COST-BENEFIT ANALYSIS IN POLARIZED TIMES

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On nearly every major issue of regulatory policy and administrative law, the two parties are sharply polarized. Yet presidential administrations of both parties have used regulatory cost-benefit analysis for nearly a half-century. Why? This Article examines the political forces that have given cost-benefit analysis staying power. While much of the existing literature focuses on the incentives of a generic President, this Article places longstanding debates over cost-benefit analysis in the context of the two parties' divergent policy agendas, the rulemaking process as a whole, and other areas of administrative law.

Cost-benefit analysis has persisted because presidential administrations of both parties have reasons to think that retaining the method is consistent with their regulatory policy aims. For Republican administrations, the main utility of cost-benefit analysis is that it erects hurdles to new progressive regulatory policymaking during Democratic administrations, by imposing onerous analytic requirements on regulatory agencies. This fact helps explain why Republicans have not fully abandoned the method, even though many conservative policy goals are not supported by cost-benefit analysis. Democratic administrations have also remained faithful to the method, but for very different reasons: they have discovered the method's progressive potential, especially but not exclusively on climate issues; balked at the seeming inconsistency of abandoning the method while purporting to be the party of science and technocratic governance more generally; and been hemmed in by the prospect of conservative courts striking down agency rulemakings not backed by rigorous cost-benefit analyses.

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This account of the politics of cost-benefit analysis helps explain current debates over the method and foreshadows likely future conflicts. When administrations of both parties have reasons to retain cost-benefit mandates, political conflict will center on how those mandates play out in practice. This dynamic helps explain partisan divisions over which rules are subject to cost-benefit requirements, who counts for purposes of cost-benefit analysis, how to discount future impacts of regulation, and whether and how to account for the distributional consequences of regulation. Only by understanding the politics of cost-benefit analysis can we understand why partisans act as they do and what the method's practical stakes are for regulatory policy.

INTRODUCTION

Over the past half-century, cost-benefit analysis has been a mainstay of regulatory policymaking in the United States. It has been endorsed by presidents of both parties, without exception.[1] Scholars have told many

1. Every presidential administration since the 1980s has either issued an executive order requiring regulatory cost-benefit analysis or retained a predecessor's order doing the same. *See infra* notes 25, 54, 118, 227–240 and accompanying text.

stories about the ascent and persistence of cost-benefit analysis. On one account, cost-benefit analysis is a product of neoliberalism and an aid to deregulation.[2] On another, cost-benefit analysis has evolved to actually support regulation, at least in many domains.[3] On yet another, cost-benefit analysis represents the triumph of technocracy.[4] And, in a more institutionalist vein, cost-benefit analysis may endure because of the value it holds for the White House as an institution, regardless of the agendas of its occupant.[5]

Each of these accounts contains important truths. But none is complete, and even collectively they leave important questions not fully answered. Why have Democratic administrations come to accept cost-benefit analysis, despite the method's historic association with deregulation? Why have Republicans continued to embrace the method, even as it has come to favor progressive outcomes in some salient policy areas? Why have some debates over regulatory policy come to play out on the narrow terrain of how to apply cost-benefit principles? And what does the future hold?

This Article seeks to answer these questions. It focuses not on the economic or philosophical merits of cost-benefit analysis but rather on the politics surrounding the method. While cost-benefit analysis can be defended or criticized from first principles, its real-world staying power is inexorably linked to political parties' substantive policy agendas. The choice of both Republican and Democratic presidential administrations to continue requiring agencies to conduct cost-benefit analysis of their most important rules means that those administrations have concluded—for very different reasons—that doing away with cost-benefit analysis would do their agendas more harm than good.

In telling this political story, this Article delves into two sets of dynamics concerning how cost-benefit analysis plays out in practice. The first concerns how cost-benefit analysis operates for each individual rulemaking, and thus might be thought of as *internal* to the method. Cost-benefit analysis is itself flexible in several respects, which in turn sometimes allows Republican and Democratic administrations to take opposite actions while both claiming that

2. *See, e.g.*, Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES IN L. 369, 392–93 (2016) ("[C]ost-benefit analysis is associated with an era of notable deregulation and in practice often is inflected by a distinctively neoliberal vision of regulatory minimization.").

3. *See, e.g.*, RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008) (making this argument).

4. *See, e.g.*, CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 3–26 (2018) (describing cost-benefit analysis as the "triumph of the technocrats").

5. *See infra* Section I.C.1.

their rulemakings have positive net benefits.[6] Further, some key inputs to cost-benefit analysis are deeply contested. The parties are divided on the relevance of non-domestic impacts of regulation,[7] the proper discount rate to use for calculating regulatory impacts that are realized in the future,[8] and the role of distributional considerations in cost-benefit analysis.[9] The reason for partisan disagreements on these points is simple: the parties have divergent regulatory policy agendas, and the mechanics of cost-benefit analysis matters for which regulations appear net beneficial. It follows naturally, then, that the parties have incentives to endorse approaches to cost-benefit analysis that make their policies appear more beneficial.

A second set of dynamics are *external* to cost-benefit analysis itself. These considerations are focused not on the mechanics of cost-benefit analysis but rather on when the method is used, how it shapes the allocation of agency resources, and how it is impacted by judicial oversight of the rulemaking process. A recurrent conflict between the parties has been on the reach of cost-benefit analysis, including questions of which rules must be accompanied by cost-benefit analyses,[10] whether the method should be mandated by statute (as opposed to executive order),[11] and whether cost-benefit analysis should be required for rules issued by independent agencies.[12] One reason that the reach of cost-benefit mandates matters is that those mandates impose a significant resource tax on agencies. The more analysis agencies are required to conduct for any given rulemaking, the fewer resources they have left for other rulemakings or other agency tasks.[13] Further, courts sometimes read agencies' organic statutes or the Administrative Procedure Act (APA) to require consideration of benefits and costs, which in turn can push presidential administrations toward a cautious approach to cost-benefit analysis, given the risk that making unconventional modeling assumptions or declining to conduct cost-benefit analysis altogether could put their rules in legal jeopardy.[14]

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6. *See infra* Section I.C.2.
7. *See infra* Section IV.B.
8. *See infra* Section IV.C.
9. *See infra* Section IV.D.
10. *See infra* Section IV.A.
11. *See infra* notes 249–261 and accompanying text.
12. *See infra* notes 324–330 and accompanying text.
13. *See infra* Section II.C.
14. *See infra* Section III.C. Dynamics that are external to cost-benefit analysis might affect how the method operates on an internal level. For example, concerns about judicial review or agency capacity (external) might push toward certain analytical methods for analyzing particular rules (internal).

With these internal and external politics in mind, we can turn to how cost-benefit analysis intersects with the two parties' agendas. Republican and Democratic administrations are differently situated with respect to the politics of cost-benefit analysis because of their differing policy agendas. But the incentives of administrations of each party, when taken together, can explain the persistence and shape of regulatory cost-benefit analysis over the last half-century.

First, consider the Republican Party's relationship with cost-benefit analysis. The Reagan Administration institutionalized cost-benefit analysis and made it a central part of regulatory policymaking, largely because it viewed the method as facilitating its deregulatory policy agenda.[15] More recent Republican administrations have at times either distorted cost-benefit analysis or eschewed the method in pursuit of deregulatory goals.[16] But the Republican Party has nonetheless continued to support a requirement that agencies engage in cost-benefit analysis of rules, including through proposed legislation to mandate the method in new contexts.[17]

One reason is that, for Republicans, cost-benefit analysis is more important to restraining Democratic regulatory policymaking than to advancing their own affirmative agendas. Republican administrations have many tools at their disposal for achieving deregulatory outcomes, most of which circumvent cost-benefit analysis—examples include laxly enforcing existing regulations, limiting agency capacity, and encouraging courts to interpret statutes narrowly to limit agency authority. Cost-benefit analysis is therefore most useful for Republicans not for what it does when they hold the White House, but rather because it can slow progressive regulatory policies during Democratic administrations. Cost-benefit analysis is costly for agencies: empirical studies have shown that preparing a cost-benefit analysis is a significant tax on agency time and staff capacity. Given that Democratic administrations have more expansive regulatory agendas than Republican ones on most issues, Republicans have reason to support cost-benefit analysis as a means of slowing down regulatory policymaking when they are out of power.[18]

The Democratic story is very different. One might think that the hurdles cost-benefit analysis imposes on regulatory policymaking would lead Democratic presidents with ambitious agendas to oppose the practice. That opposition does exist among some progressive interest groups. But the Clinton,

15. *See infra* Section II.A.

16. *See infra* notes 135–139 and accompanying text.

17. *See infra* notes 202–210 and accompanying text.

18. *See infra* Section II.C.

Obama, and Biden Administrations each ratified the basic Reagan-era framework of regulatory cost-benefit analysis.[19] Those administrations sought to reform the method to be friendlier to progressive policy agendas, but, tellingly, none rejected cost-benefit analysis altogether. Indeed, some Democrats have appreciated the potential for cost-benefit analysis to legitimate an expanded administrative state and ensure rigorous, technocratic policymaking. Other progressives have noted the method's potential to help justify rules that protect workers, consumers, and the environment.[20]

Perhaps most significantly, the shadow of judicial review by conservative courts helps entrench cost-benefit analysis during Democratic administrations. Even if a Democratic presidential administration wished to do away with cost-benefit analysis entirely, doing so would put its rules at risk of judicial invalidation. Far better, in such a scenario, to deploy the method toward progressive ends in a way that shores up the legal footing of new rulemakings, rather than imperil those rulemakings by rejecting the method.[21]

This political account contrasts with the idea that cost-benefit analysis could "replace contested, corrupt politics with neutral, scientific economics."[22] Some proponents of evidence-based policymaking, of which cost-benefit analysis is a subtype, have touted the promise that "impartial evidence will enable lawmakers to transcend . . . bitter and divisive ideological battles."[23] This Article's analysis shows that, far from overcoming ideological divisions, cost-benefit analysis itself is often the arena in which debates over contentious regulatory policy issues play out.

The remainder of the Article proceeds as follows. Part I provides an overview of how cost-benefit analysis operates, describes the method's legal status, and presents institutionally focused reasons for the method's persistence. I then turn to the political parties. Part II describes the politics of cost-benefit analysis among Republicans. It charts their initial embrace of the method as a tool of deregulation, its waning importance in serving deregulatory goals, and its continuing role in exerting a resource tax on

19. *See infra* Section III.A.

20. *See infra* Section III.B.1.

21. *See infra* Section III.C.

22. Martha T. McCluskey, *Constitutional Economic Justice: Structural Power for "We the People"*, 35 YALE L. & POL'Y REV. 271, 284 (2016) (describing and critiquing this idea). *Cf.* JEDEDIAH PURDY, TWO CHEERS FOR POLITICS 20 (2022) (describing modes of antipolitics that "shift[] the work of social order" away from politics, to "constitutional design, culture and norms, the economy and private life (properly administered from above)").

23. Elaine Kamarck, *Obama's Budget Lays Out an Ambitious Evidence-Based Policy Agenda*, BROOKINGS INST. (Feb. 5, 2015), https://www.brookings.edu/blog/fixgov/2015/02/05/obamas-budget-lays-out-an-ambitious-evidence-based-policy-agenda.

federal agencies that makes regulating difficult. Part III examines the politics of cost-benefit analysis among Democrats. It examines why Democratic administrations have endorsed the method, focusing on the method's changing political valence, the character of the Democratic Party, and the long shadow of judicial review. The differences in the parties' agendas and the divergent reasons for administrations of the two parties to retain cost-benefit analysis make it no surprise that there are many partisan divisions over how the method ought to operate. Part IV, therefore, discusses current controversies about the method and projects what sorts of conflict over cost-benefit analysis are likely in the future. Part V zooms out to briefly consider the broader lessons for public law that follow from the Article's analysis.

