jones, Assistant Adm'r, Off. of Chem. Safety and Pollution Prevention, Envtl. Prot. Agency) (stating that the Environmental Protection Agency (EPA) did not regulate asbestos or any other chemicals under this authority after the case).

7. *See, e.g.*, David M. Driesen, *The Ends and Means of Pollution Control: Toward A Positive Theory of Environmental Law*, 2017 UTAH L. REV. 57, 75 (2017) ("The decision interpreting TSCA to demand cost-benefit balancing led to a halt of final rules under TSCA's main standard setting provision, probably because the analytical burdens imposed made standard setting impracticable."); Amy Sinden, *Formality and Informality in Cost-Benefit Analysis*, 2015 UTAH L. REV. 93, 130 n.128 (2015) [hereinafter Sinden, *Formality and Informality*].

8. *See* Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 133 Stat. 448; *see also* Valerie J. Watnick, *The Lautenberg Chemical Safety Act of 2016: Cancer, Industry Pressure, and a Proactive Approach*, 43 HARV. ENV'T L. REV. 373, 389 (2019); Jessica Miller, Note, *Spread Too Thin: How the Preemption Provisions in the 2016 Amendments to TSCA Weakened the Federal Government's Regulation of Chemical Manufacturing*, 9 GEO. WASH. J. ENERGY & ENV'T L. 162, 166 (2019). The Act passed the U.S. House of Representatives 398 to 1 (with 231 Republicans and 167 Democrats voting in favor of it), and it passed the U.S. Senate via voice vote. *See* OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, ROLL CALL 378 (June 23, 2015), https://clerk.house.gov/Votes/2015378 (noting votes for H.R. 2576 and S. Amend. 2932).

and costs when evaluating possible approaches for regulation.[9] During floor debate, several Members of Congress depicted the act as, in part, a rejection of CBA and cost consideration. For example, some Members explicitly described EPA's use of CBA as "flawed"[10] and "burdensome,"[11] "prioritiz[ing] profits over health and safety"[12] and posing "far too high a bar to meet when it comes to protecting our children's safety."[13] Others focused on the importance of ensuring that EPA decides whether to regulate without the consideration of costs.[14] In fact, Senate Democrats explicitly tied removal of the "least burdensome" language to a rejection of CBA and the Fifth Circuit's review of CBA in *Corrosion Proof Fittings*.[15]

This story is revealing in several ways. First, it highlights the important role CBA has played in agency risk-management decisions. CBA is a decisionmaking procedure that requires an agency to identify and monetize all important effects of the agency's decision, to the extent possible, based on available scientific evidence. It allows the agency to then choose, from among reasonable alternatives, the approach that maximizes net benefits to society. The practice of CBA is widespread within federal agencies, even without an express requirement from

9. 15 U.S.C. §§ 2605(b)(4)(F)(iii), (c)(2)(A)(ii)–(iii).

10. 161 CONG. REC. 10,257 (2015) (statement of Rep. Lois Capps) (describing the current system as requiring EPA to use "a flawed cost-benefit analysis that prioritizes profits over health and safety.").

11. 162 CONG. REC. 7,003 (2016) (statement of Rep. Gene Green) ("The most notable improvements in the bill are replacing the current TSCA's burdensome safety standard with a pure, health-based standard . . . ."). In other statements, Representative Gene Green (Democrat, Texas) specifically emphasized how the Act would address many of the Toxic Substances Control Act's (TSCA's) "biggest flaws, including eliminating the 'least burdensome' requirement and explicitly clarifying the law's safety standard excludes any consideration of costs." 161 CONG. REC. 10,257 (2015) (statement of Rep. Gene Green).

12. 161 CONG. REC. 10,257 (2015) (statement of Rep. Lois Capps).

13. 162 CONG. REC. 7,001 (2016) (statement of Rep. Jared Polis).

14. *See* 161 CONG. REC. 10,256 (2015) (statement of Rep. Frank Pallone, Jr.) (explaining that the Act would require "the decision of whether a chemical needs to be regulated [to] be based purely on the risk it poses," instead of on "a cost-benefit standard"); 162 CONG. REC. 7,003 (2016) (statement of Rep. Gene Green); 161 CONG. REC. 10,255 (2015) (statement of Rep. John Shimkus) (approvingly pointing out that the Act requires EPA to determine whether "the chemical present[s] an unreasonable risk of injury to health or the environment," "a science question based on a combination of hazard and actual exposure," before any cost consideration).

15. *See* 162 CONG. REC. 7,983–84 (2016) (arguing that striking the "least burdensome" language was necessary to guarantee that EPA was not required to weigh benefits against costs when regulating toxic chemicals).

Congress, encouraged by long-standing executive orders from presidents of both political parties.[16]

Second, this story highlights the role of the judiciary in overseeing and promoting CBA-based regulation. Although the Fifth Circuit's review in *Corrosion Proof Fittings* was particularly searching, courts have been generally willing to evaluate agency CBAs, especially their scope and their transparency, if not the choice of specific assumptions and methodology.[17] Courts have also played a role in encouraging agencies to conduct CBA, especially independent agencies not subject to executive-order requirements.[18] This support for some kind of CBA has reached the Supreme Court of the United States; in 2015, all nine Justices agreed that determining whether regulation was "appropriate" undoubtedly requires some consideration of costs in addition to benefits.[19]

And finally, this story supports the general impression that Congress is ambivalent, and perhaps even hostile, toward the robust CBA practice among agencies. In fact, the few salient narratives about Congress and CBA are all negative. They include not only the discussion surrounding the TSCA amendment, but also Congress's decision to prohibit CBA in setting a standard for cryptosporidium under the Safe Drinking Water Act following a public health crisis involving that particular pollutant.[20] Lending additional support to this impression, Congress has failed to pass legislation codifying presidential executive-order-based CBA requirements and has failed to

16. At least since President Reagan's executive order requiring agencies to conduct CBA, agencies have generally conducted and often relied on the analysis when making difficult risk-management decisions, unless explicitly prohibited by Congress. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981). President Reagan's Order was replaced by President Clinton's Executive Order 12,866, which remains in force to this day. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735–36 (Oct. 4, 1993). The Order requires agencies to prepare a regulatory impact analysis, which includes CBA. *Id.*

17. *See generally* Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575 (2015).

18. *See, e.g.*, Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011); Chamber of Com. of the U.S. v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005); Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166, 177 (D.C. Cir. 2010).

19. Justice Scalia, writing for the Supreme Court's majority in *Michigan v. EPA*, declared that "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Writing for the dissent, Justice Kagan agreed that harms of regulation must be considered. *Id.* at 2714 (Kagan, J., dissenting) ("I agree with the majority—let there be no doubt about this—that EPA's power plant regulation would be unreasonable if '[t]he Agency gave cost no thought *at all.*'").

20. 42 U.S.C. § 300g-1.

extend these requirements to independent agencies that are not currently subject to them, despite realistic opportunities to do so.

Scholars, while devoting considerable energy to evaluating agency practice of CBA and the resulting judicial review,[21] have given little attention to examining any trends in explicit congressional requirements for agencies to conduct, consider, or rely on CBA in their decisionmaking. The few examinations of the relationship between congressional directives and CBA, usually in the environmental context, have supported the general impression of Congress's hostility to CBA.[22]

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21. The literature is full of important theoretical and practical critiques of CBA practice. *See generally* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS (2006) (responding to theoretical critiques); RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008) (responding to practical critiques). For work on prevalence and quality, see, e.g., Caroline Cecot et al., *An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the US and the EU*, 2 REG. & GOVERNANCE 405, 405–21 (2008); Jerry Ellig, Patrick A. McLaughlin & John F. Morrall III, *Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across U.S. Administrations*, 7 REG. & GOVERNANCE 153, 153–60, 164, 170–71 (2013); Jerry Ellig & Patrick A. McLaughlin, *The Quality and Use of Regulatory Analysis in 2008*, 32 RISK ANALYSIS 855, 855–63, 866–72 (2012); Robert W. Hahn et al., *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J. L. & PUB. POL'Y 859, 859–71 (2000); Robert W. Hahn & Patrick Dudley, *How Well Does the Government Do Cost-Benefit Analysis?*, 1 REV. ENV'T ECON. & POL'Y 192, 192–210 (2007); Robert W. Hahn & Robert Litan, *Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe*, 8 J. INT'L ECON. L. 473, 473–508 (2005); Stuart Shapiro & John F. Morrall III, *The Triumph of Regulatory Politics: Benefit-Cost Analysis and Political Salience*, 6 REG. & GOVERNANCE 189, 189–200 (2012); Caroline Cecot & Robert W. Hahn, *Transparency in Cost-Benefit Analysis*, 72 ADMIN. L. REV. 157 (2020). More recently, scholars have analyzed how courts review agency CBAs and the effect of judicial review on agency practice. *See, e.g.*, Cecot & Viscusi, *supra* note 17; Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENV'T L. REV. 1, 1 (2017) [hereinafter Sunstein, *Arbitrariness Review*]; Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593 (2019) [hereinafter Cecot, *Deregulatory Cost-Benefit Analysis*]; Jonathan S. Masur & Eric A. Posner, *Chevronizing Around Cost-Benefit Analysis*, 70 DUKE L.J. 1109 (2021).

22. *See, e.g.*, Sinden, *Formality and Informality*, *supra* note 7, at 129 ("Congress has in most instances actually rejected CBA as a decisionmaking rubric for environmental health and safety regulation, directing agencies to instead use feasibility or health-based standards."). Many scholars have turned their attention to arguing whether CBA should (or should not) be allowed under more general congressional directives to promote "the public interest," issue regulations that are "appropriate" and "necessary," or act to the extent "practicable." *See* Paul R. Noe & John D. Graham, *The Ascendancy of the Cost-Benefit State?*, 5 ADMIN. L. REV.

This Article undertakes a long-overdue comprehensive examination of the Congressional Record on CBA—in particular, an examination of the explicit congressional CBA directives since 1981. The analysis reveals that the conventional wisdom of congressional skepticism of CBA is misleading. A review of congressional delegations of CBA authority uncovers several ways that Congress has utilized CBA requirements for agency decisionmaking in recent years. As an initial matter, so-called explicit rejections of CBA have often turned out to be overstated. In fact, in contexts where competing tradeoffs are most salient, such as public health crises, the legislative record suggests that Congress values the neutral and expertise-forcing substantive constraint of CBA. Congress has also acted in several ways that imply that it values CBA for oversight purposes. It has passed laws such as the Unfunded Mandate Reform Act and the Congressional Review Act that require agencies to prepare CBAs or submit CBAs to Congress with certain rulemakings. And, particularly during times of divided government, Congress has passed laws requiring executive agencies to conduct CBA.[23] Such agencies are already subject to executive-order requirements; the reinforced statutory obligations signal CBA's particular value to Congress when applied to agencies controlled by the President. Finally, Congress has recognized CBA's value in prioritizing projects when funding is scarce.

This examination is helpful in light of several emerging threats to the consensus surrounding agency practice of CBA, which heightens the relevance of Congress. This Article identifies and describes these threats. CBA has enjoyed bipartisan presidential support to date, but it might not be able to rely on this support going forward. If presidents view CBA as substantively constraining their policy agendas, then they may reject or weaken Executive Branch enforcement of the longstanding executive orders requiring the use of CBA. In addition, courts may renounce their role in overseeing and encouraging high-quality agency CBA. Several prominent legal scholars, such as Richard Epstein and Jeffrey Pojanowski, are advocating for replacing "hard look" review with extreme judicial deference toward agency factfinding while simultaneously rejecting deference on issues of law.[24] The lack of a judicial quality check on CBA (especially if combined with a weak White House review) would diminish the reliability and value of CBA. And finally, the

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ACCORD 85, 122 (2020) (discussing statutes that do not specifically require CBA but mandate that the agency considers the costs of the regulation).

23. *See, e.g.*, Accountable Pipeline Safety and Partnership Act of 1996, Pub. L. No. 104-304, 110 Stat. 3793 (1996).

24. *See* RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW 2, 213–14 (2020); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 893–94 (2020).

Supreme Court might rethink the constitutional contours of acceptable delegation of authority to agencies.[25] If the Court determines that Congress must be more explicit when authorizing the use of CBA in risk-management decisionmaking, then much of the agency discretion for conducting CBA would evaporate until and unless Congress provides explicit authority.

The Article then extracts takeaways from its comprehensive examination of Congress's record on CBA to inform conversations about the future of CBA in light of the emerging threats. For example, I argue against extreme judicial deference to agency factfinding based on these congressional delegations. When it comes to CBA, congressional practice suggests that Congress gives up its control over setting stringency to take advantage of agency expertise in evaluating competing information. If so, courts, as the guardians of the bargains reflected in enacted legislation, should ensure that agencies reasonably apply their expertise in exercising the authority granted to them by Congress. The examination also helps explain why Congress has failed to pass laws such as the Regulatory Accountability Act of 2017[26] or extend CBA requirements to independent agencies, and why it proposes congressional actions that might be more successful.

This Article proceeds as follows. Part I briefly describes the current CBA consensus. It defines CBA and outlines its increasing importance in agency rulemakings in light of executive directives and judicial interpretations of statutory language. Part II examines Congress's relationship with CBA. It first outlines the theoretical reasons for congressional support of CBA in different contexts. It then analyzes explicit congressional directives requiring agencies to prepare, consider, rely on, or report CBA over the last forty years,

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25. Five Justices have expressed an interest in rethinking the nondelegation doctrine: Justices Alito, Gorsuch, Kavanaugh, and Thomas, and Chief Justice Roberts. Justice Gorsuch, in a dissent joined by Chief Justice Roberts and Justice Thomas, directly advocated for a more robust enforcement of the nondelegation doctrine. *See* Gundy v. United States, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting) ("In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code."). Justice Alito wrote a separate concurrence, indicating that he would be willing to revisit the doctrine in a future case. *See id.* at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."). Finally, Justice Kavanaugh signaled support for reconsidering the doctrine in a recent denial of certiorari. *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.").

26. Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

drawing lessons from this history. Part III then identifies and evaluates recent threats to the continuing vitality of agency practice of CBA. Finally, Part IV explains how the analysis sheds light on the importance of those threats. CBA has long played an influential role in agency decisionmaking. While its supporters should recognize and take seriously emerging threats to this consensus, a more thorough assessment of the Congressional Record reveals some basis for optimism and a path forward.

I. THE CBA CONSENSUS

Congress often requires agencies to make important risk-management decisions. Under TSCA, for example, after EPA identifies a chemical as posing significant risks to human health, it must decide how stringently to regulate it.[27] Should it ban the chemical completely, or should it limit its use to certain contexts? Should it consider available precautions, technology, and substitutes? How should it balance the tradeoff between the value of the chemical and its potential harm? Although several approaches are available, agencies often conduct CBA to help them make these risk management decisions.[28] CBA has its origins in welfare economics. Economic theory identifies the socially desirable level of environmental quality as the level that maximizes the satisfaction of individual preferences.[29] CBA sheds light on policies that potentially improve aggregate welfare by converting gains (the value of the benefits to the beneficiaries) and losses (the costs to those who are burdened) into a monetary scale.[30] It forces the agency to consider these effects of its chosen regulatory action against the status quo and reasonable alternatives. The agency could then use this analysis to guide its decisionmaking. For example, if the costs of its preferred regulatory action

27. *See* 15 U.S.C. §§ 2601–29 (providing options for regulation and testing of chemical substances).

28. Other risk-management approaches include feasibility analysis, a no-risk threshold, and risk-risk analysis. *See* LESTER B. LAVE, THE STRATEGY OF SOCIAL REGULATION: DECISION FRAMEWORKS FOR POLICY 24–26 (1981).

29. For a discussion of general welfare economics, see ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 545–72 (1995); MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS 5–6, 34–35 (2011) [hereinafter ADLER, WELL-BEING AND FAIR DISTRIBUTION] (defending the use of a social welfare function for evaluating governmental decisions).

30. CBA identifies the Kaldor-Hicks efficient policy as the one that maximizes the difference between the value of the gains to the winners and the losses to the losers without requiring the winners to compensate the losers. ADLER, WELL-BEING AND FAIR DISTRIBUTION, *supra* note 29, at 566.

turn out to be substantial and the benefits are low or highly uncertain, the agency might decide not to regulate at all at this time. Alternatively, the results of the analysis might not only support regulatory action but support more *stringent* action than initially proposed. One example of the latter scenario is the Reagan Administration's imposition of a stricter standard for phasing out lead in gasoline based on the results of CBA.[31]

Congress can explicitly require or forbid agencies to base decisions on CBA; however, in many cases, Congress has been essentially silent on the appropriate risk-management framework, requiring agencies to pursue some goal while considering several factors or acting in the public interest.[32] Instead, the extensive use of CBA has been motivated in part by presidential executive orders. In 1981, President Reagan issued Executive Order 12,291, which required agencies to choose the regulatory objective that, according to the analysis, "maximize[d] the net benefits to society."[33] Importantly, the Order required agencies to submit these CBAs to the White House for review.[34] The agencies were to follow this procedure to the extent permitted by law—in other words, as long as Congress had not explicitly prohibited cost consideration. President Clinton continued the practice of CBA, issuing Executive Order 12,866.[35] Like Executive Order 12,291, Clinton's Order encouraged agencies to "select those approaches that maximize net benefits . . . . to the extent permitted by law."[36] Clinton's Order placed more emphasis on accountability, providing several additional ways to preserve transparency during the White House review process.[37] Further, it explicitly recognized "that some costs and benefits are difficult to quantify."[38] Presidents Bush, Obama, and Trump have

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31. *See* Christopher DeMuth, *Health and Safety Regulation*, *in* AM. ECON. POL'Y IN THE 1980S 504, 508 (Martin Feldstein ed., 1994) ("A very fine piece of analysis persuaded everyone that the health harms of leaded gasoline were far greater than we had thought, and we ended up adopting a much tighter program than the one we had inherited."). For more information about that CBA and the resulting standard, see Albert L. Nichols, *Lead in Gasoline*, *in* ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT 49–84 (Richard D. Morgenstern ed., 1997).

32. *See* Noe & Graham, *supra* note 22, at 113 (arguing that agencies should rely on CBA as a default given congressional silence).

33. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981). President Reagan's Order was not the first presidential requirement for increased agency analysis, but it was the most far-reaching one—requiring all executive agencies to conduct CBA—and its requirements have endured.

34. *Id.* at 13,194.

35. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

36. *Id.* § 1.

37. *Id.* § 6(b).

38. *Id.* § 1(b)(6).

extended (and sometimes supplemented) Clinton's Order,[39] and President Biden has so far not disturbed the practice.

When President Reagan first issued Executive Order 12,291, it was viewed as part of his efforts to rein in the administrative state. In particular, the Reagan Administration hoped that CBA would support the President's deregulatory agenda by limiting the issuance of regulations. Agencies would be required to show that their regulations were net beneficial (or CBA-justified) before they could issue them, and the Reagan Administration believed most regulations were actually net costly.[40] It might seem strange then that President Clinton (and President Obama) would continue these efforts. Unlike the Reagan Administration (or the Trump Administration), those administrations were not focused on reducing regulatory burdens.

But CBA is not actually anti-regulatory. It is a neutral decisionmaking rule that neatly summarizes the effects of agency action.[41] It provides information to presidents to facilitate their oversight of agencies.[42] In addition, there is independent value to a high-quality CBA demonstrating that a president's initiatives are welfare-enhancing. President Clinton would often take credit for such agency action.[43] And President Obama, too, used CBA to provide justification and support for several costly agency actions by pointing to their even greater expected benefits.[44]

Based on this bipartisan presidential consensus, Cass Sunstein announced a

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39. *See* Exec. Order No. 13,422, 72 Fed. Reg. 2,763 (Jan. 23, 2007) (amending Exec. Order No. 12,866); Exec. Order No. 13,497, 74 Fed. Reg. 6,113 (Feb. 4, 2009) (revoking the 2007 amendments to Exec. Order No. 12,866); Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011) (reaffirming Exec. Order No. 12,866); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017) (mandating regulatory reform officers to oversee and execute Exec. Order No. 12,866).

40. *See, e.g.*, John F. Morrall III, *A Review of the Record*, REG., Nov./Dec. 1986, at 25, 29–31 (reviewing the cost-effectiveness of various risk-reducing regulations); John F. Morrall III, *Saving Lives: A Review of the Record,* J. RISK & UNCERTAINTY, Dec. 2003, at 221, 221 (presenting data for the cost-effectiveness of seventy-six regulations from 1967 to 2001).

41. Cecot & Viscusi, *supra* note 17, at 575–76.

42. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272 n.96(b) (2001); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001). Almost every modern President has expressed frustration over the difficulty of overseeing the vast array of agencies.

43. Kagan, *supra* note 42, at 2354.

44. *See, e.g.*, OFF. AIR QUALITY PLAN. AND STANDARDS, U.S. ENV'T PROT. AGENCY, EPA-452/R-15-003, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE (Aug. 2015).

CBA revolution almost twenty years ago.[45] Although others disagreed with the breadth of his proclamation (or its timing),[46] there can be no doubt that the procedure has become more widespread since then.[47] And, perhaps surprisingly, the procedure has remained evidence-based and largely immune to political influence. Scholars have found that the key elements of economic analysis across presidential administrations have been "generally insulated from politics," with differences "largely in areas for which there is reasonable debate within the academic community."[48] In fact, when the Trump Administration attempted to circumvent CBA norms in order to implement its deregulatory agenda, it was met with widespread and unequivocal condemnation by the scientific community, courts, and the public.[49]

Although there is no judicial review of compliance with these executive orders,[50] courts have played an important role in promoting CBA. First, courts have increasingly interpreted broad statutory language to allow and even require some kind of cost-benefit balancing, even if less formal than full CBA.[51] The Court of Appeals for the D.C. Circuit, for example, has interpreted language requiring independent agencies to act in the public interest to require some CBA, even though these agencies are not subject to executive-order requirements.[52] And in *Michigan v. EPA*,[53] the Supreme

45. CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION xi (2002) [hereinafter SUNSTEIN, THE COST-BENEFIT STATE].

46. *See* Amy Sinden, *A "Cost-Benefit State"? Reports of Its Birth Have Been Greatly Exaggerated*, 46 ENV'T L. REP. NEWS & ANALYSIS 10933, 10934 (2016) (noting a gap between the kind of CBA the Supreme Court has endorsed and the CBA identified and advocated by Cass Sunstein).

47. *See, e.g.*, Ellig & McLaughlin, *supra* note 21, at 855–56, 869.

48. *See* Art Fraas & Richard Morgenstern, *Identifying the Analytical Implications of Alternative Regulatory Philosophies*, 5 J. BENEFIT-COST ANALYSIS 137, 142 (2014).

49. *See* MICHAEL A. LIVERMORE & RICHARD L. REVESZ, REVIVING RATIONALITY: SAVING COST-BENEFIT ANALYSIS FOR THE SAKE OF THE ENVIRONMENT AND OUR HEALTH at 4–5 (Oxford Univ. Press 2020) [hereinafter LIVERMORE & REVESZ, REVIVING RATIONALITY] (describing how the Trump Administration tried to erode CBA norms when it could not get the analysis to support its regulatory agenda).

50. All executive orders assert that there is no judicial review of compliance with them. *See* Exec. Order No. 13563, 76 Fed. Reg. 3,821, 3,823 (Jan. 21, 2011); Exec. Order No. 12866, 58 Fed. Reg. 51,735, 51,744 (Oct. 4, 1993); Exec. Order No. 12291, 46 Fed. Reg. 13,193, 13,198 (Feb. 19, 1981).

51. *See* Bus. Roundtable v. SEC, 647 F.3d 1,144, 1,149–51 (D.C. Cir. 2011); Chamber of Com. of the U.S. v. S.E.C., 412 F.3d 133, 136 (D.C. Cir. 2005).

52. *See Bus. Roundtable*, 647 F.3d at 1149–51; *Chamber of Com.*, 412 F.3d at 136; Caroline Cecot, *Make Economics at the FCC Great Again*, Technology Policy Institute (Apr. 14, 2017), https://techpolicyinstitute.org/2017/04/14/make-economics-at-the-fcc-great-again/.

53. 135 S. Ct. 2699 (2015).