I. COST-BENEFIT BASICS

Sound policymaking requires public officials to consider the advantages and disadvantages of different options when deciding what course of action to take. Few would disagree with this general statement. But cost-benefit analysis, as the term is used in the context of U.S. regulatory policy, means something more specific—and more contestable.[24] Regulatory cost-benefit analysis refers to a particular method developed in the mid-twentieth century and applied to some proposed agency regulations per the requirements of a series of executive orders.[25] Before proceeding to consider the politics of cost-

24. *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 211 (2004) (distinguishing "analysis of costs and benefits, in lowercase letters, [a]s an essential part of any systematic thought about public policy," from "the much narrower doctrine of Cost-Benefit Analysis, which calls for a specific, controversial way of expressing and thinking about costs and benefits").

25. *See, e.g.*, Exec. Order No. 12,291, § 2(b)-(c), 46 Fed. Reg. 13,193, 13,193 (Feb. 17, 1981) (Reagan Administration executive order providing that "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society" and instructing agencies to "maximize net benefits to society"); Exec. Order No. 12,866, § 1(b)(6), 58 Fed. Reg. 51,735, 51,736 (Sept. 30, 1993) (Clinton Administration executive order providing that "[e]ach agency shall assess both the costs and the benefits of the intended regulation and . . . propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs"); Exec. Order No. 13,563, § 1(b), 76 Fed. Reg. 3,821, 3,821 (Jan. 18, 2011) (Obama Administration executive order reaffirming the practice of cost-benefit analysis as described in Executive Order 12,866); Exec. Order No. 14,094, § 1(a), 88 Fed. Reg. 21,879, 21,879 (Apr. 6, 2023) (Biden Administration executive order reaffirming the practice of cost-benefit analysis as described in Executive Orders 12,866 and 13,563). On the forerunners to these executive orders, see Edward P. Fuchs & James E. Anderson, *The Institutionalization of Cost-Benefit Analysis*, 10 PUB.

benefit analysis, I begin with a brief primer on the method's core features and philosophical underpinnings, its legal status, and existing explanations in the literature for its persistence.

A. Cost-Benefit Methodology

Cost-benefit analysis asks "whether, by undertaking this project rather than not undertaking it, or by undertaking instead any of a number of alternative projects, net benefits will accrue to a society."[26] The method calls for tallying a proposed policy's benefits and costs, mainly in monetized terms. Monetized costs are then subtracted from monetized benefits, yielding a net benefits figure: a single number that can be used to evaluate the merits of a proposed regulation. So long as there are no important unmonetized regulatory impacts, government should choose the policy that maximizes monetized net benefits. Thus, if there are two possible regulatory solutions to a given problem, one with $200 million of annual net benefits and one with $300 million of annual net benefits, the government should generally choose the latter over the former.[27]

The ostensibly simple goal of maximizing net benefits masks considerable complexity in practice. Cost-benefit analysis requires assessing the benefits and costs of a proposed regulation relative to a baseline—the situation that would result if the regulation was not issued—and that baseline can be contestable or hard to discern in some cases.[28] Cost-benefit analysis also

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PRODUCTIVITY REV. 25, 26–30 (1987) (discussing developments in the Nixon, Ford, and Carter Administrations). In contrast with these earlier orders, the Reagan Administration's order marked a discontinuity by "commanding that cost-benefit principles, rather than an agency's perception of its statutory mission, should guide administrative [policymaking]." Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1218 (1981).

26. E.J. MISHAN & EUSTON QUAH, COST-BENEFIT ANALYSIS 8 (6th ed. 2020).

27. If all benefits and costs are monetized, the government should choose the regulation with $300 million in annual net benefits over the one with $200 million in annual net benefits. Executive Order 12,866 instructs agencies that "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits . . . ." Exec. Order No. 12,866, § 1(a), 58 Fed. Reg. at 51,735. But it leaves considerable flexibility by including the proviso that net benefits "include[s] potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity." *Id.*

28. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4, REGUL. ANALYSIS 15–16 (2003), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf [hereinafter ORIGINAL CIRCULAR A-4] (discussing the choice of baseline). This section's background on cost-benefit analysis draws on the

entails making estimates based on probabilities when the existence or magnitude of a given benefit or cost is uncertain.[29] While experts are quite good at making projections about the frequency and impacts of some types of events, it is exceptionally difficult to reliably estimate the probability and magnitude of events like financial crises, pandemics, or terrorist attacks.[30] Cost-benefit analysis also requires calculating the present values of benefits and costs that will manifest only in the future, and there is considerable controversy about the appropriate discount rate to use in making those calculations.[31] Another contested issue is whether and how cost-benefit analysis should account for hard-to-monetize impacts of a regulation, such as impacts on civil liberties.[32]

The lodestar of regulatory cost-benefit analysis is the use of individual preferences to calculate benefits and costs. In determining the benefit of improved auto safety, for example, the method counsels looking to revealed preferences about how much consumers are willing to pay for cars with better safety features (ideally) or stated preferences from survey data about how much individuals value safety improvements (if revealed-preferences data is unavailable).[33] This use of individual preferences,[34] however, quickly gives

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original version of Circular A-4, issued in 2003, which itself built on earlier guidance on the topic. *See id.* at 1. The Biden Administration finalized revisions to Circular A-4 in late 2023, as this Article was going to print. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4, REGUL. ANALYSIS (2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf [hereinafter REVISED 2023 CIRCULAR A-4]. I discuss the content of those revisions in detail in Part IV, *infra*.

29. *See* ORIGINAL CIRCULAR A-4, *supra* note 28, at 38–46 (discussing the treatment of uncertainty).

30. *See, e.g.*, John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 960–70 (2015) (describing the difficulty of deriving estimates of both the cost and frequency of financial crises).

31. *See infra* Section IV.C (discussing discount rates).

32. *See* ORIGINAL CIRCULAR A-4, *supra* note 28, at 26–27. President Clinton's Executive Order 12,866 sought to incorporate hard-to-monetize regulatory impacts into cost-benefit analysis, though it gave little guidance on how precisely this should be done in practice. *See* Exec. Order No. 12,866, § 1(a), 58 Fed. Reg. at 51,735 ("Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."). Later scholarship has proposed various ways of accounting for hard-to-monetize effects of regulation. *See infra* note 140 and accompanying text.

33. *See* ORIGINAL CIRCULAR A-4, *supra* note 28, at 20–24.

34. *See id.* at 18 ("The principle of 'willingness-to-pay' (WTP) captures the notion of

rise to complications. For example, consider how agencies calculate the value of a statistical life (VSL)—the monetary value used in cost-benefit analysis to account for the fact that some rules either save lives or cause the loss of life.[35] The common practice of calculating the VSL based on revealed preferences (such as wage premiums for hazardous work) has been subject to a host of criticisms.[36] Further, individual willingness to pay may fail to capture the full value of things that individuals care about, as an empirical matter, or that they ought to care about, as a normative matter. Measuring individuals' willingness to pay to avert harms, such as the long-term harms of climate change, also does not account for the interests of persons who will live in the future or of nonhuman animals.[37] And even those inclined to accept willingness to pay as a general matter face an obvious and fundamental challenge: for any given benefit, wealthy individuals will have a higher willingness to pay as compared to poor individuals, not because the wealthy place greater value on particular goods—life, health, safety, and so forth—but rather because the wealthy have more resources at their disposal.[38]

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opportunity cost by measuring what individuals are willing to forgo to enjoy a particular benefit. In general, economists tend to view WTP as the most appropriate measure of opportunity cost, but an individual's 'willingness-to-accept' (WTA) compensation for not receiving the improvement can also provide a valid measure of opportunity cost.").

35. *See id.* at 29–31.

36. On how agencies calculate the value of a statistical life, see, for example, Memorandum from the Off. of the Adm'r Sci. Advisory Bd., U.S. Env't Prot. Agency (EPA), to Hon. Lisa P. Jackson (July 29, 2011), https://www.epa.gov/system/files/documents/2022-03/86189901_0.pdf; and Memorandum from Molly J. Moran, Acting Gen. Couns., & Carlos Monje, Assistant Sec'y for Transp. Pol'y, to Secretarial Officers & Modal Adm'rs (Aug. 8, 2016), https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20a%20Statistical%20Life%20Guidance.pdf. For a critique of existing methods, see, for example, Peter Dorman & Les Boden, *Risk Without Reward: The Myth of Wage Compensation for Hazardous Work*, ECON. POL'Y INST. (Apr. 19, 2021), https://www.epi.org/unequalpower/publications/risk-without-reward-the-myth-of-wage-compensation-for-hazardous-work/ (arguing that "problems in theory, measurement, and methodology" undermine efforts to use hedonic wage studies to calculate the VSL).

37. It accounts for altruism that current persons may have toward future persons or nonhuman animals, as reflected in current persons' willingness to pay, but it does not account for the interests of those future persons or nonhuman animals in their own right.

38. *See, e.g.*, Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1685–86 (2018) (arguing that when goods like clean air are allocated through regulation based on willingness-to-pay measures, "not only is the declining marginal utility of income ignored, but also the fact that the wealthy tend to have a higher willingness to pay for the good will lead systematically to *more* allocation of the good to the well-off"); John Bronsteen, Christopher

More foundationally, cost-benefit analysis attempts to take a welfarist orientation toward public policy.[39] The decision rule of maximizing net benefits rests on the philosophical view that the goal of regulation is to increase the overall welfare of society.[40] A welfarist view provides cost-benefit proponents with the "most natural defense of cost-benefit analysis as a moral criterion"[41]; conversely, cost-benefit analysis has less appeal for those who reject welfarism as a moral theory.

An important consequence of any approach to policy analysis that focuses on aggregating benefits and costs based on individual preferences is that such an approach does not directly account for distributional consequences of regulation. Considering only the aggregated impacts of a regulation for society as a whole can mask how regulatory benefits and costs fall on particular subgroups. Thus, traditional cost-benefit analysis would be agnostic with respect to how benefits and costs are distributed across lines of race, ethnicity, sex, age, geography, or other demographic characteristics. A rejoinder to this critique is the argument that government regulation is not the appropriate forum for addressing distributional issues because redistribution through regulation is inefficient.[42] More efficient, the argument goes, is to pursue redistributive goals only through taxes and transfers.[43]

Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603, 1652 (2013) (arguing that "[w]ealth effects play a large and undeniable role in wage-premium studies, yet CBA cannot fully account for these effects" and that "[t]he fact that rich and poor people (who presumably care equally, or at least comparably, about staying alive) would be willing to pay vastly different amounts to avoid a 1-in-10,000 risk of death illustrates the inadequacy of this metric for valuing lives").

39. The hedging language that cost-benefit analysis *attempts to* take a welfarist approach is important because critics of cost-benefit analysis as traditionally practiced emphasize that the method is not actually welfarist, because it fails to account for the diminishing marginal utility of income.

40. *See, e.g.*, Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 194–95 (1999) (arguing that cost-benefit analysis "is properly conceptualized as a *welfarist decision procedure*" in that it "is the decision procedure best justified in light of overall well-being").

41. Lewis A. Kornhauser, *On Justifying Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1037, 1052 (2000).

42. *See* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994) ("[R]edistribution through legal rules offers no advantage over redistribution through the income tax system and typically is less efficient.").

43. *See id.* at 669 ("[A]ny regime with an inefficient legal rule . . . [can be replaced by a] regime with an efficient legal rule and a modified income tax system designed so that every

Further, even adopting the goal of maximizing social welfare would not resolve debates about how cost-benefit analysis should function. Traditionally weighted cost-benefit analysis (that is, cost-benefit analysis that does not take into account the fact that willingness to pay varies by income and wealth) cannot capture a regulation's actual effect on social welfare.[44] Recent scholarship has showed that the relationship between willingness to pay as used in cost-benefit analysis and actual individual well-being is tenuous.[45] Even those who accept welfare-maximization as the goal of regulatory policy have reasons to question the use of willingness-to-pay measurements in practice.

Cost-benefit analysis, thus described, has been controversial among scholars for decades. Proponents have argued that the method is the best way of making regulatory policy and have defended it against various critiques,[46] and scholars have developed sophisticated techniques for

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person is made better off."); *see also* Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 SCANDINAVIAN J. ECON. 264, 266 (1979) ("In the optimal arrangement, distributional objectives are achieved through the tax system alone. Government programs are chosen solely on the basis of efficiency criteria, that is, total net benefits are maximized."). Other scholars, by contrast, have called for greater redistribution through the regulatory system. *See, e.g.*, Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495 (2022); Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489 (2018).

44. *See* Daniel J. Acland & David H. Greenberg, *Distributional Weighting and Welfare/Equity Tradeoffs: A New Approach*, 14 J. BENEFIT-COST ANALYSIS 68, 72 (2023).

45. *See, e.g.*, Bronsteen et al., *supra* note 38, at 1607 (calling for replacing cost-benefit analysis with "well-being analysis," which "would analyze directly the effect of costs and benefits on people's quality of life"); *see also* Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 VA. L. REV. 1809, 1825 (2017) (noting that though "mounting interest in more direct measurement of subjective well-being has not yet produced an administrable way of capturing the actual effects of regulatory interventions . . . it has pointed to the possibility that cost-benefit analysis may not capture those effects accurately, or as accurately as other methods would").

46. *See, e.g.*, SUNSTEIN, *supra* note 4, at xvi (defending cost-benefit analysis as "a way of both increasing welfare and respecting individual autonomy"); REVESZ & LIVERMORE, *supra* note 3 (defending regulatory cost-benefit analysis while also proposing reforms to how it operates in practice); Adler & Posner, *supra* note 40, at 168 (defending a version of cost-benefit analysis as "consistent with a broad array of popular theories of the proper role of government," including nonutilitarian theories); John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 395 (2008) (arguing that "lifesaving regulation informed by benefit-cost analysis (BCA) has compelling advantages compared to regulation informed by the main alternatives to BCA").

addressing some of the practical challenges described above.[47] Critics, meanwhile, have argued that the method is fatally flawed and that policymakers should either abandon or dramatically reform it.[48] Whatever the force of these criticisms, they have not succeeded in preventing cost-benefit analysis from gaining a strong foothold in public law. I turn to the method's legal status next.

B. Cost-Benefit Analysis as Law?

Regulatory cost-benefit analysis is predominately a creature of the Executive Branch. Every presidential administration since the early 1980s has either issued an executive order mandating that agencies use regulatory cost-benefit analysis or kept in place a predecessor's orders doing the same.[49] Those executive orders are worded in general terms, but the Executive Branch has developed more detailed guidance on how agencies are to go about implementing cost-benefit analysis in practice. Most notably, the Office of Management and Budget (OMB) has issued Circular A-4, an Executive Branch-wide guidance on how to conduct cost-benefit analysis.[50] Circular A-4 provides detailed instructions on many of the specific issues just discussed, as well as other technical issues that I examine in further detail below (such as the appropriate discount rate). In addition to the guidance set out in Circular A-4, some agencies have issued their own detailed internal documents advising

47. *See infra* note 109 and accompanying text (discussing the work of the Society for Benefit-Cost Analysis).

48. *See, e.g.*, ACKERMAN & HEINZERLING, *supra* note 24, at 8–10 (arguing that "[t]he basic problem with narrow economic analysis of health and environmental protection is that human life, health, and nature cannot be described meaningfully in monetary terms" and that cost-benefit analysis often "muddies rather than clarifies fundamental clashes about values" and "excludes the voices of people untrained in the field"); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 190–216 (1993) (arguing that by regarding human life and environmental quality "only as commodity values, cost-benefit analysis fails to consider the proper roles they occupy in public life"); DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 15–16 (2010) (arguing that cost-benefit analysis "proves disruptive to the project of reasoning through certain daunting collective issues" and "implicitly denigrates the [political] community's judgment"); Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 5 REGULATION 33, 33 (1981) (arguing that "[i]n areas of environmental, safety, and health regulation, there may be many instances where a certain decision might be right even though its benefits do not outweigh its costs").

49. *See* sources cited *supra* note 25.

50. *See supra* note 28 (discussing the original Circular A-4, issued in 2003, and revisions issued in 2023).

agency staff on how to prepare cost-benefit analyses.[51]

Each of these forms of guidance is a type of what Gillian Metzger and Kevin Stack have called internal administrative law: the "internal policies, procedures, practices, oversight mechanisms, and the like" that "not only bind and are perceived as binding by agency officials; they also encourage consistency, predictability, and reasoned argument in agency decisionmaking."[52] Internal Executive Branch directives, including those governing the use of cost-benefit analysis, can be revised or repealed without the consent of any other branch.[53] The history of presidential directives on cost-benefit analysis in recent decades includes notable instances of presidents modifying their predecessors' orders, even if they have never rejected cost-benefit analysis entirely.[54] Circular A-4, which was promulgated and revised through processes involving notice-and-comment and peer review,[55] is more stable, but there too the Executive Branch need not receive approval from Congress or the courts to enact reforms. The same holds for instructions that agencies promulgate for themselves on how to conduct cost-benefit analyses.[56]

The fate of cost-benefit analysis is not, however, entirely within the unilateral control of the Executive Branch. Congress rarely issues clear mandates that agencies conduct cost-benefit analysis of regulations under a

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51. *See e.g.*, NAT'L CTR. FOR ENV'T. ECON., U.S. ENV'T PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES (2014), https://www.epa.gov/sites/default/files/2017-08/documents/ee-0568-50.pdf [hereinafter EPA GUIDELINES].

52. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1244 (2017).

53. *See* BENJAMIN B. WILHELM, CONG. RSCH. SERV., IFF11358, PRESIDENTIAL DIRECTIVES: AN INTRODUCTION (2019), https://sgp.fas.org/crs/natsec/IF11358.pdf.

54. *See, e.g.*, Exec. Order No. 12,866, § 11, 58 Fed. Reg. 51,735, 51,744 (Sept. 30, 1993) (Clinton Administration executive order revoking Reagan Administration executive orders); Exec. Order No. 13,497, § 1, 74 Fed. Reg. 6,113, 6,113 (Jan. 30, 2009) (Obama Administration executive order revoking Bush Administration executive orders); Exec. Order No. 13,992, § 2, 86 Fed. Reg. 7,049, 7,049 (Jan. 20, 2021) (Biden Administration executive order revoking Trump Administration executive orders).

55. *See* Circular A-4, Regulatory Analysis, 68 Fed. Reg. 58,366, 58,366 (Oct. 9, 2003) ("A draft of this Circular . . . was subject to public comment, external peer review, and interagency review."); REVISED 2023 CIRCULAR A-4, *supra* note 28, at 1 ("This update to Circular No. A-4 was subject to interagency review, public comment, and peer review.").

56. Characterizing Executive Branch directives on cost-benefit analysis as a form of internal administrative law is not to say that agencies always follow such directives or that OIRA is always interested in enforcing them. *See, e.g.*, Richard L. Revesz & Samantha P. Yi, *Distributional Consequences and Regulatory Analysis*, 52 ENV'T. L. 53, 93 (2022) (noting the "decisions of agencies to consistently ignore [Circular A-4's] command" on distributional analysis and "OIRA's decision to consistently look the other way when that happens").

particular statute, but it retains the power to do so, and Congress does mandate cost-benefit analysis for some particular regulations.[57] Congress also retains the broader power to mandate (or, conversely, forbid) cost-benefit analysis across agency rulemakings.[58] But it has not successfully codified, modified, or repealed Circular A-4 through legislation.[59] Beyond the initial action of passing statutes that delegate authority to administrative agencies, Congress's role in cost-benefit debates is more often one of lurking in the background rather than playing an active part.

In practice, the more important pressure for agencies to use cost-benefit analysis comes from the courts. Judicial promotion of cost-benefit analysis can take either of two forms. Courts can read cost-benefit mandates into statutes that authorize or require agency action, or courts can interpret the APA's ban on arbitrary and capricious agency action to require cost-benefit analysis. Part III of this Article examines courts' use of each of these approaches in detail.[60] For present purposes, though, the key point is that what began as an Executive Branch effort to promote regulatory cost-benefit analysis is now reinforced by the courts, such that even a (hypothetical) presidential administration that wished to reject cost-benefit analysis entirely would face difficulties in doing so. In Cass Sunstein's words, "[t]he cost-benefit principle is not quite judicially enforceable law," but agencies "violate

57. For an overview of how Congress has treated cost-benefit analysis in various statutory schemes, see Caroline Cecot, 73 ADMIN. L. REV. 787, 799–812 (2021). For an example of a context-specific statutory requirement, see the discussion of the safety of transporting natural gas in 49 U.S.C. § 60102(b)(5) ("Except where otherwise required by statute, the Secretary [of Transportation] shall propose or issue a standard under this chapter only upon a reasoned determination that the benefits, including safety and environmental benefits, of the intended standard justify its costs.").

58. *Cf.* Cecot, *supra* note 57, at 800–01, 805–06.

59. Two trans-substantive statutes touch on cost-benefit analysis, though neither requires monetization nor mandates that agencies choose the policy option that maximize net benefits. The Unfunded Mandates Reform Act (UMRA), Pub. L. No. 104-4, 109 Stat. 48 (1995), requires only that agencies taking "significant regulatory actions" prepare "a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments or the private sector, as well as the effect of the Federal mandate on health, safety, and the natural environment." *Id.* § 202(a)(2), 109 Stat. at 64 (codified as 2 U.S.C. § 1532(a)(2)). More modestly, the Congressional Review Act of 1996, 5 U.S.C. §§ 801–808, requires only that agencies, when issuing "major rule[s]," furnish to Congress a copy of its cost-benefit analysis if one exists, *id.* § 801(a)(1)(B)(i).

60. *See infra* Section III.C.

the principle at their peril."[61]

C. Nonpartisan Accounts of Persistence

With this backdrop in mind, we can turn to the question of why cost-benefit analysis has proved resilient through presidential administrations of both parties. Whatever one thinks of cost-benefit analysis on the merits, it has become a mainstay of the contemporary regulatory state. Why?

The bulk of this Article answers this question primarily in light of the policy objectives of the two major political parties. But before turning to those partisan explanations, some nonpartisan accounts of the method's emergence and persistence merit review.