Court unanimously agreed that "appropriate" regulation requires at least some analysis of cost.[54] Some scholars have even argued that courts might require CBA as the default risk-management option when Congress has been silent on the approach because of the Administrative Procedure Act's (APA's) requirement that the agency not act arbitrarily or capriciously.[55] Second, courts have provided a useful quality check on CBA-based decisionmaking by agencies. Although they have often deferred on technical issues, courts have required agencies to disclose and explain important assumptions.[56] And sometimes, as in the case of *Corrosion Proof Fittings*, courts put in considerable effort to chastise an agency for poor analysis.[57]

In other words, when given the discretion to choose a risk-management approach, federal agencies have adopted CBA as the framework of choice. This is in part due to executive orders requiring executive agencies to conduct CBA when not prohibited by law. It also reflects increasing judicial approval of CBA as a component of rational decisionmaking. These developments—congressional acquiescence, presidential requirements, and judicial encouragement and oversight—have arguably resulted in relatively stable, predictable, and increasingly efficient agency rules.[58]

II. CONGRESS AND CBA

Although the Executive and Judicial Branches have developed a CBA consensus, in which presidents and courts encourage agencies to construe ambiguous statutory language to allow or require decisions based on CBA, there is no reason to think that Congress also increasingly supports CBA. In

54. Justice Scalia, writing for the Supreme Court's majority in *Michigan v. EPA*, declared that "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Compare id.* at 2707 (2015) (majority opinion), *with id.* at 2714 (Kagan, J., dissenting) ("I agree with the majority—let there be no doubt about this—that EPA's power plant regulation would be unreasonable if '[t]he Agency gave cost no thought *at all.*'"). This evolution in the Supreme Court's attitude to CBA can be traced in its opinions stretching from *American Trucking* to *Entergy v. Riverkeeper* to *Michigan v. EPA*, all written by Justice Scalia for the majority. *See* Noe & Graham, *supra* note 22, at 98–101 (tracing this evolution).

55. *See* Sunstein, *Arbitrariness Review*, *supra* note 21, at 1 (noting that where CBA is authorized but not required, agencies typically must now provide nonarbitrary reasons for failing to consider CBA); Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1692 (2001) (describing cost-consideration as a default canon of construction); Noe & Graham, *supra* note 22.

56. Cecot & Viscusi, *supra* note 17, at 592–605.

57. *See* CRISTOPHER CARRIGAN, JERRY ELLIG & ZHOUDAN XIE, REGULATORY IMPACT ANALYSIS AND LITIGATION RISK 4 (2019), https://regulatorystudies.columbian.gwu.edu/regulatory-impact-analysis-and-litigation-risk.

58. *See* Cecot, *Deregulatory Cost-Benefit Analysis*, *supra* note 21.

fact, the conventional wisdom is that Congress does not. Notably, Congress has failed to pass crosscutting substantive CBA requirements or extend current requirements to independent agencies.[59] Congress's rejection of CBA in several high-profile contexts has created an impression that its support for CBA lags behind the support in agencies and courts.

In truth, however, congressional trends on CBA have remained unexamined. This Part undertakes a comprehensive examination of congressional decisions on CBA over time. Section A describes the theoretical pros and cons of CBA from the perspective of Congress and discusses the kinds of legislation that Congress would pass in light of the baseline CBA consensus. Section B examines actual congressional action on CBA and discusses implications of such action.

A. Congressional Considerations

Scholars have often modeled Congress's relationship with agencies as a principal–agent problem: Congress wants the agencies to implement Congress's preferences and priorities.[60] In this model, Congress supports CBA if CBA makes it more likely for Congress to impose its preferences on an agency action as compared to the other branches. This Section summarizes these theoretical considerations and makes empirical predictions.

1. Oversight, Efficiency, and Ossification

Congress engages in oversight of agency action, and its members tend to be interested in the efficiency and responsiveness of agency action.[61] Agency CBA requirements can be helpful for oversight and promoting efficiency, but they will also introduce delays.[62] Congress's willingness to enact legislation that

59. MAEVE P. CAREY, CONG. RSCH. SERV., R41974, COST-BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULEMAKING PROCESS 1–2 (2014), https://fas.org/sgp/crs/misc/R41974.pdf.

60. Scholars often focus on the President as the principal, but the reasoning just as easily applies to Congress. *See, e.g.*, Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1140 (1990); Bernard Steunenberg, *Congress, Bureaucracy, and Regulatory Policy-Making*, 8 J.L. ECON. & ORG. 673 (1992); Posner, *supra* note 42; Kagan, *supra* note 42, at 2385 ("[A]n era of presidential administration has arrived."); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 33–34 (1994).

61. *See* Shapiro, *supra* note 60, at 9–10.

62. *Id.* at 35–36.

promotes CBA will depend on the relative importance of these considerations.

Robust political oversight is necessary for agency accountability.[63] CBA could facilitate such oversight by succinctly providing information about the likely costs and benefits of agency actions; this information could help both the President and Congress to oversee agencies.[64] The information revealed in a CBA could give Congress the opportunity to pressure the agency to correct its course through public oversight actions or the threat of legislation before the agency issues a regulation.[65] CBA could also reduce Congress's need to rely on information from interest groups, which might have motivated one-sided information about regulatory effects.[66] Provisions requiring agencies to conduct CBA and submit it to Congress and requiring courts to ensure compliance with such requirements could be desirable from Congress's perspective if it values the informational component of CBA.

A CBA requirement could also contain a substantive component, such as requiring an agency to issue only cost-benefit justified rules. Of course, there is often uncertainty in estimates of benefits and costs, and important categories of benefits or costs are not always quantifiable based on currently available data.[67] These uncertainties and data gaps often require some judgment of the relative value of different categories of benefits or costs and result in a reasonable range of cost-benefit justified approaches. But even acknowledging such a range, a CBA-based decision rule would constrain agency action.[68]

There are at least two reasons why Congress might separately value a CBA-based substantive constraint: (1) it forces the agency to apply its expertise, and (2) it constrains the President's ability to push the agency in a different direction. Although scholars have long questioned Congress's interest in promoting efficient regulation,[69] the idea is not

63. *See* Posner, *supra* note 42, at 1141; McCubbins, Noll & Weingast, *supra* note 60, at 246.

64. Eric Posner describes this as "convert[ing] a relationship of asymmetric information to one of full information." Posner, *supra* note 42, at 1143.

65. Brian Feinstein has found congressional hearings to be effective. Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences & Congressional Monitoring of the Administrative State*, 8 J.L. ECON. & POL'Y 23 (2011).

66. *See* Posner, *supra* note 42, at 1189 (arguing that "[a]nother virtue of cost-benefit analysis is that it reduces the ability of interest groups to use their information advantages to influence political outcomes.").

67. *See, e.g.*, *id.* at 1144.

68. *See id.* at 1197–98 (arguing that "it is not usually easy to manipulate cost-benefit data" while acknowledging that some variables are hard to measure); Cecot, *Deregulatory Cost-Benefit Analysis*, *supra* note 21, at 1611; Masur & Posner, *supra* note 21.

69. Posner, *supra* note 42, at 1141 ("The purpose of requiring agencies to perform cost-

entirely implausible. It is unquestionable that a responsible balancing of tradeoffs requires the application of expertise.[70] This is particularly true for risk-management decisions, which require considering and balancing relevant tradeoffs.[71] A CBA requirement forces the agency to transparently acknowledge these tradeoffs and make evidence-based decisions to the extent possible. This option might be especially valuable to a Congress that recognizes these tradeoffs but is divided on how to balance them (or wishes to avoid direct accountability for the balancing). This is consistent with the reality that, for many high-profile issues, members of Congress are lobbied by groups on both sides of an issue, each highlighting the part of the tradeoff that affects them.[72] Of course, it is possible to accomplish these aims with a more general delegation of expertise-based decisionmaking. But especially when Congress and the President are divided, a neutral decision rule that constrains presidential influence over agency outcomes might be desirable in its own right.[73] If Congress supports substantive CBA, Congress should enact legislation that requires agencies not only to conduct CBA, but also to rely on CBA when justifying their actions.

Finally, CBA is expensive and time-consuming to conduct.[74] Preparing high-quality CBA, especially for complex rulemakings, could present a formidable hurdle, particularly if speed is important. In general, hurdles to quick federal regulatory action—sometimes referred to as regulatory

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benefit analysis is not to ensure that regulations are efficient . . . .[E]valuation of cost-benefit analysis should be based . . . not on its instantiation of ethical principles that elected officials may or may not share.") (citing McCubbins, Noll & Weingast, *supra* note 60).

70. Cecot & Viscusi, *supra* note 17, at 591.

71. *See* Cecot, *Deregulatory Cost-Benefit Analysis*, *supra* note 21, at 1606–07.

72. *See* Posner, *supra* note 42, at 1173–74; McCubbins, Noll & Weingast, *supra* note 60, at 267, 272.

73. Of course, a non-neutral decision rule might be most desirable by a Congress whose majority disagrees with presidential priorities and preferences, but such legislation would likely fail to get the necessary presidential approval for enactment. CBA constrains political action, but in a politically neutral way that would be difficult for a president (especially one that supports CBA via Executive Order) to oppose. *See* Posner, *supra* note 42, at 1185 (explaining Congress appreciated CBA because it gave them power in a politically divided government).

74. As an example, an environmental impact statement, a type of specialized CBA required under the National Environmental Policy Act, can take between one and six years to prepare. The analysis can range in cost from $250,000 to $2,000,000. *See* THE NEPA TASK FORCE REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY: MODERNIZING NEPA IMPLEMENTATION 65–66 (2003), https://www.energy.gov/sites/default/files/2016/02/f29/finalreport.pdf.

"ossification"[75]—could also be problematic when there are large costs to delaying regulations. The costs of inaction could include unaddressed or worsening market failures or inconsistent state solutions. Congress, if concerned about these issues, might loosen CBA constraints in particular situations where these costs of delay are most salient.

Overall, a Congress interested in high-quality CBA for oversight purposes might require agencies to produce a CBA to accompany its regulatory action—and require courts to ensure that agencies adhere to this requirement—but it would not necessarily require an agency to rely on the substantive conclusions of a CBA to justify its action. Meanwhile, a Congress interested in constraining agencies substantively would require that agencies issue regulations when the benefits justify the costs, and it might require judicial review of compliance with this decision rule. CBA reveals information about regulatory action that could be useful in oversight, and it forces agencies to apply evidence-based expertise before deciding on a course of action.[76] To the extent that Congress cares about speed, however, a CBA requirement might prove costly; in contexts where agency speed is important, Congress might be wary about requiring CBA.[77]

2. *Background CBA Practice*

There are thus practical reasons why Congress might encourage CBA in particular contexts. Executive orders, however, already require executive agencies to conduct and even, when permissible, rely on CBA.[78] These background requirements reduce Congress's incentive to enact legislation requiring CBA, regardless of any value Congress might place on CBA. In other words, because presidents are requiring CBA, Congress can support CBA by doing nothing at all.

Assuming that Congress knows about Executive Order 12,291 and its

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75. *See* William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 128 (2001) (agreeing that detailed judicial scrutiny of agency rationales has contributed to "ossification" of the regulatory process); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 394–95 (2000); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 529–30 (1997); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387 (1992) (noting that "it is difficult to disagree with the conclusion that it is much harder for an agency to promulgate a rule now than it was twenty years ago.").

76. *See* Cecot, *Deregulatory Cost-Benefit Analysis*, *supra* note 21, at 1606.

77. *See* THE NEPA TASK FORCE, *supra* note 74 and accompanying text.

78. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,193–94 (Feb. 17, 1981); Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,736–38 (Oct. 4, 1993).

progeny,[79] it is not clear that Congress would expect these requirements to endure and continue to be enforced. When it was adopted, Executive Order 12,291 faced considerable resistance both within agencies and in academic circles.[80] In fact, many thought that President Clinton would rescind the Order when he got into office.[81] Instead, President Clinton reinforced its main principles in Executive Order 12,866.[82] It would be far-fetched, though, to think that Congress during the 1980s acted with any expectation that future presidents would continue to require CBA. Similarly, because compliance with the executive orders is not judicially enforceable, there was little reason for Congress to expect compliance with CBA requirements.[83]

But even if Congress's incentives to enact some types of CBA-based legislation are reduced because of background executive support, this reduced incentive does not hold across the board. Notably, no executive order extends CBA to independent agencies or to "insignificant" agency actions,[84] leaving a

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79. The assumption of congressional knowledge over judicial rules, at least, has been questioned. *See* Abbe Gluck & Lisa Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 907 (2013) (arguing that Congress is often unaware of judicial rules).

80. *See* James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 857–60 (2001) (describing C. Boyden Gray's account of the agitation and confusion surrounding the unveiling of Executive Order 12,291); Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, REGUL., Jan.–Feb. 1981, at 33, 35–36; *see also* Marc Granetz, *Deregulation Rodeo: Reagan's Rulebusters Get Ready to Ride*, NEW REPUBLIC, Nov. 12, 1984, at 9, 9–10, 12; David Hoffman, *Election '84: The Reagan Record*, WASH. POST, Jan. 31, 1984, at A1.