1. Presidential control. — One nonpartisan explanation is that cost-benefit analysis endures because it is an effective tool for presidents to control the administrative state. The bipartisan acceptance of cost-benefit analysis, the reasoning goes, arose by virtue of its role in aiding presidents of both parties in centralizing regulatory policymaking, thereby enhancing their own authority. This explanation gains credence from the fact that regulatory cost-benefit analysis became dominant during a period in which Republican and Democratic presidents alike sought to centralize administrative policymaking in the White House.[62] Indeed, "[t]he prevailing view is that cost-benefit analysis serves mainly as a mechanism for OIRA to assert authority over agencies, in service of presidential control over the executive branch."[63]

The most straightforward way cost-benefit analysis can aid the White House in controlling agencies is by giving the White House a principled (or principled-sounding) justification for overseeing agency rulemakings. Cost-benefit analysis provides technocratic language for the White House—under the control of either party—to modify or even outright reject a proposed agency rulemaking. The Reagan Administration institutionalized regulatory cost-benefit analysis in part as a means of controlling regulatory agencies that

61. SUNSTEIN, *supra* note 4, at 4.

62. *See, e.g.*, David J. Barron, *Foreword, From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1099–121 (2008); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272–319 (2001); Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235 (John E. Chubb & Paul E. Peterson eds., 1985).

63. Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609, 611 (2014) (describing this view, but dissenting from it).

it distrusted,[64] and subsequent Republican administrations have taken even more hostile postures toward the federal bureaucracy.[65] Democratic administrations are far less hostile to the administrative state, but cost-benefit principles can likewise give a Democratic White House a rationale for weakening or preventing the issuance of regulations favored by agencies.[66] One reason for the persistence of cost-benefit analysis, then, is that it can prove useful to the White House, under the control of either party, in "disciplining agencies and enhancing the control of elected officials"[67]—most importantly, the President.[68]

Another version of the presidential control story views cost-benefit analysis as advantageous for the White House because it serves as a counterweight against agency capture or myopia. Cost-benefit analysis "requires the weighing of all relevant competing considerations, thereby providing some check against the possibility that particular considerations would be left out of an agency's decisionmaking process as a result of capture."[69] On this reasoning, because cost-benefit analysis requires that agencies examine all benefits and costs of a regulation—not just those relevant to the agency's

64. *See* Kagan, *supra* note 62, at 2279 (noting the Reagan-era view that "[i]f agency heads had to assess costs and benefits—and to offer their assessments for external review—they would begin to correct for what two former heads of [the Office of Information and Regulatory Affairs (OIRA)] termed 'covert redistribution and overzealous pursuit of agency goals'").

65. *See, e.g.*, Max Fisher, *Stephen K. Bannon's CPAC Comments, Annotated and Explained*, N.Y. TIMES, Feb. 24, 2017, at A13 (discussing the Trump Administration's goal of "deconstruction" of the administrative state).

66. *See, e.g.*, Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T. L. REV. 325, 352–53 (2014) (arguing that cost-benefit analysis can hamper EPA rulemaking efforts, especially those concerning water pollution, toxins, and hazardous waste). Less frequently—but in some important instances—cost-benefit analysis can also be a tool for a Democratic White House to push agencies toward stricter regulation. *See, e.g.*, Arianna Skibell & Kelsey Brugger, *EPA Rejected White House Effort to Toughen Car Rules*, E&E NEWS (Jan. 13, 2022, 6:44 AM), https://www.eenews.net/articles/epa-rejected-white-house-effort-to-toughen-car-rules (providing the example of auto emissions standards early in the Biden Administration).

67. Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1141 (2001).

68. *But see* Livermore, *supra* note 63, at 688 (arguing that "the cost-benefit standard preserves some degree of agency autonomy," "encourages agencies to engage in knowledge production," and "makes both agencies and OIRA accountable to a specific group of outside experts").

69. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1361–62 (2013).

policy agenda or particular constituencies—it serves as a counterweight against capture.[70] At its best, the theory goes, cost-benefit analysis can help to "illuminate a broader range of regulatory effects that matter for a diverse set of party constituencies."[71] Because presidents have (comparatively) diverse national consistencies, they stand to benefit from the method precisely because it highlights regulatory impacts that might be overlooked by agencies with missions focused on a particular subject matter or set of constituencies. To be sure, presidents have incentives to cater to various narrow interests relevant to their own political prospects, and scholars have debunked the idea that presidents are themselves immune from parochialism or capture.[72] But because presidents are responsive to different constituencies than agencies are, cost-benefit analysis can help ensure that agencies do not neglect regulatory impacts that matter to the White House.

Presidents also benefit from cost-benefit analysis because it elicits information from agencies. As Eric Posner has explained, "cost-benefit analysis changes the relationship between principals [the White House] and agencies" from "a relationship of asymmetric information to one of full information."[73] Cost-benefit analysis provides the White House with information about the effects of agencies' proposed actions, allowing administrations of both parties to proceed with those actions or not based on a greater understanding of their impacts. Further, on this reasoning, cost-benefit analysis enhances the ability of presidents to exercise other sorts of control over agencies (through personnel, budgeting, and so forth), since presidents of both parties want to exercise that control in a well-informed

70. *See id.* at 1370 ("[Cost-benefit] methodology has three important features that have the potential to reduce agency capture: it is comprehensive, requiring the examination of a wide range of regulatory effects; it is standardized and supported by a set of professional norms; and it improves transparency, by publishing for public scrutiny agency estimates of regulatory effects."). The Reagan Administration institutionalized cost-benefit analysis in part "to guard against . . . excessive regulatory costs imposed by single-mission agencies with ties to special interest groups." Kagan, *supra* note 62, at 2279.

71. Michael A. Livermore, *Political Parties and Presidential Oversight*, 67 ALA. L. REV. 45, 128 (2015). On the possibility that cost-benefit analysis could overcome myopia, in agencies and more broadly, see, for example, Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1060 (2000) (arguing that "[c]ost-benefit analysis should be understood as a method for putting 'on screen' important social facts that might otherwise escape private and public attention").

72. *See, e.g.*, DOUGLAS L. KRINER & ANDREW REEVES, THE PARTICULARISTIC PRESIDENT EXECUTIVE BRANCH POLITICS AND POLITICAL INEQUALITY (2015); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006).

73. Posner, *supra* note 67, at 1143.

way.[74] Having the information that comes from cost-benefit analysis, on this view, enables presidential control over the bureaucracy.

There is considerable truth to each of these accounts, but a focus on presidential control alone does not explain administrations' support for a *specific method* of economic analysis. Nor does it explain why presidents of both parties made remarkably few changes to the method's substance over multiple decades. A thought experiment decoupling presidential control and cost-benefit analysis helps underscore this point. One could easily imagine adopting, retaining, or even strengthening White House control of regulatory policymaking without subjecting regulations to cost-benefit analysis at all. The President's staff could have just as much control over agency rulemaking—indeed, even more control than at present—but simply evaluate proposed rulemakings based on some criteria other than cost-benefit analysis. Effective presidential control does require that agencies provide the White House with at least some information about a regulation's likely impacts, but that information could take many forms besides the sort of cost-benefit analysis described above. For example, benefits and costs of proposed regulations could be listed and quantified, but not monetized. In evaluating regulations, the White House could rely on a given conception of justice, a focus on distributive effects of regulation, greater emphasis on political considerations, or other possible approaches. Whatever one thinks about these or other approaches to regulatory policymaking as a normative matter, they would need not entail a surrender of presidential control. The fact that presidential control has grown alongside cost-benefit analysis should not obscure the fact that the former need not entail the latter. Even if presidential control favors centralization of regulatory policymaking, that dynamic fails to explain the persistence of a particular method of centralized review: cost-benefit analysis based on individual willingness to pay, as detailed above.

2. Flexibility and policymaking. — A second explanation for the endurance of cost-benefit analysis is that it gives administrations of both parties flexibility to pursue their policy agendas. Presidents, party members, interest groups, and other stakeholders all have reasons to be more committed to substantive policy outcomes than to cost-benefit analysis. The method's very persistence, then, suggests that cost-benefit analysis might be minimally constraining on federal agencies. A closer look at the method in practice shows why this will often be so.

One way in which cost-benefit analysis is flexible rests with the method

74. *See* Eric A. Posner, *Cost-Benefit Analysis as a Solution to a Principal-Agent Problem*, 53 ADMIN. L. REV. 289, 291–92 (2001).

itself. As the philosopher Henry Richardson noted over two decades ago, "it is striking that on most major regulatory questions in fields such as the environment and health, those on opposite sides of the issues commission their own competing cost-benefit studies, which unsurprisingly yield contrasting implications."[75] Similarly, in the context of financial regulation, John Coates has argued that "the financial agencies retain too much discretion to select inputs and make assumptions . . . meaning that numbers that emerge in any effort at quantification are unlikely to demonstrate whether a proposed change is net beneficial."[76] The discussion in the previous section shows how this can be the case. In conducting a cost-benefit analysis, agencies may need to estimate the magnitudes of future benefits and costs, estimate the probabilities of different sorts of outcomes, determine what sorts of revealed- or stated-preferences data is appropriate for a given context, employ a discount rate for future benefits and costs, monetize hard-to-monetize impacts, or make other modeling choices. Each of these choices involves the exercise of judgment, and each affects the bottom-line calculation of net benefits. Given these many variables, outcome-oriented agencies can often find a way to derive cost-benefit analyses that support their preferred policies.[77]

To see the flexibility of cost-benefit analysis in concrete terms, consider the example of rules to require more advanced braking systems on trains carrying hazardous materials. The Obama Administration's Department of Transportation (DOT) promulgated a rule in 2015 requiring electronically controlled pneumatic brakes on certain trains.[78] DOT estimated that the

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75. Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, 29 J. LEGAL STUD. 971, 998 (2000).

76. Coates, *supra* note 30, at 1004; *see also id.* ("Worse, the goal of disciplining agencies may be undermined if the result is to encourage agencies to use [cost-benefit analysis] as camouflage—to hide discretionary judgments under impressive numbers.").

77. *See, e.g.*, Wesley A. Magat & Christopher H. Schroeder, *Administrative Process Reform in a Discretionary Age: The Role of Social Consequences*, 1984 DUKE L.J. 301, 315 ("Even mandating the use of cost-benefit analysis will not eliminate discretion, given that many assumptions must be made, hard-to-quantify factors must be quantified, shadow prices must be approximated for factors for which no market price is available, and assessments must be made of regulatory outcomes."); Daniel H. Cole, *Law, Politics, and Cost-Benefit Analysis*, 64 ALA. L. REV. 55, 88 (2012) ("[I]nherently subjective elements of CBAs make them liable to manipulation and abuse to make regulatory proposals appear welfare-maximizing when they are not, and vice versa.").

78. Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 80 Fed. Reg. 26,644 (May 8, 2015) (to be codified at 49 C.F.R. pts. 171–74 & 179).

benefits of the braking requirement over a twenty-year period ($730.3 million to $1.11 billion) far exceeded costs ($492 million).[79] Two years later, the Trump Administration repealed the braking requirements,[80] basing that decision on revised DOT calculations showing, over a twenty-year period, a much lower benefits figure ($131.0 million to $198.0 million) that failed to justify the rule's costs ($375.6 million to $491.7 million).[81] The merits of these competing approaches are beyond this Article's scope, but the divergent bottom-line figures illustrate a broader point about the flexibility of the method. If the promulgation and rescission of a rule just two years apart can both present themselves as passing cost-benefit analysis, then the method does less to constrain than it may at first seem.[82]

The flexibility of cost-benefit analysis should not be overstated. Attempts to regularize key inputs to cost-benefit analysis—like the discount rate[83] and the value of a statistical life[84]—make the method less manipulable than it would otherwise be. Further, sometimes a proposed rule's impacts are so overwhelmingly positive or negative that even changes to modeling assumptions would not change the outcome. Despite its best efforts, for example, the Trump Administration "could not help but produce a [cost-benefit] showing that the [Obama-era] Clean Power Plan would yield benefits that substantially exceeded costs."[85] Similarly, in attempting to revise fuel economy standards, the Trump Administration initially made analytical assumptions "that were widely viewed as implausible,"[86] and when it revised its cost-benefit analysis it concluded that its revised standards would

79. *See id.* at 26,723–24 tbl. 4 (reporting these figures, all based on a 7% discount rate); *see also* PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., U.S. DEP'T OF TRANSP., FINAL REGULATORY IMPACT ANALYSIS, HAZARDOUS MATERIALS: ENHANCED TANK CAR STANDARDS AND OPERATIONAL CONTROLS FOR HIGH-HAZARD FLAMMABLE TRAINS 239–45 (2015), https://www.regulations.gov/document/PHMSA-2012-0082-3442 (providing more detailed analysis of benefits and costs of braking-related requirements).

80. Hazardous Materials: Removal of Electronically Controlled Pneumatic Brake System Requirements for High Hazard Flammable Unit Trains, 83 Fed. Reg. 48,393 (Sept. 25, 2018) (codified at 49 C.F.R. pts. 174 & 179).

81. *See id.* at 48,395 tbl. 1 (reporting these figures, all based on a 7% discount rate).

82. For another example, see the discussions of differing estimates of the social cost of greenhouse gases, *infra* notes 270–274, 341–350 and accompanying text.

83. *See infra* Section IV.C (discussing OMB Circular A-4's approach to discount rates).

84. *See* sources cited *supra* notes 35–36.

85. Jonathan S. Masur, *Regulatory Oscillation*, 39 YALE J. ON REG. 744, 767 (2022).

86. Jonathan S. Masur & Eric A. Posner, *Chevronizing Around Cost-Benefit Analysis*, 70 DUKE L.J. 1109, 1129 (2021).

actually produce *negative* net benefits.[87] Even if cost-benefit analysis is flexible enough to be manipulable in some circumstances, some rules have net benefits of such a high magnitude (either positive or negative) that manipulation will be difficult.[88]

A second form of flexibility comes from presidential administrations circumventing cost-benefit analysis altogether, including on important and controversial issues. Even if cost-benefit analysis was not flexible, the method would limit government discretion only to the extent that agencies actually use it.[89] But agencies can and do find ways to avoid employing monetized cost-benefit analysis. In some instances, the White House might decline to require a cost-benefit analysis. In others, agencies might act strategically to shield their rules from centralized White House review, including cost-benefit analysis.[90] On the whole, the result is that the overwhelming majority of agency rulemakings—over 98% during one decade-long sample period—take place without a formal cost-benefit analysis.[91]

For a high-profile example of both political parties avoiding monetized cost-benefit analysis, consider the Affirmatively Furthering Fair Housing

87. *See id.* at 1131 (citing NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. & U.S. ENV'T PROT. AGENCY, FINAL REGULATORY IMPACT ANALYSIS, THE SAFER AFFORDABLE FUEL-EFFICIENT (SAFE) VEHICLES RULE FOR MODEL YEAR 2021–2026 PASSENGER CARS AND LIGHT TRUCKS 49 tbl. I-74 (Mar. 2020)).

88. *Cf.* Masur, *supra* note 85, at 760 ("Despite all of the Trump [A]dministration's machinations, it could not make the costs of the Clean Power Plan or a number of other Obama-era regulations exceed their benefits. To some degree, then, cost-benefit analysis is robust to even the most aggressive attempts to manipulate it.").

89. *See* Michael Abramowicz, *Information Markets, Administrative Decisionmaking, and Predictive Cost-Benefit Analysis*, 71 U. CHI. L. REV. 933, 968 (2004) ("This is, however, a limitation of cost-benefit analysis and other objective guides to policy as well. Any methodology for improving governmental decisionmaking can be successful only to the extent that it is followed.").

90. *See, e.g.*, Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1789 (2013) (noting that "agencies can choose between simple inaction, adjudication, guidance documents, or nonsignificant rules as instruments that are more likely as a class to bypass presidential review"); Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 995 (2011) (arguing that "agencies may seek to avoid OIRA review by understating the costs of rules").

91. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 2017 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATED REFORM ACT 8 (2017) (reporting that from FY 2007–16, OMB reviewed 609 rules that were characterized as major (and therefore subject to cost-benefit requirements), as compared to 2,670 rules reviewed by OMB overall and 36,255 total rules published by agencies in the Federal Register).

rule.[92] That rule, initially promulgated by the Obama Administration's Department of Housing and Urban Development (HUD) in 2015, monetized compliance costs but did not attempt to monetize benefits. HUD justified that choice in the following terms: "[M]ost of the [rule's] positive impacts entail changes in equity, human dignity, and fairness . . . [s]ince the rule primarily results in such unquantifiable impacts, it is appropriate to consider many of its effects in qualitative terms."[93] HUD was undoubtedly correct that decreasing residential segregation has many hard-to-monetize benefits. Any effort to monetize dignity and fairness considerations would necessarily be incomplete and contestable (though other benefits of integration may be more easily monetizable[94]). But the ability to issue a rule based on dignity and fairness benefits means that the cost-benefit standard is more flexible than it may appear at first glance. In a notable symmetry, when the Trump Administration rescinded the rule in 2020,[95] it likewise eschewed monetized cost-benefit analysis, with HUD claiming to be exempt from cost-benefit analysis entirely.[96] When monetized net benefits are either not calculated at all or are a sideshow in both the issuance and the rescission of a high-profile rule, there is reason to doubt how much the method actually restricts administrations from pursuing their preferred policies.[97]

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92. *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576 & 903).

93. *See id.* at 42,349; *see also id.* ("If the rule prompts communities to promote a more racially and socio-economically equitable allocation of neighborhood services and amenities, residents would enjoy the mere sense of fairness from the new distribution. Elevating communities out of segregation revitalizes the dignity of residents who felt suppressed under previous housing and zoning regimes. Quantifying such factors as fairness and dignity is likely impossible, yet these values are the crux of the final rule.").

94. *See, e.g.*, Mark Zandi et al., *The Macroeconomic Benefits of Racial Integration*, MOODY'S ANALYTICS (Oct. 6, 2021), https://www.moodysanalytics.com/-/media/article/2021/macro-consequences-of-racial-integration.pdf (modeling the effects of racial integration on GDP growth and other variables).

95. *See* Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

96. *See id.* at 47,904 (waiving review of the rule under Executive Order 12,866); *see also* Exec. Order No. 12,866, § 6(a)(3)(A), 58 Fed. Reg. 51,735, 51,740–41 (Sept. 30, 1993) (providing that "[t]he Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with [various requirements, including cost-benefit requirements]").

97. This is not necessarily a critique—there are good reasons to leave some regulatory impacts unmonetized and to make decisions based on values that cannot readily be captured by a calculation of monetized net benefits—but it does show that the method is less discretion-constraining than it might seem.

The flexibility of cost-benefit analysis has been highlighted by scholars on both the left[98] and right[99] as a critique of the method. From the standpoint of a system of administrative law and governance, the flexibility of cost-benefit analysis undermines one of the key goals that its proponents have asserted the method can serve: as a constraint on Executive Branch discretion.[100] But from the standpoint of a presidential administration seeking to enact its policy agenda, the flexibility of cost-benefit analysis is an advantage.[101] The method's flexibility thereby helps explain its persistence.

3. Institutional path dependence. — Cost-benefit analysis also benefits from path dependence. The simple idea behind path dependence is that institutions tend to continue operating in the ways they have in the past.[102] In the federal government context, one reason for path dependence is that it is costly for senior Executive Branch officials to change policies or

98. *See, e.g.*, Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1409–10 (2005) ("As many commentators have effectively demonstrated, CBA is indeterminate, both because of intractable theoretical difficulties (like wealth effects and discount rates) and because of practical problems (like inadequate data and scientific uncertainty). This indeterminacy renders CBA not only ineffectual, but also endlessly manipulable. That is to say, for any claim that the benefits of a particular project outweigh its costs, another economist can make a credible argument that the costs outweigh the benefits.").

99. *See, e.g.*, Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 182 (2016) ("A regulatory agency can argue that almost anything it wishes to do will have benefits exceeding its costs—based on properly crafted assumptions about consumer irrationality, producer oligopoly, dysfunctional social norms, or the social benefits of redistribution.").

100. *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PENN. L. REV. 1553, 1562 (2002) ("The holy grail of administrative law . . . is to prevent an agency either from making arbitrary decisions or, more invidiously, from benefiting politically-favored groups through its decisions. Cost-benefit analysis has been offered as a means of constraining agency discretion in this way.").

101. *Cf.* Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENV'T. L. REV. 433, 463–64 (2008) ("So long as CBA does not limit administrative discretion significantly, and the methodology provides political cover for administrators, agencies will be inclined to continue using it even though they are aware of its deficiencies.").

102. For accounts from different fields, see generally PAUL STARR, ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTIONS OF DEMOCRATIC SOCIETIES 1–31 (2019) (sociology); Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332 (1985) (economics); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000) (political science); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 101 (2003) (law).

procedures.[103] Any given reform can consume time and political capital, which in turn can have high opportunity costs given the many policy objectives on any administration's agenda. Another reason is that particular actors—both within and outside the Executive Branch—may seek to entrench the status quo. Political appointees necessarily rely on civil servants to implement their agendas.[104] The extensive literature on the "internal separation of powers" emphasizes the ways in which civil servants within the Executive Branch can push back on agendas pursued by political appointees.[105]

This frame sheds light on the staying power of cost-benefit analysis. Within the White House, the Office of Information and Regulatory Affairs (OIRA) polices agencies' cost-benefit analyses. OIRA ensures that agencies have undertaken that analysis and sends rules back to agencies if the analysis is wanting.[106] Many (though not all) members of the OIRA career staff are regulatory economists who are trained in cost-benefit analysis and believe strongly in the virtues of the method. While it is difficult to peer within the black box of internal White House dynamics, one study found that OIRA career staff exercise judgment independent from that of political leadership on questions of policy.[107] Any attempt by an administration to deviate from cost-benefit orthodoxy would likely face pushback from OIRA career staff.[108] It

103. *Cf.* Pierson, *supra* note 102, at 252 ("Path dependence has to mean, if it is to mean anything, that once a country or region has started down a track, the costs of reversal are very high.").

104. *See, e.g.*, Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 542 (2015) ("On their own, agency leaders simply are not numerous enough or, in many cases, experienced or sophisticated enough to conduct research or promulgate rules.").

105. *See, e.g.*, Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 426–34 (2009).

106. *See, e.g.*, Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1058–59 (2011) (describing OIRA as "an external enforcer with legal authority (via executive order) to force agencies to reconsider policy choices that do not plausibly survive cost-benefit scrutiny"). Enforcing cost-benefit requirements is a key function of OIRA, though not the only one. *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1858 (2013) (noting that "[c]osts and benefits can matter a great deal" during OIRA review but emphasizing that OIRA is frequently "operating as a convener . . . in the position of transmitting comments [from other Executive Branch actors] with which it does not necessarily agree or on which it is neutral").

107. *See* Lisa S. Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 74–75 (2006); *see also id.* at 74 nn.144, 148 (citing survey results showing that OIRA career staff often exercised authority independent from political appointees).

108. For general accounts of this sort of resistance, not focused on OIRA, see Jennifer

stands to reason that OIRA regulatory economists would be especially resistant to any administration that attacked the method of analysis on which they have built their careers and which they view as vital to sound policymaking.