81. *See* SUNSTEIN, THE COST-BENEFIT STATE, *supra* note 45, at 11–12 (noting that many environmentalists were expected to exert significant influence in the Clinton Administration to change policies issued under the Reagan and Bush Administrations).

82. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993) (reaffirming CBA guidelines found in Exec. Order No. 12,291, such as assessing all costs and benefits of available regulatory alternatives and choosing the option that maximizes "net benefits").

83. If an agency does not need to rely on CBA to support its decisionmaking—and explicitly chooses not to—then the production and quality of the CBA is largely irrelevant and would not ordinarily be evaluated by courts. Courts will review a CBA only if it plays a role in the agency's decisionmaking. *See* Cecot & Viscusi, *supra* note 17, at 576, 590–91 (stating that only a legal challenge in support of a regulation to the agency's decisionmaking can trigger judicial review of an agency's CBA).

84. All executive orders exclude independent agencies from the CBA requirements, and all have a threshold rule for when the requirements apply to executive agency action. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,194 (Feb. 19, 1981) (limited to "major" executive agency rules); Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993) (limited to "significant" executive agency rules).

substantial amount of regulatory action outside of CBA requirements and executive review.[85] Congress also has an incentive to suspend CBA if it does not value the information it produces, disagrees with its substantive restraint, or is concerned about delay costs in a particular context. For these reasons, an evaluation of the Congressional Record would still be informative. The next Section evaluates the underlying support for CBA over time and under different circumstances by examining explicit delegations, paying particular attention to the context in which these delegations arise.

B. Congressional CBA Directives

This Article examines thirty-five enacted laws that contain explicit provisions related to CBA since 1981, listed in Appendix Table 1.[86] The list includes provisions requiring an agency to prepare a CBA (2), requiring an agency to consider the results of a CBA (17), requiring an agency to issue cost-benefit justified regulations (6), requiring an agency to review the costs and benefits of prior regulations (2), waiving agency CBA requirements (5), and requiring an agency to report CBA of regulation to Congress (6).[87] Notably, the list reveals that Congress has not generally required agencies to limit regulations to those with benefits greater than costs—but it has often required agencies to consider both

85. Scholars have examined additional contexts in which agencies could currently avoid White House review and CBA requirements that would be ripe for congressional attention. *See, e.g.*, Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J. L. & PUB. POL'Y 447, 472–73 (2014); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1757–58 (2013).

86. In particular, the Article examines all the relevant statutory provisions identified by the following two searches in Westlaw: (1) "adv: ("cost-benefit" "benefit-cost") (cost! /s benefit! /30 (regulation! rule! action requirement level stringency)), limited to "federal" jurisdiction and "statutes"; and (2) "adv: (cost! /p benefit! /p (regulation! rule! action requirement level stringency)), limited to "federal" jurisdiction and "statutes." These searches identified 701 and 628 provisions, respectively (with substantial overlap). Because the analysis is limited to explicit congressional language related to agency rulemaking after Executive Order 12,291, I excluded: 1) applicable provisions enacted before February 1981 (5 provisions); 2) provisions where the cost-benefit language appeared only in "Relevant Additional Resources" or "Relevant Notes of Decisions" (the majority of search results); 3) provisions requiring cost-benefit justified local or private projects for federal approval, grants, or funding (49); 4) provisions requesting studies including CBA of legislation or enacted pilot programs (21); 5) provisions requiring CBA for another purpose besides aiding in rulemaking (e.g., field reorganizations; agency name changes); and 6) irrelevant provisions picked up by the search (e.g., cost-sharing in health benefit plans). The final list included thirty-five enacted laws with relevant provisions.

87. Some bills included multiple relevant types of provisions, as indicated in the table.

costs and benefits before issuing regulations. Below I discuss some of the features of these provisions, examining both the enacted language and the associated legislative history.[88]

Seventy percent of the laws with explicit CBA provisions (twenty-five out of thirty-five) were enacted during times when the President and the congressional majority were members of different political parties. Overall, seventeen laws were enacted by a Republican-controlled Congress, twelve by a Democratic-controlled Congress, and six by a split Congress. The Republican-controlled 104th Congress (January 1995 through January 1997) during the Clinton Administration was particularly active in passing such laws (seven out of thirty-five).[89] But laws with explicit CBA provisions still made up a tiny minority of all enacted legislation.[90] In fact, between 1981 and 2019, such laws made up less than one percent of legislation enacted by each Congress, with the exception of the 104th Congress (two percent of its laws contained explicit CBA provisions).[91]

By design, the sample is limited to the period where executive agencies were already subject to presidential CBA requirements. Nonetheless, the majority of laws (nineteen laws) imposed some CBA requirement on executive agencies. The majority of these were enacted in times of divided government, particularly when Congress was Republican and the President was Democratic (most notably during the 104th Congress). This activity is consistent with congressional interest in exerting additional control over

88. While I acknowledge that Congress is made up of many different individuals over time, representing diverse and evolving opinions, I nonetheless examine legislative history to provide clues about congressional concerns at the time the laws were enacted.

89. After the midterm 1994 election, Republicans took control of the House of Representatives for the first time since 1954. During the election, Speaker of the House Newt Gingrich championed a "Contract with America," specifying policies that Republicans would focus their efforts on reforming. None of the proposed policy reforms, however, were directly related to cost-benefit analysis or even agency action. *See* REPUBLICAN CONTRACT WITH AMERICA (Sept. 27, 1994), https://web.archive.org/web/19990427174200/http://www.house.gov/house/Contract/CONTRACT.html (proposing eight reforms targeting equal accountability for the Congress, setting limitations on the terms of committee chairs, and requiring higher thresholds for tax and budget amendments).

90. I note again, however, that these laws were all enacted against the backdrop of executive CBA requirements. Congressional silence suggests some approval of or, at least, acquiescence to, agency practice.

91. Between 1981 and 2020, each Congress enacted about 480 laws. *Statistics and Historical Comparison*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics (last visited Nov. 14, 2021). This includes the 97th Congress through the 116th Congress. Most legislation, however, does not pertain to risk-management decisionmaking.

these agencies at those times and an interest in slowing down regulation.

Four laws waived CBA requirements for executive agencies. But the waivers were all responsive to specific concerns about speed and flexibility, diminishing their generalizability as an indication of CBA disapproval. One waiver, in the wake of the September 11 attacks, gave the Under Secretary of the Transportation Security Administration emergency authority to issue regulations to protect transportation security, without adhering to CBA requirements, without complying with the notice-and-comment procedure, and even without prior approval from the Secretary.[92] The other three waivers were specific and limited waivers. Two of them expressly waived CBA requirements to ensure that previously settled agreements could be swiftly implemented.[93]

The CBA waiver provision under the Safe Drinking Water Act (SDWA) Amendments is particularly worth highlighting. In the spring of 1993, Milwaukee suffered a devastating outbreak of cryptosporidium, a parasite that causes severe intestinal illness and is a leading cause of water-borne disease among humans.[94] A later study revealed that the outbreak was caused by the failure of one of the city's water treatment plants to adequately remove cryptosporidium oocysts.[95] In the original SDWA, Congress specifically required EPA to regulate a long list of eighty-three contaminants, many of which were not thought to be high risk. EPA developed a huge backlog and did not prioritize regulating high-risk contaminants. Critics at the time argued that EPA's failure to regulate contaminants that posed immediate health risks contributed to the outbreak in Milwaukee.[96] In other words, the health effects of water contamination and the importance of prioritizing high-risk contaminants were salient due to the recent outbreak. But the costs of imposing burdensome requirements that would be borne by poor rural households were also salient.[97] CBA, perhaps surprisingly,

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92. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 114(k)(1)(2)(A), 115 Stat. 597 (2001).

93. *See* Cape Town Treaty Implementation Act of 2004, Pub. L. No. 108-297, § 4(c)(3), 118 Stat. 1095 (2004); Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, § 3(2)–(6), 110 Stat. 1613 (1996).

94. Michael Decourcy Hinds, *Milwaukee's Water Suspected as Cause of Intestinal Illness*, N.Y. TIMES, Apr. 9, 1993, at A1.

95. Joseph N. S. Eisenberg et al., *An Analysis of the Milwaukee Cryptosporidiosis Outbreak Based on a Dynamic Model of the Infection Process*, 9 EPIDEMIOLOGY 255, 255 (1998).

96. H.R. REP. NO. 104-632, at 10 (1996).

97. *Id.* at 130 (statement of Rep. Tom Coburn) ("At the same time, we know that fully implementing this rule will be extremely costly for public water systems, especially those small systems serving rural areas. For instance, each household in northeastern Oklahoma would

emerged as the ideal solution to this problem. The Senate report's opening statement made clear that the 1996 SDWA Amendments were inspired by the 1993 contamination.[98] The Senate report then discussed the value of CBA in policymaking, especially in making effective environmental laws that require making difficult tradeoffs.[99] CBA was a widely applauded, bipartisan addition to the statute. The exception for cryptosporidium and disinfection byproducts, supported by Robert Perciasepe, EPA Assistant Administrator, was enacted because significant progress had already been made since the outbreak to issue a responsive regulation, and EPA worried that the CBA requirement would only be a holdup at that point.[100] The SDWA Amendments, therefore, were nuanced, enacted by a Congress fully aware of tradeoffs and committed to having the agency strike the right balance after considering the costs and benefits. In fact, Congress specified that

> "[a] court may set aside a rule for which no cogent analysis of the costs and benefits is offered in support of the determinations required by [the relevant provision] . . . [b]ut a court is not to examine the values that the Administrator brings to bear on these

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have to pay nearly $200 more a year if we fail to use common sense and move forward with the proposed rule."); *id.* at 15 (statement of P. John Seward, Exec. Vice President, Am. Med. Ass'n) (echoing some of Rep. Coburn's concerns).

98. S. REP. NO. 104-169, at 1 (1995).

99. *See id.* at 99.

100. H.R. REP. NO. 104-632, at 17. Perciasepe's letter describes the process of negotiation and fact finding that led to the current rules governing disinfectants, noting that, as part of the long negotiations, "[c]osts and benefits were extensively analyzed and addressed in a manner satisfactory to all signatories of the agreement." *Id.* at 17–18 ("[I]t is important to understand that the negotiators and EPA have agreed to governing principles (for developing the D/DBP-microbial rules) which ensure greater certainty that protection against waterborne disease will be maintained or improved, at an affordable cost, than would a cost-benefit framework. Potential weakening of such protection is not categorically ruled out within the cost-benefit framework advocated by Dr. Seward. . . . Any provision disturbing the negotiated agreement could lead to delay in additional, much-needed public health protections."). Congress suggested that it thought the proposed rulemaking was largely consistent with CBA requirements. *See* H.R. REP. NO. 104-741, at 87 (1996) (Conf. Rep.) ("The Conferees recognize, however, that the development of this regulatory package has required the negotiators to consider complex issues of risk, costs, affordability, feasible technology, and health benefits. It is the Conferees' view that the proposed rule that has been produced is consistent with the 'risk-risk' provision set out in new section 1412(b)(5). Therefore, Section 104(b) makes clear that the Administrator may use the authority of section 1412(b)(5) to promulgate Stage I and Stage II rules. However, it is also the Conferees' intent that no provision of Section 1412(b)(5) be interpreted to force an alteration of the negotiated agreement.").

decisions . . . [which] are delegated by the Congress solely to the Administrator."[101]

Another CBA waiver provision was the removal of a CBA requirement in determining whether to regulate a chemical under TSCA.[102] This initiative was a response to reports that CBA requirements contributed to stalling regulation. Both environmental and industry groups pressured Congress to loosen the requirements that trigger federal regulation, though each group had different reasons for doing so. Environmental groups wanted EPA to regulate more chemicals to promote chemical safety, and industry groups wanted EPA to regulate more chemicals (or affirmatively decide it will not regulate a chemical) to preempt inconsistent state regulation. Thus, in the Frank R. Lautenberg Chemical Safety Act, Congress notably removed the requirement that the agency consider costs when deciding whether to regulate.[103] But also notably, Congress decided to keep the requirement to consider CBA when establishing the *stringency* of regulation, which is the key risk-management decision.[104]

Although Congress never passed any law that would extend any requirement to consider (or even conduct) CBA to all independent agencies,[105] ten laws imposed CBA requirements on specific independent agencies. These agencies were not otherwise subject to CBA requirements. Two laws, however, waived requirements previously imposed on such agencies. Both of these CBA waiver provisions applied to regulations issued by the Consumer Product Safety Commission (CPSC). Originally, Congress required the CPSC to issue only cost-benefit justified regulations—a strict and substantive CBA requirement.[106] The 1981 Congress was responding to President Reagan's goal of reducing the regulatory burdens on the economy, particularly to small businesses, and sought to codify the cost-benefit test articulated by the Fifth Circuit in *Southland Mower Co. v. CPSC*.[107] In 1990, the Democratic-controlled Congress waived the requirement, prompted by concerns about the length and inefficiency of CPSC rulemaking, the

101. S. REP. NO. 104-169, at 37.

102. *See* Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448, 460 (2016) (codified as amended at 15 U.S.C. § 2605).