Outside of government, a cadre of academics and others likewise advocate in support of cost-benefit analysis. Most notable is the Society for Benefit-Cost Analysis, which is made up of academics who "work[] to improve the theory and practice of benefit-cost analysis and support evidence-based policy decisions," including through the publication of a journal devoted to the method.[109] There is a close relationship between OIRA and the academic cost-benefit analysis community: scholars of cost-benefit analysis offer public commentary on OIRA's work and serve as outside reviewers for Circular A-4,[110] and OIRA administrators are often prominent scholars of and advocates for cost-benefit analysis.[111] This community of cost-benefit proponents serves as a check on any presidential administration that would seek to marginalize cost-benefit analysis or depart from the best practices developed by the method's proponents. Indeed, the Biden Administration's proposed updates to Circular A-4 prompted some advocates for cost-benefit analysis as it has traditionally been practiced to criticize any such reform effort and suggest that it is improperly politically motivated.[112] If any administration were to depart too far from the orthodox academic views of those who write about cost-benefit analysis, members of the field would almost certainly push back.

The normative valence of these informal checks on departures from cost-

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Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019); and Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U.L. REV. 601 (2013).

109. *See About*, SOC'Y FOR BENEFIT-COST ANALYSIS, https://www.benefitcostanalysis.org/about (last visited Nov. 11, 2023).

110. *See* sources cited *supra* note 55.

111. Notable examples include John Graham (Bush Administration), Cass Sunstein (Obama Administration), and Richard Revesz (Biden Administration).

112. *See, e.g.*, Susan Dudley & W. Kip Viscusi, *Biden's OMB Politicizes Cost-Benefit Analysis*, WALL ST. J. (Aug. 28, 2023, 5:44 PM), https://www.wsj.com/articles/bidens-omb-politicizes-cost-benefit-analysis-regulation-social-justice2534e819 (contending that revisions "embed values other than economic efficiency in the benefit-cost analysis" and that those revisions may be "perceived as biasing assessments to support the current administration's policy preferences"); Letter from Former Society for Benefit-Cost Analysis Presidents on Circular A-4, to Richard Revesz, Adm'r, Off. of Info. & Regul. Affs. 2 (Aug. 28, 2023), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2023-08/sbca_former_president_letter_administrator_revesz_a4_8-28-23.pdf (arguing that "[t]o the extent that the Circular is perceived as not being neutral, or as embedding practices that favor certain policy preferences, it risks the stability of the longstanding bipartisan support for regulatory impact analysis").

benefit analysis depends on one's views of the method. For cost-benefit proponents, such checks are a desirable source of stability; for cost-benefit critics, they wrongfully prevent salutary change. In either case, though, the epistemic community of cost-benefit practitioners inside and outside of government constitutes a force that helps entrench cost-benefit analysis.[113]

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Each of these accounts reflects an important aspect of the institutional incentives holding up cost-benefit analysis. Together, they do a good deal to explain the emergence, persistence, and character of cost-benefit analysis. But they are also incomplete in critical respects: none are especially well-suited to explaining partisan differences, change over time, or the attitudes of interest groups or public officials outside the Executive Branch. To understand these dynamics, it is necessary to examine how cost-benefit analysis intersects with the goals of the two parties and the constraints that they face. I turn to those partisan stories next, beginning with Republicans and then turning to Democrats.

II. REPUBLICAN POLITICS AND COST-BENEFIT ANALYSIS

A. A Tool of Deregulation

The standard reason given for conservative support for cost-benefit analysis is the method's historical association with anti-regulatory politics. This story typically begins in the 1980s, with President Ronald Reagan using the White House to promote a staunchly deregulatory and anti-regulatory agenda. While his predecessors had pursued regulatory reform, "Reagan came into office explicitly committed to reducing" regulation.[114] During his first week in office, he established a Task Force on Regulatory Relief, which recommended an executive order requiring White House approval of new regulations and mandating that agencies undertake cost-benefit analysis

113. A final account of the appeal of cost-benefit analysis that is not party- or agenda-specific looks to the ways in which the method could encourage regulatory stability. For an administration of either party, making a rule accompanied by a cost-benefit analysis imposes a hurdle to a future administration undoing the rule—though a modest one, given the foregoing discussion of the flexibility of cost-benefit analysis. On cost-benefit analysis and regulatory stability, see Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593 (2019).

114. DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 247 (2003); *see also* MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 32 (2001) (describing the "Reagan [A]dministration's intense commitment to reducing the regulatory burden").

before issuing regulations.[115]

The Reagan Administration's embrace of cost-benefit analysis can only be understood in this broader context. Executive Order 12,291, issued in 1981, provided that "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."[116] It further required that regulatory objectives and priorities be set in a way that maximized the aggregate net benefits to society.[117] Though this language reads as technocratic in isolation from its context, contemporaneous observers on both sides of the debate over regulation recognized the deregulatory effects that mandating cost-benefit analysis would have. The Reagan Administration itself justified the need for cost-benefit analysis as a means of disciplining "government regulations [that] are imposing an enormous economic burden on our national economy and our people."[118]

The deregulatory goals of early requirements for regulatory cost-benefit analysis were clear from the fact that the Reagan Administration required cost-benefit analysis for rules that would impose regulatory mandates but not for those that would loosen or repeal such mandates.[119] The Administration "applied its [cost-benefit] criteria selectively, requiring no analysis for proposals that eliminate regulation, and no cost analysis for those that relax existing standards."[120] The then-recently established OIRA was tasked with ensuring agency compliance with cost-benefit requirements.[121] Even if cost-benefit analysis is formally neutral as between regulation and deregulation,

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115. *See* VOGEL, *supra* note 114, at 247.

116. Exec. Order 12,291, § 2(b), 46 Fed. Reg. 13,193, 13,193 (Feb. 17, 1981).

117. *Id.* § 2(c)-(e), 46 Fed. Reg. at 13,193–94.

118. Press Release, Off. of the Press Sec'y to Vice President George Bush, Statement by Vice President George Bush Regarding the Membership and the Charter of the Presidential Task Force on Regul. Relief, at 3 (Jan. 30, 1981) (on file with the Reagan Library); *see also* Press Release, Off. of the Press Sec'y, Fact Sheet: President Reagan's Initiatives to Reduce Regul. Burdens (Feb. 18, 1981) (on file with the Reagan Library) ("Previous administrations have instituted programs to manage the regulatory process. But, despite these measures, regulations have continued to proliferate, often based on inadequate analysis of the costs and benefits that would result.").

119. *See* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 163 (1991) (noting "OMB's practice of granting waivers from the regulatory analysis requirements to rules designed to provide regulatory relief").

120. Oliver A. Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. U.L. REV. 535, 542 (1987) (footnotes omitted).

121. *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995).

in practice it was a tool of deregulation during the 1980s.

Interest groups and members of Congress understood the deregulatory valence of cost-benefit analysis during this time period. The business community viewed the advent of cost-benefit analysis as a way to "stem the tide of unnecessary and excessive regulations that they say have been a severe and growing burden to the nation's economy," while environmentalists and advocates for health and safety regulation viewed the cost-benefit requirement "as little more than a justification for deregulating business and industry."[122] In the ensuing decades, business groups would continue to be among the most important proponents of cost-benefit analysis, with organizations like the Chamber of Commerce and Business Roundtable vocally supporting the method.[123] In summing up how interest groups viewed cost-benefit analysis in the 1980s, Thomas McGarity underscored that "regulatees express a keen preference for cost-benefit analysis and regulatory beneficiaries uniformly oppose it."[124]

It is not hard to see why business, then and now, would see promise in efforts to require cost-benefit analysis of federal regulations. Shifting focus toward cost-benefit analysis is a way of shifting focus away from agencies' statutory mandates to protect workers, consumers, the environment, or the like. The process of developing a cost-benefit analysis also requires data on the costs of regulation, which are frequently provided by regulated industries

122. Philip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES (Nov. 7, 1981), https://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html; *see also* Pildes & Sunstein, *supra* note 121, at 3 (describing centralized review under Executive Order 12,291 as being "conducted in accordance with presidential policies favoring deregulation and close attention to cost").

123. *See, e.g.*, Press Release, U.S. Chamber of Comm., U.S. Chamber Opposes Changes to Regulatory Cost-Benefit Analysis That Would Unleash More Regulatory Overreach (Apr. 7, 2023), https://www.uschamber.com/regulations/u-s-chamber-opposes-changes-to-regulatory-cost-benefit-analysis-that-would-unleash-more-regulatory-overreach (asserting that "America has benefitted for over four decades from an objective cost-benefit approach to assessing regulations" and criticizing Biden Administration reform efforts); *Achieving Smarter Regulation*, BUS. ROUNDTABLE 9, 12, 14 (Sept. 2011), https://s3.amazonaws.com/brt.org/archive/reports/2011_09_BRT_Achieving_Smarter_Regulation.pdf (endorsing cost-benefit analysis and criticizing agencies for not always employing it). *See also, e.g.*, Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B.C. ENV'T AFF. L. REV. 733, 747 (1996) ("Risk assessment and cost-benefit analysis have been tactical favorites of the anti-regulation lobbyists, spawning several plenary cost-benefit requirement bills as well.").

124. MCGARITY, *supra* note 119, at 149–50.

that can present inflated costs in an effort to water down regulations or stymie them altogether.[125] Further, cost-benefit requirements give regulated entities a hook for future litigation: once a rule is issued, a regulated entity can criticize some aspect of the underlying cost-benefit analysis and ask a court to vacate the rule on that basis.[126] And, as I discuss in detail below, cost-benefit requirements slow down the pace of federal regulatory activity.[127] These considerations have all given the business community good reason to support cost-benefit requirements.

On Capitol Hill, some Republicans sought to complement Reagan Administration Executive Branch reforms by proposing legislation that would have mandated cost-benefit analysis for new rules, required that cost-benefit analysis be retrospectively undertaken for existing rules, and allowed private parties to challenge agency cost-benefit analysis in court separate from review under the APA.[128] Paul Verkuil described these efforts as having "seem[ed] designed as much to stymie as to refocus the rulemaking process."[129] Indeed, the very term "cost-benefit" analysis emphasizes regulatory costs, by naming costs before benefits. (Tellingly, while political discourse and legal scholarship typically use the term "cost-benefit analysis," scholars in other fields are more likely to use the term "benefit-cost analysis."[130])

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125. *See* Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2044–46 (2002) (discussing agencies' reliance on regulated entities for data on costs); MCGARITY, *supra* note 119, at 137 ("Retrospective economic impact studies indicate a general trend toward overestimating compliance costs, sometimes to a fairly large degree. For example, a retrospective look at the costs of complying with OSHA's vinyl chloride standard found the actual costs were only about 7% of predicted costs.").

126. *See infra* Section III.C (discussing litigation of this sort). One account, focused on financial regulation, described cost-benefit analysis as "fruitful territory for opponents of the Dodd-Frank law" and emphasized that "[i]ndustry groups often undermine or raise questions about an agency's cost-benefit analysis in lawsuits in an effort to overturn the regulations—and they have had some success, especially in a handful of cases against the S.E.C. in the federal court of appeals in Washington over the last decade." Victoria Finkle, *Proposed Legislation Would Add Scrutiny of Wall Street Regulators*, N.Y. TIMES (Jan. 19, 2016), https://www.nytimes.com/2016/01/20/business/dealbook/proposed-legislation-would-add-new-scrutiny-of-wall-street-regulators.html.

127. *See infra* Section II.C.