103. *See id.*

104. 15 U.S.C. § 2605(b)(1)(B).

105. Such laws were frequently proposed. *E.g.*, Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. § 102–03 (2017). The Office of Legal Counsel recently released a memo from 2019 concluding, "The President may direct independent regulatory agencies to comply with the centralized regulatory review process prescribed by Executive Order 12[,]866." Extending Regulatory Review Under Executive Order 12,866 to Independent Regulatory Agencies, 43 Op. O.L.C. 1, 1 (2019).

106. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 710 (1981).

107. 619 F.2d 499, 524 (5th Cir. 1980). *See* H. REP. NO. 97-208, at 876 (1981) (Conf. Rep.).

ineffectiveness of a "mechanical" CBA requirement, and perceived inappropriateness of CBA to the topic of reviewing whether a consumer product has a defect.[108] But Congress stopped short of prohibiting CBA, making clear that the Commission was permitted to conduct CBA in those situations where it believed the analysis to be appropriate.

The only two laws that applied to all agencies—the Unfunded Mandate Reform Act (UMRA) and the Congressional Review Act (CRA)—imposed minimal procedural CBA requirements: a requirement to prepare a CBA (but not necessarily consider or rely on the CBA) for specific types of regulation (UMRA) and a requirement to send any CBA, along with the regulation, to Congress for all significant regulation (CRA).[109] Substantive CBA requirements (whether to consider CBA or, more strongly, require regulations to be CBA-justified), though common overall in the sample (twenty-three out of thirty-five provisions), were limited to specific agencies and provisions.

Earlier I discussed the nuanced CBA provisions in the SDWA Amendments inspired by the outbreak in Milwaukee. These were not the only CBA-related provisions enacted in the wake of a public health crisis. For example, after a series of salmonella and *E. coli* food outbreaks during the recession in the late 2000s, Congress passed the Food Safety Modernization Act.[110] There was extensive discussion of various costs and the general benefit to public health throughout the legislative history and little specific debate over the decision to include a CBA provision. In the only mention of the CBA requirement in the legislative history, it was described as an improvement to the legislation.[111] Similarly, the Drug Quality and Security Act[112] was passed after a fungal meningitis outbreak in

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108. S. REP. NO. 101-37, at 9–10 (1989).

109. *See* Unfunded Mandate Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995).

110. FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011). A series of salmonella food outbreaks during the recession prompted development of the bill, including the peanut butter salmonella outbreak and recalls of 2008, which cost industry $65 million in recalls; *E. coli* outbreak in bagged spinach which cost over $350 million; the "cookie dough" salmonella outbreak; and avoidance of tomatoes after an incorrectly reported salmonella outbreak in Florida. *Hearing to Review Current Issues in Food Safety Before the H. Comm. on Agric.*, 111th Cong. 40 (2009) [hereinafter *Hearing to Review Current Issues in Food Safety*] (statement of Carol L. Tucker-Foreman, Distinguished Fellow, The Food Policy Institute).

111. *See Hearing to Review Current Issues in Food Safety*, *supra* note 110, at 55 (statement of Kent Peppler, President, Rocky Mountain Farmers Union, on behalf of Nat'l Farmers Union) ("This section was also improved by requiring a cost/benefit analysis, public hearings, a pilot project and information gathering effort prior to publishing regulations.").

112. Drug Quality and Security Act, Pub. L. No. 113-54, 127 Stat. 587, 605 (2013) (codified as amended at 21 U.S.C. § 360eee-1).

Massachusetts caused by a failure of proper care in the drug supply chain that allowed counterfeit drugs to be sold on the market, leading to the death of at least sixty-four people.[113] Congress was focused on preventing this from happening again.[114] While there was no specific discussion of the CBA provision, the Congressional Record also reveals debates over the potential costs of various technology solutions to big pharmaceutical companies, to small pharmacies, and to the American consumer and about which groups have the most to lose from receiving a counterfeit prescription drug.[115] Significant statements included in the legislative record focused on striking the right balance between costs and benefits to these stakeholders.[116]

These high-profile public disasters certainly put pressure on Congress to respond quickly and effectively—and such pressure can often result in overreaction. At least, that is the conventional wisdom. But these examples, focused on CBA provisions, cut against assumptions that Congress tends to overreact to low-probability disasters or events. Although the high-profile events prompted congressional action, they attracted competing stakeholders—stakeholders representing both costs and benefits—preventing Congress from implementing a one-sided solution. Statements in the record show that Congress grappled with the tradeoffs and wanted to strike the right balance. Instead of making the (costly and difficult) policy decision, however, Congress delegated it to the agency—avoiding the political heat but also taking advantage of agency expertise by tying the agency to a CBA provision. In other words, in at least some situations where Congress is forced to

113. 159 CONG. REC. 14,631, 14,646–97 (2013) (House consideration and passage of H.R. 3204).

114. *See Securing Our Nation's Prescription Drug Supply Chain: Hearing Before the H. Subcomm. on Health of the Comm. on Energy and Com.*, 113th Cong. (2013).

115. *See id.* at 10 (statement of Janet Woodcock, Director, Ctr. for Drug Evaluation and Rsch., Food and Drug Admin.).

116. *See id.* at 20 ("[W]e have to make sure we strike the appropriate balance between the need to establish a secure system that protects the public health and the costs and feasibility of such a system and we need to make sure we put something in place, I think, that evolves over time to a common goal that we all have is a system that prevents criminals from taking advantage of our patients, prevents people from diverting drugs and marking them up, prevents us not being able to identify recall drugs and actually people being harmed while we are doing investigations and trying to figure out where these drugs ended up."); *Reforming the Drug Compounding Regulatory Framework*: *Hearing Before the H. Subcomm. on Health of the Comm. on Energy and Com.*, 113th Cong. 28 (2013) (statement of Janet Woodcock, Director, Ctr. for Drug Evaluation and Rsch., Food and Drug Admin.) ("While the health care system has grown to rely on obtaining these products from outsourcers, if they are produced under substandard sterile conditions, the risks to patients can outweigh any perceived benefits.").

acknowledge competing tradeoffs and recognize the usefulness and importance of technical expertise, it has deployed CBA—a neutral principle for balancing competing interests.[117]

Overall, the examination reveals the following takeaways: (1) when Congress enacts a CBA provision, it most often requires agencies to *consider* CBA; (2) salient rejections of CBA (CBA waiver provisions) have been overstated as indicating congressional opposition to CBA; (3) Congress appears to value statutory CBA requirements for executive agencies especially in times of divided government; (4) Congress tends to impose CBA requirements, at least initially, on independent agencies that are not otherwise subject to executive-order CBA requirements; and (5) after some public health crises, Congress has required agencies to regulate after considering CBA. But Congress has been reluctant to impose crosscutting substantive CBA requirements that would apply to all agencies. This reluctance may be because CBA consideration is not costless. The CBA waiver provisions, for example, were often motivated by concerns that CBA could interfere with specific settlements, needlessly delay rulemakings already underway, or, if the agency refused to initiate any regulation in light of CBA requirements, facilitate inefficient and inconsistent state action.

In addition, Congress often requires agencies to prioritize projects seeking federal money on substantive CBA grounds. The examination revealed at least thirty-nine provisions requiring agencies to limit federal funding to cost-benefit-justified projects or acquisitions, listed in Appendix Table 2.[118] The list also includes CBA conditions on reciprocity with foreign governments. All of these require the agency to at least consider or, in most cases, rely on the CBA when selecting or approving projects, acquisitions, or joint ventures. These provisions relate to the use of federal funds, while the statutory provisions previously discussed related to the issuance of regulations; the latter impose burdens on nongovernment entities. This separate examination suggests another takeaway: (6) Congress embraces CBA as a prioritization method in situations when it perceives resources are scarce.

III. THREATS TO THE CBA CONSENSUS

CBA is widespread, influential, and—some argue—net beneficial. But, to date, the stability of the practice has depended on continued executive and judicial support. This Part argues that this support is at increasing risk.

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117. In some ways, the Lautenberg Act is an exception to this pattern, where the crisis was deemed to be caused by CBA. *See supra* note 102.

118. *See supra* note 86. These provisions were picked up by the same search. This list omits permit approvals conditional on CBA requirements.

A. Waning Presidential Support

When CBA is not explicitly required by statute, it is executed "at will," or at the pleasure of the President—and may be discontinued the moment it ceases to be net useful to the President. Scholars have tied presidential support for CBA to its utility in controlling and overseeing agencies rather than to substantive commitments to net beneficial regulatory policy.[119] There are at least three reasons to think that CBA might no longer be perceived to be a net useful tool for presidents.

First, the Trump Administration effectively used loyal political appointees to exert control over agency action, making CBA comparatively less valuable for the task of controlling agencies. President Trump appointed loyal political officials to direct agencies, and if they strayed from the President's political interests, he liberally removed them. Terry Moe first proposed "politicization" and "centralization" as two competing ways of overseeing rulemaking.[120] "Politicization" refers to using the appointment power to fill positions based on loyalty, while "centralization" refers to overseeing rulemaking via tools such as CBA and White House review. These two strategies act as substitutes because if one strategy works, the other is less important.[121] Moreover, politicization, if it works, is preferable because it avoids adding a layer of oversight that is costly and may generate errors.[122] In the past, there have been limits on using politicization effectively—both in confirming a president's preferred candidate and in removing the candidate if the relationship ceases to benefit the president. The Trump Administration revealed that the perceived political constraints on the effective use of politicization have been overstated. The value of CBA to the President is lower given the more effective alternative.

Second, CBA proved to be more of a substantive constraint on the

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119. *See* Posner, *supra* note 42; Susan E. Dudley, *The Office of Information and Regulatory Affairs and the Durability of Regulatory Oversight in the United States*, REG. & GOVERNANCE (2020) https://onlinelibrary.wiley.com/doi/abs/10.1111/rego.12337.

120. Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235, 256 (John E. Chubb & Paul E. Peterson eds., 1985).

121. *See* Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1347–48 (2013) (discussing the substitutability of the two strategies).

122. *See* Yair Listokin, *Bounded Institutions*, 124 YALE L.J. 336, 355 (2014) (arguing that when an agent shares the principal's preferences "unbounded institutional structures are preferable"); *see also* Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 646 (2010) (noting that the President's "strongest possible control over an agency" is "placing a clone in the position of agency head"); Kagan, *supra* note 42, at 2317–18 (speculating on President George W. Bush's likely approach).

President's policies than in the past. In particular, agencies under the Trump Administration often prominently lost in litigation due to poor-quality CBA, especially the failure to evaluate the impact of climate change in the analysis.[123] Courts are becoming more comfortable evaluating CBAs and pushing back against unexplained or suspect choices in CBA scope or methodology. Agency reliance on high-quality CBA tends to promote regulatory stability because it is more difficult to reasonably justify switching course from prior CBA-justified actions (and more difficult to get away with poor-quality analyses).[124] In fact, agencies under the Trump Administration performed particularly badly in adhering to even basic procedural requirements.[125] There is also some evidence that CBA had a constraining influence *within* the Administration. For example, in November 2019, the Trump Administration changed its tune on freezing fuel economy standards. *E&E News* reported, "[t]he flip-flop comes after career and political staffers at EPA and the Department of Transportation struggled to produce a sound cost-benefit analysis to justify the freeze, the source said."[126] And, in particular, "[t]he staffers worried that the cost-benefit analysis wouldn't survive the inevitable legal challenges from environmental groups and other critics, the person said."[127] By constraining the President's preferred policies, the costs of CBA are higher for the President.

Third, the Trump Administration's efforts to manipulate CBA, despite being largely unsuccessful, could have eroded public trust in the procedure.[128]

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123. *See, e.g.*, High Country Conservation Advocs. v. U.S. Forest Serv., 52 F. Supp. 3d 1174 (D. Colo. 2014); California v. Bernhardt, 472 F. Supp. 3d 573 (N.D. Cal. 2020) (rejecting Bureau of Land Management methane waste prevention rule because it used a low Social Cost of Carbon that omitted impacts outside the United States). *See generally* Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 353 (2021) [hereinafter Davis Noll, *Tired of Winning*].

124. *See* Cecot, *Deregulatory Cost-Benefit Analysis*, *supra* note 21.

125. *See* Davis Noll, *Tired of Winning*, *supra* note 123, at 358–59; Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. (2019); Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks*, 38 ENERGY L.J. 269 (2017); John Graham & Keith Belton, *Trump's Deregulation Record: Is It Working?*, 71 ADMIN. L. REV. 803–880 (2019). It is possible there is a tradeoff between complying with procedural requirements and obtaining political control of agencies.

126. Maxine Joselow, *Trump Makes U-turn on Fuel Economy Standards*, E&E NEWS (Nov. 1, 2019), https://www.eenews.net/stories/1061435263.

127. *Id.*

128. *See* LIVERMORE & REVESZ, REVIVING RATIONALITY, *supra* note 49, at 4–5

Michael Livermore and Richard Revesz comprehensively document such efforts by the Administration over the last few years.[129] For example, the Administration tried to limit the scientific evidence that can be considered by agencies in these analyses and at times truncated the consideration of beneficial impacts of regulations to improve the perceived benefit-cost ratio of its actions.[130] At every turn, its efforts were rebuffed by the scientific community, limiting some of their ultimate effectiveness.[131] Nonetheless, the attempts may have reduced trust in CBA's neutrality and increased perceptions of the manipulability of CBA's substantive conclusions,[132] even though the actions were ultimately largely unsuccessful.[133]

For these reasons, it is not as clear that the Biden Administration—or, more generally, a future Democratic *or* Republican administration—will continue to support CBA as administrations of both political parties have in the past. From the President's perspective, the benefits are lower, the costs are higher, and public support is potentially lower on both sides—for both conservatives who saw it thwart many Trump Administration policies and for progressives who already were skeptical of its value. In fact, the Center for Progressive Reform has released several reports calling for President Biden to revamp the Office of Information and Regulatory Affairs (OIRA), the office responsible for reviewing agency CBA, and end reliance on CBA more generally.[134] President Biden has already signaled the importance of

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(describing how the Trump Administration eroded CBA norms when it could not get the analysis to support its regulatory agenda).

129. *Id.*

130. *See id.*; *see, e.g.*, Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469, 476 (Jan. 6, 2021).

131. *See* LIVERMORE & REVESZ, REVIVING RATIONALITY, *supra* note 49.

132. CBA has historically faced such criticisms. *See, e.g.*, Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENV'T L. 191, 194 (2011) (book review) ("The danger of CBA . . . lies in its false promise of determinacy, its pretense of objectivity and scientific accuracy . . . [which] renders CBA . . . vulnerable to manipulation . . . ."); Karl Coplan, *Pruitt's Arbitrary Cost Accounting is Built into the Concept of Cost Benefit Analysis*, GREENLAW (Oct. 10, 2017), https://greenlaw.blogs.pace.edu/2017/10/10/pruitts-arbitrary-cost-accounting-is-built-into-the-concept-of-cost-benefit-analysis [https://perma.cc/7UP3-8MNR] ("[T]he manipulability of cost benefit analysis is an inherent feature of an analysis that seeks to apply monetized accounting concepts to values for which there are no dollar values and no accounting rules. Which argues against ever relying on cost benefit analysis for regulatory rulemaking in the first place.").

133. *See* Davis Noll, *Tired of Winning*, *supra* note 123, at 385.

134. *See* Kelsey Brugger, *'Abolish OIRA': Left Hopes Biden Would Reform Regs Shop*, E&E NEWS

environmental initiatives to his Administration,[135] and he may be persuaded that CBA would undermine his goals and priorities in this area. For now, there is one promising signal for the continuation of CBA requirements: in one of his first directives as President, President Biden instructed the Office of Management and Budget (OMB) to begin a process for modernizing regulatory review, and key to this modernization is taking into account the distributional consequences of regulations "including as part of any quantitative or qualitative analysis of the costs and benefits of regulations."[136] He also instructed OMB to consider updating its guidance to agencies on how to consider costs and benefits of regulations.[137] That said, as of August 2021, President Biden has yet to nominate someone to be director of OMB or the administrator of OIRA, suggesting that CBA might be deprioritized in this Administration.

B. Calls for "Soft Look" Judicial Review

Although compliance with the CBA-related executive orders is not judicially reviewable, courts evaluate the reasons agencies give for their actions to ensure compliance with the APA—that is, to ensure the agency's decisionmaking is not arbitrary and capricious.[138] More than thirty years ago, the National Highway Traffic Safety Administration (NHTSA) rescinded a passive-restraint requirement for motor vehicles that it had previously promulgated.[139] The resulting litigation defined the contours of

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(Aug. 28, 2020); James Goodwin, *The Progressive Case Against Cost-Benefit Analysis*, CTR. FOR PROG. REFORM (Aug. 2020), https://progressivereform.org/our-work/regulatory-policy/progressive-case-against-cost-benefit-analysis/; James Goodwin, *Beyond 12866: A Progressive Plan for Reforming the Regulatory System*, CTR. FOR PROG. REFORM (Aug. 2020), https://progressivereform.org/our-work/regulatory-policy/progressive-plan-reforming-regulatory-system/.

135. *See, e.g.*, Fact Sheet, Briefing Room, President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government (Jan. 27, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/.

136. *See* Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7,059, 7,223 (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/; *see also* Exec. Order No. 13,985, 86 Fed. Reg. 6,827, 7,009 (Jan. 25, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.

137. Memorandum on Modernizing Regulatory Review, 86 Fed. Reg., *supra* note 136.

138. *See* Administrative Procedure Act, 5 U.S.C. § 706.

139. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 34 (1983).

review under the "arbitrary and capricious" standard.[140] In *State Farm*,[141] the Supreme Court held that NHTSA had failed to adequately explain why it had rescinded the passive-restraint requirement, which appeared to have benefits that justified its costs.[142] Specifically, the Court emphasized that "the direction in which an agency chooses to move does not alter the standard of judicial review established by law,"[143] but that the agency had to provide reasons for its actions that are supported by the record.[144]

This judicial review has allowed courts to push back effectively against some recent agency actions, especially when the accompanying CBAs have raised questions about the agency's choices to rescind prior rules or loosen standards.[145] Judicial review of agency rationales has bite; inadequate explanation is one of the most common grounds for judicial reversal and remand of agency actions.[146]

Perhaps partly in reaction to the effectiveness of judicial review in curbing the Trump Administration's regulatory policies, some scholars have argued that this "hard look" judicial oversight is illegitimate, unwise, or prone to judicial activism or overreach. Richard Epstein, for example, has called for an end to "hard look" review of all agency factfinding.[147] He compares agencies to lower courts and argues that current administrative law doctrine has it backwards—as in the case of lower courts, there should be no deference on questions of law and extreme deference on questions of fact.[148] Jeffrey Pojanowski identifies and categorizes this new way of thinking about

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140. *Id.* at 42–44.

141. 463 U.S. 29 (1983).

142. *Id.* at 34.

143. *Id.* at 42.

144. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

145. *See generally* Cecot & Viscusi, *supra* note 17. But such review has not been limited to CBA-justified action. Courts have recently also vacated other agency actions for inadequate explanations of their actions, such as the decision to include a citizenship question on the Census or the reason for rescinding the Deferred Action for Childhood Arrivals (DACA) program. *See* Dept. of Com. v. New York, 139 S. Ct. 2551 (2019) (the Census Case); Dept. of Homeland Security v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020) (the DACA Case).

146. *See, e.g.*, Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1035 tbl.6 (1990) (showing that about twenty percent of remands in 1985 were based on inadequate agency rationale); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 72 (1997) (suggesting that inadequate agency reasoning is the most frequent ground for judicial rejection of agency decisions).

147. *See generally* RICHARD EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW (2020).

148. *Id.* at 3–5.

administrative law as "neoclassical administrative law."[149] Under this view, current administrative doctrines result in a judicial method that is inappropriately (1) too deferential to agencies on legal questions, and (2) not deferential enough on policy questions.[150] Adherents of neoclassical administrative law would reject *State Farm* and defer more frequently to agencies on questions of fact and policy, and they would reject *Chevron* and defer less on questions of law. These views were reflected in some of the commentary by Trump Administration officials during the Department of Justice's December 2019 summit, entitled *Modernizing the Administrative Procedure Act*.[151] Pojanowski argues that corners of the federal judiciary also agree with this movement, and he is optimistic that this approach might gain ground with the Supreme Court.[152] If so, it would bring an end to the judicial check on CBA.

In addition, some judges have questioned longstanding ways courts have ensured quality CBA. One important judicial check is ensuring that agencies disclose important data and assumptions used in generating CBA estimates.[153] If an agency relies on CBA to justify its actions, an interested party should be able to review the analysis and comment on the data and assumptions that informed the analysis. The Court of Appeals for the D.C. Circuit, in its *Portland Cement*[154] decision, held that agencies must disclose this kind of information in order to give parties a meaningful opportunity to comment under the APA.[155] When Justice Kavanaugh was a judge on the D.C. Circuit, he questioned the *Portland Cement* doctrine, arguing that it violated the Supreme Court's *Vermont Yankee* doctrine.[156] In *Vermont Yankee*,[157] the Supreme Court admonished the D.C. Circuit for inappropriately imposing procedural requirements on agencies beyond those required by the APA, and the APA does not explicitly require disclosure of data.[158] But then-Judge Kavanaugh went even further; he also argued that the *Portland Cement*

149. Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 853 (2020).

150. *Id.*

151. *See, e.g.*, Claire McCusker Murray, Introductory Remarks, *in* MODERNIZING THE ADMINISTRATIVE PROCEDURE ACT 10 (2020), https://www.justice.gov/file/1302321/download (last visited Nov. 1, 2021).

152. Pojanowski, *supra* note 149, at 919.

153. *See* Cecot & Viscusi, *supra* note 17 (describing judicial review of CBA disclosure of data and assumptions).

154. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973).

155. *Id.* at 394 (D.C. Cir. 1973). The basis for this requirement is in the Administrative Procedure Act's notice and comment provisions. *See* 5 U.S.C. § 553.

156. Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246–47 (D.C. Cir. 2008).

157. Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519 (1978).

158. *Id.* at 557.

doctrine is ill-advised because it overly constrains agencies. According to him, "[t]he judicially created obstacle course can hinder Executive Branch agencies from rapidly and effectively responding to changing or emerging issues within their authority, such as consumer access to broadband, or effectuating policy or philosophical changes in the Executive's approach to the subject matter at hand."[159] Then-Judge Kavanaugh's statement is reminiscent of Justice Rehnquist's partial dissent in *State Farm*,[160] where Justice Rehnquist worried about judicial second-guessing of executive policy choices through "hard look" review of agency decisionmaking.[161]

Both the rejection of "hard look" review and the reinvigoration of *Vermont Yankee*-justified limits on judicial review are founded on a concern that judicial nitpicking gets in the way of speedy and responsive agency action. If the Supreme Court adopts either of these views, the current CBA consensus would face a formidable threat. A recent empirical analysis has found that agency action supported by high-quality CBA lowers litigation risk, while incomplete CBA increases it.[162] This suggests that judicial review serves a valuable role in incentivizing agencies to conduct high-quality CBA (and that high-quality CBA protects agency action subject to searching judicial review). If courts move to a hands-off approach, deferring to agency fact-finding without consideration of its quality, then CBA would become low-quality, meaningless, and ultimately unimportant.

C. Shaky Authorizations

There is also an ongoing debate on acceptable agency rulemaking discretion and authority—a debate that often involves implicit assumptions about the effect and desirability of requiring Congress to limit agency discretion. Under current precedents, the nondelegation doctrine is not violated as long as Congress provides an intelligible principle to guide the agency's exercise of discretion.[163] And because courts readily identify such principles in statutes, this allows an agency to wield vast rulemaking

159. *Am. Radio Relay League*, 524 F.3d at 248.

160. 463 U.S. 29, 59 (1983).

161. *Id.* (Rehnquist, J., concurring in part and dissenting in part) (arguing that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations, [a]s long as the agency remains within the bounds established by Congress").