128. *See* Laura B. Weiss, *Administration Backs Regulatory Reform Bill*, GOV'T OPERATIONS, April 11, 1981, at 627 (describing proposals by Sen. Paul Laxalt (R-NV)).

129. Paul R. Verkuil, Comment, *Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 454 (1995).

130. *See supra* note 109 and accompanying text (discussing the Society for Benefit-Cost Analysis).

Subsequent Republican administrations likewise viewed cost-benefit analysis as consistent with their deregulatory agendas. President George H.W. Bush, who had chaired President Reagan's Task Force on Regulatory Relief, kept Executive Order 12,291 in place. President George W. Bush's Executive Order on regulatory policy further expanded the scope of cost-benefit analysis. It required that cost-benefit analysis be undertaken not only for rulemakings but also for some guidance documents[131] and mandated that agencies submit with their annual regulatory plan a discussion of the costs and benefits of all rules planned for the coming year (in addition to retaining cost-benefit analysis for individual rules).[132] The business community hailed the second Bush Administration's executive order, lauding it for ensuring that "regulations will be less onerous and more reasonable" and "[f]ederal officials will have to pay more attention to the costs imposed on business, state and local governments, and society."[133] These examples show that, in the late-twentieth and early twenty-first centuries, political actors widely understood there to be a strong relationship between deregulation and cost-benefit analysis.

B. Changing Political Valence

The power of the association between cost-benefit analysis and anti-regulatory politics has eroded over time. Even in the early days after the method came to predominate, it sometimes prompted agencies to adopt stricter rather than more lax regulations.[134] A wedge between cost-benefit analysis and deregulation became especially evident, however, during the Trump Administration. That Administration pursued numerous deregulatory efforts that were in tension with cost-benefit analysis, often by seeking to repeal existing rules that were backed by plausible cost-benefit analyses.[135] The cost-

131. Exec. Order 13,422, § 2, 72 Fed. Reg. 2,763, 2,763 (Jan. 18, 2007).

132. *Id.* § 4(c), 72 Fed. Reg. at 2,764.

133. Robert Pear, *Bush Directive Increases Sway on Regulation*, N.Y. TIMES (Jan. 30, 2007), https://www.nytimes.com/2007/01/30/washington/30rules.html (quoting William L. Kovacs, Vice President, U.S. Chamber of Commerce).

134. In the mid-1980s, for example, a cost-benefit analysis by the EPA showed massive benefits of deleading gasoline, prompting Reagan Administration officials to conclude that "the study's results provided a firm basis for reducing the lead in gasoline." *See* John M. Berry, *Cost-Benefit Foes Surprised*, WASH. POST (April 1, 1984), https://www.washingtonpost.com/archive/business/1984/04/01/cost-benefit-foes-surprised/ca65d1a9-aa94-461f-a882-10853c1f375a.

135. *See* Masur & Posner, *supra* note 86, at 1112–13; *see also id.* at 1123 (citing sources showing that "the Trump EPA reported that its repeal of the Obama [Clean Power Plan

benefit analyses that it produced were often incomplete, inaccurate, or biased. Michael Livermore and Richard Revesz have documented in detail how the Trump Administration "treated cost-benefit analysis as a charade by "ignor[ing] the benefits of regulations," "question[ing] those benefits at every opportunity," and "invent[ing] sham benefits out of thin air to support a favored deregulatory action."[136]

Further, a number of Trump-era reforms to the regulatory process were in tension with the theory of cost-benefit analysis. For example, a White House mandate that agencies identify two existing regulations to be repealed for every new one that they proposed[137] disregarded whether the regulations at issue (either the one being promulgated or the two being repealed) passed cost-benefit analysis. Similarly, the Trump Administration's imposition of a "regulatory budget" that capped the total costs of new regulations, regardless of those regulations' benefits,[138] ran contrary to the view propounded by advocates of cost-benefit analysis that the relevant metric for evaluating a regulation is *net* benefits, not costs alone.[139]

These examples complicate the relationship between Republican politics and cost-benefit analysis. Republican presidents have never formally departed from the Reagan-era support for the method, and congressional Republicans have repeatedly tried to expand the reach of cost-benefit analysis. But the Trump Administration's retreat from cost-benefit orthodoxy shows a weak commitment to the method in practice, at least when Republicans hold the White House. I turn now to the reasons for this shift.

1. Changes in analytic methods. — A first reason for the Republican retreat from cost-benefit analysis is that, as economists have become more sophisticated in incorporating a broader range of values into cost-benefit analysis, the method has lost some of its deregulatory potential. A longstanding critique of cost-benefit analysis on the left is that the method can undercount regulatory benefits. For example, a proposed rule that

(CPP)] would produce costs well in excess of benefits" and noting that "Trump EPA also offered a variety of different options involving partial repeals of the CPP—all of those options failed a cost-benefit test as well").

136. MICHAEL A. LIVERMORE & RICHARD L. REVESZ, REVIVING RATIONALITY: SAVING COST-BENEFIT ANALYSIS FOR THE SAKE OF THE ENVIRONMENT AND OUR HEALTH 104 (2020); *see also id.* at 107–77 (providing examples from across subject-matter areas); Carolina Arlota, *How President Trump's War on Science Undermines Cost-Benefit Analysis of Climate Policies*, 50 ENV'T. L. REP. 10999, 11008–14 (2020) (providing examples from the climate context).

137. *See* Exec. Order No. 13,771, § 2(a), 82 Fed. Reg. 9,339, 9,339 (Jan. 30, 2017).

138. *See id.* §§ 2 (b), 2(d), 82 Fed. Reg. at 9,339.

139. *See* Daniel A. Farber, *Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 383, 404–06 (2019) (discussing the regulatory budgeting aspects of Executive Order 13,771).

would place a regulatory mandate on private business in order to improve physical access for persons with disabilities has costs that are easy to monetize (compliance costs) but at least some benefits that are hard to monetize (dignity- and equity-related benefits). The same goes in the environmental context: it is much easier to calculate the economic cost of limiting logging in an old-growth forest than it is to monetize the myriad benefits, many noneconomic, of regulation that would safeguard such a forest. This sort of asymmetry has at times given cost-benefit analysis a deregulatory bent: if cost-benefit analysis is likely to understate the benefits of regulatory mandates, that fact makes the method useful to opponents of regulation.

This asymmetry has shrunk over time, rendering cost-benefit analysis less biased against regulation than it once was. In recent decades, the science of cost-benefit analysis has become ever more sophisticated, allowing some traditionally hard-to-monetize regulatory impacts to be included in net-benefit calculations. The development of the field of "ecosystem services" and the increasing sophistication of environmental economics provide a prominent example.[140] So, too, do more sophisticated means of accounting for uncertainty in cost-benefit analysis[141] and proposals to incorporate dignity into cost-benefit analysis.[142] Indeed, one theme of the Biden Administration's revisions to Circular A-4, discussed at further length below, is that those revisions expand the scope of the considerations that should be relevant to regulatory analysis.

Particular methods associated with attempts to widen the ambit of cost-benefit analysis remain subject to significant academic criticism, typically from the left.[143] However, the very existence of methods that monetize regulations' effects on human dignity or the environment means that cost-benefit analysis can account for a broader range of regulatory benefits than in the past, which means that the method has less of an anti-regulatory bias than it once did. This, in turn, reduces the bias of cost-benefit analysis

140. *See, e.g.*, *Guidance for Assessing Changes in Environmental and Ecosystem Services in Benefit-Cost Analysis*, OFF. OF INFO. & REGUL. AFF. (Aug. 2023), https://www.whitehouse.gov/wp-content/uploads/2023/08/DraftESGuidance.pdf (OMB draft guidance for use of environmental and ecosystem services in cost-benefit analysis); Robert Costanza et al., *Twenty Years of Ecosystem Services: How Far Have We Come and How Far Do We Still Need to Go?*, 20 ECOSYSTEM SERVS. 1 (2017) (reviewing the development and history of ecosystem services).

141. *See, e.g.*, David Weissbach, *Introduction: Legal Decision Making Under Deep Uncertainty*, 44 J. LEGAL STUD. 319 (2015) (summarizing conference papers by scholars in a variety of fields).

142. *See, e.g.*, Rachel Bayefsky, Note, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 YALE L.J. 1732, 1747–53 (2014) (discussing various approaches).

143. *See* sources cited *supra* note 48; *see also, e.g.*, Marion Fourcade, *Cents and Sensibility: Economic Valuation and the Nature of "Nature"*, 116 AM. J. SOCIO. 1721 (2011) (critiquing ecosystem services).

toward Republican agendas, as compared to in an earlier era.

2. Changing issues on the public agenda. — Relatedly, the most politically salient regulatory policy issues have changed in ways that give cost-benefit analysis less of an anti-regulatory valence than it once had. Earlier efforts at regulatory reform, including calls for regulatory cost-benefit analysis, arose in part as a backlash to a set of regulatory mandates much more wide-ranging than any that exist today. In the 1970s and 1980s, among the most prominent regulatory policy debates were over efforts to deregulate the airline, trucking, and railroad industries. Those industries were heavily regulated, including through price controls, in ways that arguably benefited small numbers of firms while having negative impacts on the public at large.[144] Deregulatory efforts were "the product not of a small band of Reaganauts in the 1980s, but of a diverse coalition of regulators, legislators, judges, and Presidents of both parties and all ideological stripes in the 1970s."[145] This included the Carter Administration and even some consumer advocates, who criticized regulatory agencies as "arrogant and unresponsive."[146] In this environment, proponents of deregulation plausibly argued that their deregulatory efforts would have positive net benefits for society. Cost-benefit analysis, then, could facilitate deregulation.

A generation later, the most prominent regulatory policy issues are different, which in turn changes the political valence of cost-benefit analysis. When progressive regulations have high net benefits, it stands to reason that opponents of those regulations will be less enamored with cost-benefit analysis. Recent Democratic administrations have promulgated rules with high net benefits that simultaneously advance progressive policy priorities. In the climate domain, regulations seeking to reduce greenhouse gas emissions often have extremely high net benefits (and deregulatory efforts in the area often have large negative net benefits).[147] High-profile regulations

144. *See, e.g.*, ALAN DEVLIN, FUNDAMENTAL PRINCIPLES OF LAW AND ECONOMICS 383 (2014) (describing regulation of airline pricing and routing prior to the deregulation of the airline industry).

145. ROBERT M. COLLINS, TRANSFORMING AMERICA POLITICS AND CULTURE IN THE REAGAN YEARS 82 (2007).

146. VOGEL, *supra* note 114, at 170; *see also* PAUL SABIN, PUBLIC CITIZENS THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM (2021) (offering a wide-ranging account of criticism of the regulatory state from the left during this period).

147. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 2013 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATED REFORM ACT 65 tbl. 2-2 (2013), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/2013_cb/draft_20

seeking to protect consumers from exploitation also have high net benefits.[148] So do those that seek to safeguard workers' health.[149] And, while not a conventional regulatory policy issue, the same holds for some progressive immigration policies.[150] When some of the most politically salient (and polarizing) regulatory efforts that Democratic presidents undertake have high net benefits, it follows logically that those who oppose those regulations may retreat from cost-benefit analysis. As Jonathan Masur and Eric Posner put it, "in a major irony from the standpoint of the Reagan era, cost-benefit analysis now seems to be a hindrance to deregulation," describing this as a "startling shift . . . that runs directly counter to the caricatured notion of cost-benefit analysis as necessarily anti-regulatory."[151]

3. The Republican Party coalition. — Cost-benefit analysis is often associated with issues of business (de)regulation, but other parts of the Republican Party coalition matter as well. Given the importance of libertarian and socially conservative ideology to key parts of the Republican Party coalition, the relationship between those ideologies and cost-benefit analysis matters. Though cost-benefit analysis is a good fit with the longstanding conservative critique of regulatory mandates creating inefficiencies by tying the hands of business, the analysis differs for those conservatives focused on other values. For libertarians or social conservatives, cost-benefit analysis will typically be beside the point, and at times may set back their agendas.