162. CARRIGAN, ELLIG & XIE, *supra* note 57, at 4.

163. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (citing Mistretta v. United States, 438 U.S. 361 (1989)).

authority. According to some Justices of the Supreme Court, this weak enforcement of the nondelegation doctrine violates the Constitution's separation of powers by concentrating distinct powers in one entity.[164] In particular, it allows an executive agency to prescribe and then apply general rules of private conduct without going through the cumbersome legislative process. In these Justices' views, the weak enforcement of the nondelegation doctrine upsets the framers' intended balance.[165] And relatedly, weak enforcement of the nondelegation doctrine allows unelected officials to make often difficult policy choices that Congress is supposed to make.[166]

CBA has so far played an influential role in encouraging net beneficial and relatively stable regulations, especially in the context of public health and safety. But agencies often conduct and rely on CBA when exercising their discretion under general statutory directives to act reasonably or in the public interest.[167] Some scholars and judges have argued that deciding the applicable risk-management framework, however, is exactly the sort of important policy decision that Congress should explicitly make. At its core, the risk-management framework tells agencies how they should balance the costs to those burdened by a policy and the benefits to those who stand to benefit from a policy.

In fact, congressional silence on this issue—that is, leaving the risk-management decision up to the agency's discretion—has previously been criticized as a violation of the nondelegation doctrine as currently enforced. In the 1980 *Benzene Case*,[168] the majority held that the Occupational Safety and Health Administration's stringent standard

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164. *See, e.g.*, *id.* at 2116, 2133 (2019) (Gorsuch, J., dissenting) ("[T]he Constitution proceeded to vest the authority to exercise different aspects of the people's sovereign power in distinct entities."); *see also* DOT v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1244, 1251 (2015) (Thomas, J., concurring) ("The Framers' dedication to the separation of powers has been well-documented, if only half-heartedly honored . . . . For whatever reason, the intelligible principle test now requires nothing more than a minimal degree of specificity in the instructions Congress gives to the Executive when it authorizes the Executive to make rules having the force and effect of law.").

165. This concern is not just reflected in recent nondelegation doctrine jurisprudence. The Court has expressed willingness to enact barriers to agency forms based on its view of which forms best protect liberty. *See, e.g.*, PHH Corp. v. CFPB, 881 F.3d 75, 168, 187–88 (D.C. Cir. 2018) (then-Judge Kavanaugh's views); Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2211 (2020) (also relying, at least in part, on a desire to protect liberty).

166. *Gundy*, 139 S. Ct. at 2145.

167. The examination of the Congressional Record reveals numerous explicit CBA provisions in federal statutes, but the majority of these provisions simply require an agency to consider CBA; many agencies that use CBA to inform their decisionmaking do so under much less explicit congressional authorizations.

168. Indus. Union Dep't v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607, 662 (1980).

limiting exposure to benzene in the workplace was invalid because the agency failed to make threshold findings about the significance of current exposure levels.[169] Justice Rehnquist, however, wrote a powerful concurrence, arguing that the regulation is actually invalid because Congress impermissibly delegated the key risk-management decision to the agency.[170] In his view, "Congress [must] lay down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to particular cases."[171] The litigants—and the Justices—all seemed to think the statute at issue potentially allowed for several different risk-management approaches, including adopting all regulations feasible (a bankruptcy constraint) and all regulations that are cost-benefit justified (a CBA approach). To Justice Rehnquist, because the statute did not clearly specify what threshold the agency should use before it decided to regulate and, moreover, did not tell the agency how stringently to regulate, it violated the nondelegation doctrine by passing the risk-management decision on to the agency.[172] In other words, congressional silence on this "difficult issue"—the key risk-management decision—violated the nondelegation doctrine.[173] Justice Rehnquist's arguments in the *Benzene Case* about the limits of constitutional delegation are strikingly similar to Justice Gorsuch's re-envisioned doctrine in *Gundy*.[174]

Similarly, when the D.C. Circuit held that the Clean Air Act violated the nondelegation doctrine, it was for Congress's failure to articulate a

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169. *Id.*

170. *See id.* at 672 (Rehnquist, J., concurring) (calling this "one of the most difficult issues that could confront a decisionmaker.").

171. *Id* at 675.

172. *Id.* at 685–86 (Rehnquist, J., concurring) ("Congress was faced with a clear, if difficult, choice between balancing statistical lives and industrial resources or authorizing the Secretary to elevate human life above all concerns save massive dislocation in an affected industry . . . . That Congress chose, intentionally or unintentionally, to pass this difficult choice on to the Secretary is evident from the spectral quality of the standard it selected . . . . The decision whether the law of diminishing returns should have any place in the regulation of toxic substances is quintessentially one of legislative policy.").

173. *Id.* at 672.

174. *Compare id.* at 674–75 (Rehnquist, J., concurring), *with* Gundy v. United States, 139 S. Ct. 2116, 2141–42 (Gorsuch, J.). Justice Kavanaugh also favorably referred to Justice Rehnquist's opinion. *See also* Paul v. United States, 140 S. Ct. 342 ("Justice Gorsuch's opinion built on views expressed by then-Justice Rehnquist some 40 years ago in [the *Benzene Case*] . . . . Like Justice Rehnquist's opinion 40 years ago, Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.").

reasonable risk-management standard while forbidding the agency to consider costs.[175] Of course, in that case, the Supreme Court reversed the D.C. Circuit's decision, holding that the Clean Air Act had a sufficiently intelligible principle guiding the agency's risk-management decision notwithstanding the prohibition on cost consideration.[176]

Nondelegation doctrine jurisprudence has long recognized practical issues of governance,[177] and normative considerations appear to play a role in the Court's recent interest in the doctrine's revitalization and its analysis of the constitutional question—in particular, a view that less regulation is desirable.[178] For example, Justice Gorsuch explains that "the framers went to great lengths to make lawmaking difficult" because "[t]hey believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty," and that "[a]n 'excess of law-making' was, in their words, one of 'the diseases to which our governments are most liable.'"[179] Depending on how the Court rethinks enforcement of the nondelegation doctrine, much of current federal rulemaking could be on uncertain ground.[180] For some Justices, any resulting abrogation of federal

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175. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1057 (D.C. Cir. 1999).

176. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 471 (2001). Because of this decision, EPA is not allowed to set national ambient air quality standards based on CBA and instead sets the stringency level based on other factors that are often not clear. Perhaps counterintuitively, this approach has resulted in levels that are less stringent than CBA would have encouraged. *See* Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. 1184, 1188–89 (2014) (referring to this problem as the "inadequacy paradox").

177. *See, e.g.*, J.W. Hampton & Co. v. United States, 276 U.S. 394, 406 (1928) ("This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches . . . . In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.").

178. *See also* Jeffrey A. Wertkin, Note, *Reintroducing Compromise to the Nondelegation Doctrine*, 90 GEO. L.J. 1055, 1074–75 (2002) (summarizing arguments for and against stricter enforcement of nondelegation).

179. Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

180. Justice Gorsuch sketched out a few of his ideas in his dissent in *Gundy*. *See Gundy*, 139 S. Ct. at 2136–42 (Gorsuch, J., dissenting) ("Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed . . . . [O]nce Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding."). Justice Thomas seems to have an even narrower view of acceptable agency rulemaking authority. *See* DOT v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1252 (2015) (Thomas, J., concurring) ("We

rulemaking would be a normatively desirable consequence of reworking the doctrine's enforcement (a feature, not a bug). Justice Gorsuch, for example, argues that requiring greater specificity from Congress will "promote deliberation" and protect minority interests,[181] "promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules,"[182] and promote accountability.[183] For Justice Thomas, too, any cost in speed and flexibility of government action would be justified by the benefits of congressional restraint. Quoting Alexander Hamilton in The Federalist No. 73, he writes that any "injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."[184] Of course, these conclusions assume that requiring greater specificity from Congress will result in inaction—and less lawmaking and less regulation—which the Justices believe to be normatively desirable.

So far, the Supreme Court has not granted certiorari on any nondelegation challenges that it has reviewed since *Gundy*.[185] And even if it rethinks the doctrine, it is not clear whether and how this would affect agency discretion to adopt a risk-management approach in the face of congressional silence.[186] But if the Supreme Court requires Congress to explicitly make the risk-management policy decision, what effect would this have? In the short term, of course, it might mean that much of CBA-justified rulemaking is invalid because many statutes do not specifically require CBA. What happens after that depends on the congressional response. Congress might adopt new statutes that require CBA, likely satisfying the Court's criteria for appropriate authorization. The result would not be much different from current practice. Or, Congress might set stringency itself by statute, which would be likely less informed and could be more or less stringent than CBA-justified. After the resignation of Anne Gorsuch Burford as Administrator of

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should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power.").

181. *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

182. *Id.* at 2134.

183. *Id.*

184. *DOT*, 135 S. Ct. at 1252 (Thomas, J., concurring).

185. *See, e.g.*, Am. Inst. for Int'l Steel Inc. v. United States, 806 Fed. Appx. 982 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020); Ctr. for Biological Diversity v. McAleenan, 404 F. Supp. 3d 218 (D.C. Cir. 2019), *cert. denied sub nom.* Ctr. for Biological Diversity v. Wolf, 141 S. Ct. 138 (2020).

186. *See* Cary Coglianese, *Dimensions of Delegation*, FACULTY SCHOLARSHIP AT PENN L. 2114 (2019), https://scholarship.law.upenn.edu/faculty_scholarship/2114/; Cody Ray Milner, *Into the Multiverse: Replacing the Intelligible Principle Standard With a Modern Multi-Theory of Nondelegation*, 28 GEO. MASON L. REV. 395 (2020) (working copy).

a scandal-prone EPA in 1983, Congress responded by enacting several highly prescriptive statutes.[187] If something other than CBA fills the gap, the result might not reflect the restraint and stability that Justices Gorsuch and Thomas envision. The congressional response matters.

IV. FUTURE OF CBA

Within agencies, CBA has established itself as the default risk-management framework. It still has its detractors, but it is increasingly seen as sensible governance. Current CBA practice, however, relies on continued presidential and judicial support. Although this support has been stable for four decades, there are emerging threats to this continued support.

There is no guarantee that future presidential administrations will continue to support CBA. The Trump Administration revealed the constraining power of CBA. It then unsuccessfully tried to erode CBA norms to loosen CBA constraints. A future administration might try a direct approach by simply eliminating these self-imposed constraints, especially as explicit political control over agencies becomes more acceptable. Similarly, the CBA-based losses in courts have highlighted outstanding questions about the legitimacy of such scrutiny. While studies suggest that courts generally play a positive role in evaluating agency CBA, often simply ensuring that choices are well-explained and data is reasonably available, there is some concern that this scrutiny could be wielded by politically motivated judges. And finally, the Supreme Court may decide that Congress must explicitly provide the risk-management framework—or even set stringency itself—to satisfy constitutional requirements. Justices who support rethinking the contours of the nondelegation doctrine envision a world with less regulations, lower burdens on private parties, and net welfare improvements to society, "ensuring the people would be subject to a relatively stable and predictable set of rules."[188] The actual likely effects of such a sea change in delegation practice, however, are much more unclear. In fact, if any of these threats manifest and upset the current CBA consensus, the resulting situation might

187. *See, e.g.*, Hazardous and Solid Waste Amendments, Pub. L. No. 98-616, 98 Stat. 3221 (1984) (amending the Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965) (codified as amended throughout 42 U.S.C. ch. 82)); Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (amending the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended throughout 42 U.S.C. ch. 103)); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (amending the Clean Air Act, Pub. L. No. 88-207, 77 Stat. 392 (codified as amended throughout 42 U.S.C. ch. 83)).

188. Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

be one that such Justices would likely consider to be worse. CBA generally constrains agencies from making unreasonable moves—whether in a deregulatory or pro-regulatory direction—and promotes transparency, a requirement for accountability.[189]

Congress can strengthen the foundations for CBA, but conventional wisdom has suggested that Congress is, at best, indifferent to it. This Article analyzes the Congressional Record on CBA and disputes this standard account, with implications for the future of CBA.

First, the most notable rejections of CBA have been overstated. In all cases, they have been limited to specific issues. Some of them, in fact, suggest some continued support for CBA. Similarly, the failure to enact cross-cutting statutes such as the Regulatory Accountability Act (RAA) can be explained by past congressional practice. Congress most often requires agencies to *consider* CBA. But the RAA bills typically go much farther, even with respect to CBA.[190] For example, the RAA of 2017 would have required all agencies to issue only regulations that are CBA-justified.[191] One statement, summarizing the minority views of Senators Claire McCaskill, Thomas Carper, and Gary C. Peters, is particularly revealing.[192] While the Senators acknowledged that "the principle of using [CBA] to inform the development of public policy is both commonsense and has been shown by administrations of both parties to be beneficial over the last 40 years," they worried that a cross-cutting mandate to rely on CBA would limit flexibility to forego CBA when warranted and override the carefully crafted statutory exceptions to CBA.[193] Additionally, the Senators emphasized the various other ways that the RAA would go beyond current requirements.[194] A new, more modest RAA effort, focused on a requirement to *consider* CBA or codify executive-order requirements, might have more chance of success. The overall Congressional Record suggests that there could be strong support for such

189. Cecot, *Deregulatory Cost-Benefit Analysis*, *supra* note 21 (arguing that extensive use of CBA promotes efficiency, regulatory stability, and political accountability).

190. *See, e.g.*, Cass R. Sunstein, *A Regulatory Reform Bill That Everyone Should Like*, BLOOMBERG (June 22, 2017, 8:30 AM), https://www.bloomberg.com/opinion/articles/2017-06-22/a-regulatory-reform-bill-that-everyone-should-like [https://perma.cc/K3AD-APK3] (discussing the consensus around the CBA provisions of Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017)).

191. Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

192. S. REP. NO. 115-208, at 21 (2018).

193. *Id.* at 25.

194. *E.g.*, *id.* at 21 ("The RAA would establish new regulatory requirements and codify and expand many of the principles found in existing, widely supported executive orders . . . go[ing] well beyond the intent of these executive actions.").

more limited requirements, especially when adequate release valves are in place. Exceptions to requirements to consider or rely on CBA could include cases of preexisting agreements/settlements, contexts where Congress previously prohibited CBA, or other situations where there is good cause for suspending the requirements. Similarly, a cross-cutting mandate imposing some CBA requirement need not result in additional judicial review opportunities beyond those already in place.

Second, the examination reveals evidence that, in the risk-management context, the application of agency expertise is sometimes key to Congress's decision to authorize agencies to issue regulations. Congress has imposed CBA requirements after public health crises, when faced with competing tradeoffs and when expertise is most useful. Scholars such as Richard Epstein call for a rejection of "hard look" review, arguing that agencies are no different from lower courts and that courts should similarly defer to agency fact-finding unless clearly erroneous. But there are important differences between agencies and lower courts that undermine this argument. Agencies implement Congress's statutory objectives. In risk-management contexts, when Congress delegates implementation to agencies, it accepts less control for itself over ultimate outcomes in exchange for requiring agencies to apply technical expertise. As long as the delegation is constitutional, courts should enforce the bargain that Congress struck. In the context of CBA, courts should continue to ensure that the analyses are consistent, evaluate important categories of costs and benefits, and disclose important data or assumptions. Courts should not defer to agencies if they shirk their expert role—and they should resist calls to do so.

The review of the Congressional Record provides some reason for supporters of CBA to be cautiously optimistic about the tool's future if it depends on congressional action. Although efficiency has no constituency, the concepts of expertise, transparency, and oversight still have political traction. When it matters—and more often than commonly believed—Congress has enacted explicit CBA provisions.

APPENDIX

APPENDIX TABLE 1. SUMMARY OF CONGRESSIONAL CBA DIRECTIVES FOR REGULATION (35)

Bill	Year	Statutory provisions	CBA (Require/ Consider/ Report/ Prepare/ Waive)	Congressional majority, D/R/Split (Pres.)	Agency
Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, Aug. 13, 1981, 95 Stat. 710	1981	15 U.S.C. §§ 1262, 2058	Require	Split (R)	CPSC
Telecommunications for the Disabled Act of 1982, Pub. L. 97-410, Jan. 3, 1983, 96 Stat. 2043	1983	47 U.S.C. § 610	Consider	Split (R)	FCC
Tandem Truck Safety Act of 1984, Pub. L. 98-554, Oct. 30, 1984, 98 Stat. 2829	1984	49 U.S.C. § 31502	Consider	Split (R)	DOT
Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, Aug. 23, 1988, 102 Stat. 1107	1988	19 U.S.C. §§ 2251, 2253	Require	D (R)	President
Clean Air Act, Amendments of 1990, Pub. L. 101-549, Nov. 15, 1990, 104 Stat. 2399	1990	42 U.S.C. §§ 7511b, 7612	Consider/ Review	D (R)	EPA
Consumer Product Safety Improvement Act of 1990, Pub. L. 101-608, Nov. 16, 1990, 104 Stat. 3110	1990	15 U.S.C. § 1274	Waive	D (R)	CPSC
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, Oct. 5, 1992, 106 Stat. 1460	1992	47 U.S.C. § 544a	Consider	D (R)	FCC
Mammography Quality Standards Act of 1992, Pub. L. 102-539, Oct. 27, 1992, 106 Stat. 3547	1992	42 U.S.C. § 263b	Report to Congress	D (R)	DHHS

Bill	**Year**	**Statutory provisions**	**CBA (Require/ Consider/ Report/ Prepare/ Waive)**	**Congressional majority, D/R/Split (Pres.)**	**Agency**
Revision of Title 49 U.S.C., "Transportation", Pub. L. 103-272, July 5, 1994, 108 Stat. 745	1994	49 U.S.C. § 31136(c)(2)	Consider	D (D)	DOT
Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. 103-354, Oct. 13, 1994, 108 Stat. 3178	1994	7 U.S.C. § 2204e	Prepare/ CBA Office	D (D)	USDA
Swift Rail Development Act of 1994, Pub. L. 103-440, Nov. 2, 1994, 108 Stat. 4615	1994	49 U.S.C. § 20148	Consider	D (D)	DOT
Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, Mar. 22, 1995, 109 Stat. 48	1995	2 U.S.C. § 1532	Prepare	R (D)	All agencies
ICC Termination Act of 1995, Pub. L. 104-88, Dec. 29, 1995, 109 Stat. 803	1995	49 U.S.C. § 14104	Consider	R (D)	DOT
Safe Drinking Water Act Amendments of 1996, Pub. L. 104-182, Aug. 6, 1996, 110 Stat. 1613	1996	42 U.S.C. § 300g-1	Consider/ Waive	R (D)	EPA
Federal Agriculture Improvement and Reform Act of 1996, Pub. L. 104-127, Apr. 4, 1996, 110 Stat. 888	1996	7 U.S.C. § 7313	Report to Congress	R (D)	USDA
Contract with America Advancement Act of 1996 ("Congressional Review Act"), Pub. L. 104-121, Mar. 29, 1996, 110 Stat. 847	1996	5 U.S.C. § 801	Report to Congress	R (D)	All agencies

Bill	Year	Statutory provisions	CBA (Require/ Consider/ Report/ Prepare/ Waive)	Congressional majority, D/R/Split (Pres.)	Agency
Federal Aviation Reauthorization Act of 1996, Pub. L. 104-264, Oct. 9, 1996, 110 Stat. 3213	1996	49 U.S.C. § 106	Review	R (D)	FAA/DOT
Accountable Pipeline Safety and Partnership Act Of 1996, Pub. L. 104-304, Oct. 12, 1996, 110 Stat. 3793	1996	49 U.S.C. § 60102	Require	R (D)	DOT
Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. 105-83, Nov. 14, 1997, 111 Stat. 1543	1997	16 U.S.C. § 620f	Require	R (D)	USDA/DOI
Healthcare Research and Quality Act of 1999, Pub. L. 106-129, Dec. 6, 1999, 113 Stat. 1653	1999	42 U.S.C. § 299b-5	Consider	R (D)	DHHS
Consolidated Appropriations—FY 2001, Pub. L. 106-554, Dec. 21, 2000, 114 Stat. 2763	2000	7 U.S.C. § 19	Consider	R (D)	CFTC
Aviation and Transportation Security Act, Pub. L. 107-71, Nov. 19, 2001, 115 Stat. 597	2001	49 U.S.C. § 114	Waive	Split (R)	DHS
Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, Dec. 4, 2003, 117 Stat. 1952	2003	15 U.S.C. § 1681s-2	Consider	R (R)	"Federal banking agencies"/FTC
Cape Town Treaty Implementation Act of 2004, Pub. L. 108-297, Aug. 9, 2004, 118 Stat. 1095	2004	49 U.S.C. § 44101 note	Waive	R (R)	DOT (FAA)
Security and Accountability for Every Port Act Of 2006 (SAFE Port Act), Pub. L. 109-347, Oct. 13, 2006, 120 Stat. 1884	2006	6 U.S.C. § 943	Consider	R (R)	DHS (CBP)

Bill	**Year**	**Statutory provisions**	**CBA (Require/ Consider/ Report/ Prepare/ Waive)**	**Congressional majority, D/R/Split (Pres.)**	**Agency**
Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, Aug. 3, 2007, 121 Stat. 266	2007	6 U.S.C. § 1204	Consider	D (R)	DHS/DOT
Consumer Product Safety Improvement Act of 2008, Pub. L. 110-314, Aug. 14, 2008, 122 Stat. 3016	2008	15 U.S.C. § 1472	Waive	D (R)	CPSC
Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, July 21, 2010, 124 Stat. 1376	2010	12 U.S.C. §§ 5496b, 5512, 5551; 31 U.S.C. § 313	Consider/ Report to Congress (CG)	D (D)	CFPB
Twenty–First Century Communications and Video Accessibility Act of 2010, Pub. L. 111-260, Oct. 8, 2010, 124 Stat. 2751	2010	47 U.S.C. § 613	Require	D (D)	FCC
FDA Food Safety Modernization Act, PL 111-353, Jan. 4, 2011, 124 Stat. 3885	2011	21 U.S.C. § 2223	Require	Split (D)	DHHS
Drug Quality and Security Act, Pub. L. 113-54, Nov. 27, 2013, 127 Stat. 587	2013	21 U.S.C. § 360eee-1	Consider	Split (D)	DHHS
Every Student Succeeds Act, Pub. L. 114-95, Dec. 10, 2015, 129 Stat. 1802	2015	20 U.S.C. § 6571	Report to Congress	R (D)	Dept. of Educ.
Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114-182, June 22, 2016, 130 Stat. 448	2016	15 U.S.C. § 2605	Consider/ Waive	R (D)	EPA

Bill	Year	Statutory provisions	CBA (Require/ Consider/ Report/ Prepare/ Waive)	Congressional majority, D/R/Split (Pres.)	Agency
Strengthening Career and Technical Education for the 21st Century Act, Pub. L. 115-224, July 31, 2018, 132 Stat. 1563	2018	20 U.S.C. § 2306a	Report to Congress	R (R)	Dept. of Educ.
FAA Reauthorization Act of 2018, Pub. L. 115-254, Oct. 5, 2018, 132 Stat. 3186	2018	49 U.S.C. § 44805	Consider	R (R)	FAA/DOT

Notes. "Prepare" refers to provisions requiring an agency to prepare a CBA (2), "consider" refers to provisions requiring an agency to consider the results of a CBA (17), "require" refers to provisions requiring an agency to issue cost-benefit justified regulations (6), "review" refers to provisions requiring an agency to review the costs and benefits of prior regulations (2), "waive" refers to provisions waiving agency CBA requirements (5), and "Report to Congress" refers to provisions requiring an agency to report CBA of regulation to Congress (6).

APPENDIX TABLE 2. CBA CONDITIONS ON FEDERAL FUNDING (39)

Statutory provisions requiring some assessments of costs and benefits	
6 U.S.C. § 563a	33 U.S.C. § 2326
6 U.S.C. § 945	33 U.S.C. § 579a
7 U.S.C. § 3157	33 U.S.C. § 579f
10 U.S.C. § 1788a	38 U.S.C. § 8163
10 U.S.C. § 2926	38 U.S.C. § 8164
15 U.S.C. § 2207	42 U.S.C. § 16134
16 U.S.C. § 1005	42 U.S.C. § 6348
16 U.S.C. § 1602	42 U.S.C. § 6602
16 U.S.C. § 3744	43 U.S.C. § 373f
16 U.S.C. § 3839aa-3	46 U.S.C. § 50302
16 U.S.C. § 757a	48 U.S.C. § 1492
16 U.S.C. § 79c	49 U.S.C. § 22101
19 U.S.C. § 2901	49 U.S.C. § 22907
19 U.S.C. § 3802	49 U.S.C. § 24320
19 U.S.C. § 4201	49 U.S.C. § 24904
22 U.S.C. § 2381a	49 U.S.C. § 24911
22 U.S.C. § 262m-5	49 U.S.C. § 47124
22 U.S.C. § 7709	49 U.S.C. § 5309
33 U.S.C. § 1268	49 U.S.C. § 6103
33 U.S.C. § 2282	