Libertarians, for example, focus on how government coercion wrongfully

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13_cost_benefit_report.pdf (listing the five rules with the highest net benefits during the first half of the Obama Administration, all of which were pollution- or emissions-related rules, and all of which had net benefits ranging from $9.9 billion to $44.3 billion in 2001 dollars); *see also infra* notes 165–169 and accompanying text (discussing the Clean Power Plan).

148. *See, e.g.*, DEP'T OF LAB., REGULATORY IMPACT ANALYSIS FOR FINAL RULE AND EXEMPTIONS, REGULATING ADVICE MARKETS: DEFINITION OF THE TERM "FIDUCIARY" CONFLICTS OF INTEREST-RETIREMENT INVESTMENT ADVICE 10 (Apr. 2016), https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf (estimating that the Department of Labor's 2016 "fiduciary rule" would produce benefits of $33–$36 billion over ten years and costs of $16.1 billion over the same period).

149. Occupational Exposure to Respirable Crystalline Silica, 81 Fed. Reg. 16,286, 16,612 (Mar. 25, 2016) (to be codified at 29 C.F.R. pts. 1910, 1915, 1926) (reporting, for OSHA's 2016 silica rule, a "best estimate of the net annualized benefits of the final rule . . . [of] between $3.8 billion and $11.6 billion, with a midpoint value of $7.7 billion").

150. *See infra* notes 171–175 and accompanying text (discussing cost-benefit analysis of deferred action immigration programs).

151. *Cf.* Masur & Posner, *supra* note 86, at 1112–13.

inhibits individual liberty or property interests.[152] Nearly any sort of regulatory mandate could be reframed by those with libertarian inclinations as wrongful infringement on those sorts of interests.[153] For those who view at least some regulation as a per se objectionable infringement on individual liberty or property interests, opposition to regulation is unrelated to cost-benefit analysis. The fact that a regulation has positive net benefits is simply immaterial.

The tension between cost-benefit analysis and a certain brand of libertarianism is exemplified by the backlash to the Biden Administration's efforts to impose a vaccine-or-test mandate on private businesses during the COVID-19 pandemic.[154] The rule described in detail the mandate's benefits and explained why compliance would be feasible for covered employers in spite of its costs.[155] For many opponents of the mandate, this assessment of benefits and costs was beside the point. Instead, many on the right came to view vaccination mandates and other pandemic prevention–related mandates as wrongful infringements on personal liberty.[156] Such violations of individual liberty, the reasoning goes, cannot be justified merely because they may increase aggregate social welfare.

Cost-benefit considerations are similarly marginal to social conservatives. Social conservatives are motivated by moral values, such as values about

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152. *See, e.g.*, Randy E. Barnett, *The Moral Foundations of Modern Libertarianism*, *in* VARIETIES OF CONSERVATIVISM IN AMERICA 51, 55–59 (Peter Berkowitz ed. 2004) (contrasting libertarians' focus on rights with consequentialist considerations of the sort that underly cost-benefit analysis).

153. While there is considerable variation in how different sorts of philosophical libertarians view government action, my focus here is on libertarianism as a political ideology rather than as a philosophical position.

154. *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, 1928).

155. *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. at 61,459 (employing a feasibility analysis rather than a cost-benefit analysis because "the Supreme Court has conclusively ruled that economic feasibility [under the Occupational Safety and Health Act] does not involve a cost-benefit analysis" (citing Pub. Citizen Health Rsch. Grp. v. U.S. Dept. of Lab., 557 F.3d 165, 177 (3d Cir. 2009))).

156. *See* Alana Wise, *The Political Fight Over Vaccine Mandates Deepens Despite Their Effectiveness*, NAT'L PUB. RADIO (Oct. 17, 2021, 7:00 AM), https://www.npr.org/2021/10/17/1046598351/the-political-fight-over-vaccine-mandates-deepens-despite-their-effectiveness ("Republicans have grown increasingly hostile to the notion of mandatory vaccines . . . and have parlayed the fight against COVID-19 into a political battle, with vaccine mandates as the latest frontier in the great American defense of freedom and liberty.").

when life begins and issues of gender and sexuality, among many others.[157] These values can eclipse cost-benefit considerations. Imagine if a Democratic administration issued a regulation meant to expand abortion access or the availability of gender-affirming medical care. Even if that regulation were backed by a cost-benefit analysis showing significant and positive net benefits, social conservatives would no doubt continue to oppose it on the grounds that it runs contrary to their values.

These examples suggest that cost-benefit analysis is either unimportant or counterproductive to the agendas of key parts of the Republican Party's coalition. Libertarian conservatives and social conservatives are motivated by agendas that have little to do with the net-benefits of regulation, and in some instances, regulations with positive net benefits could be anathema to libertarians or social conservatives. To the extent that Republican presidential administrations are responsive to the interests of those groups, those administrations have reason to hedge in their support for cost-benefit analysis.

4. Alternative paths to deregulation, with a focus on judicial review. — Finally, the Republican Party has many ways of curbing the reach of federal regulation that are easier to implement than deregulatory rulemakings subject to cost-benefit analysis. Most straightforwardly, agencies can simply decline to issue new regulations, and decisions not to act are exempt from cost-benefit analysis requirements.[158] Administrations can also create new barriers to regulatory action, such as requiring White House review of agency guidance documents,[159] requiring that an agency identify two existing regulations to be repealed for every new one that it proposes,[160] or imposing "regulatory budgeting" requirements.[161] All of these techniques can inhibit the issuance of new rules.

Agencies can also limit the reach of rules on the books without formally repealing them. While repealing or modifying a rule often requires cost-benefit analysis, many other ways of blunting regulatory impact do not. Decisions to lightly enforce existing regulations are not subject to cost-benefit

157. *See, e.g.*, Mark C. Henrie, *Understanding Traditionalist Conservatism*, *in* VARIETIES OF CONSERVATIVISM IN AMERICA 3, 19–22 (Peter Berkowitz, ed. 2004) (discussing traditionalist conservatives' views on the family).

158. Those decisions are also often exempt from judicial review, except in rare circumstances. *See* Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007) ("Refusals to promulgate rules are thus susceptible to judicial review, though such review is 'extremely limited' and 'highly deferential.'" (internal citations omitted)).

159. *See* Exec. Order No. 13,422, §§ 1(b)-(e), 2(a)-(b), 7, 72 Fed. Reg. 2,763, 2,763, 2764–65 (Jan. 18, 2007).

160. *See* Exec. Order No. 13,771, § 2(a), 82 Fed. Reg. 9,339, 9,339 (Jan. 30, 2017).

161. *See id.* § 3, 82 Fed. Reg. at 9,339–40.

analysis,[162] and recent Republican administrations have scaled back regulatory enforcement across many domains.[163] Beyond simple nonenforcement, Jody Freeman and Sharon Jacobs have documented a rise in "structural deregulation" during Republican administrations, characterized by "target[ing] an agency's core capacities" to accomplish its statutory tasks by "erod[ing] an agency's staffing, leadership, resource base, expertise, and reputation."[164] None of these tactics are subject to cost-benefit analysis. An administration seeking to make significant progress in curbing agency capacity can do so without resorting to measures—namely, modifying or repealing existing rules—that must pass cost-benefit muster.

Narrow interpretations of agency statutory authority can also do the anti-regulatory work that perhaps once would have been done by cost-benefit analysis. A conservative judiciary that narrowly reads grants of statutory authority to agencies can prevent agencies from undertaking new regulatory actions, even when those actions would pass cost-benefit analysis.

The fate of the Obama Administration's Clean Power Plan (CPP) powerfully illustrates the point. The CPP was an Environmental Protection Agency (EPA) regulation that sought to limit carbon emissions from the nation's power plants, in part by shifting power sources away from fossil fuels and toward renewable sources of energy.[165] The EPA's cost-benefit analysis of the CPP found that the rule would have many billions of dollars of net benefits (more than $40 billion under some modeling assumptions).[166] These

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162. Nor are they typically subject to judicial review. *See* Heckler v. Chaney, 470 U.S. 821, 838 (1985) ("The general exception to reviewability provided by [5 U.S.C.] § 701(a)(2) for action 'committed to agency discretion' remains a narrow one . . . but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise." (internal citation omitted)).

163. *See, e.g.*, Alex Leary, *Trump Administration Pushes to Deregulate with Less Enforcement*, WALL ST. J. (June 23, 2019, 7:12 PM), https://wsj.com/articles/trump-administration-pushes-to-deregulatewith-less-enforcement-11561291201 (describing major decreases in EPA, OSHA, and CFPB inspections and enforcement during the Trump Administration).

164. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 587 (2021).

165. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,662 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60).

166. *See* U.S. ENV'T PROT. AGENCY, EPA-452/R-14-002, REGULATORY IMPACT ANALYSIS (RIA) FOR THE PROPOSED CARBON POLLUTION GUIDELINES FOR EXISTING POWER PLANTS AND EMISSION STANDARDS FOR MODIFIED AND RECONSTRUCTED POWER PLANTS ES-22 tbl. ES-9, ES-23 tbl. ES-10 (2015), https://archive.epa.gov/epa/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf [hereinafter CLEAN POWER PLAN RIA].

extremely high net benefits figures were almost certainly an underestimate, given the other benefits of the rule that the EPA noted it could not monetize.[167] However, opponents of the CPP did not focus their critique of the rule on its cost-benefit analysis. In repealing the rule, the Trump Administration instead contended that it was *required* to repeal the rule irrespective of benefits and costs. It reasoned that "[b]ecause the CPP significantly exceeded the Agency's [statutory] authority, it must be repealed."[168] Multiyear litigation over the CPP's legality focused on whether the Clean Air Act authorized the EPA to issue the regulation. That litigation culminated in a 6–3 majority of the Supreme Court holding that the statute did not give the EPA authority to devise emissions caps of the sort contained in the CPP.[169] The Court's opinion did not mention of the CPP's favorable cost-benefit analysis, because that analysis was simply immaterial when the case was decided on statutory grounds.[170]

Deferred action immigration programs present a similar case study. In 2012, the Obama Administration's Department of Homeland Security (DHS) issued a memorandum creating the Deferred Action for Childhood Arrivals (DACA) program, which allowed undocumented immigrants who met specific criteria to apply both for relief from deportation and for employment authorization.[171] The Trump Administration sought to repeal

167. *See id.* at ES-21 (noting that "[t]here are additional important benefits that the EPA could not monetize," including climate benefits of reducing emissions of non-CO_2 greenhouse gases, health benefits of reducing exposure to other pollutants, benefits of reduced ocean acidification, and benefits of prevention of reaching potential tipping points in natural or managed ecosystems).

168. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,523 (July 18, 2019).

169. *See* West Virginia v. EPA, 597 S. Ct. 2587, 2615–16 (2022).

170. Tellingly, the only mention of the agency's cost-benefit analysis came in a dissenting opinion. *See id.* at 2638 n.6 (Kagan, J., dissenting).

171. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs. & John Morton, Dir., U.S. Immigr. & Customs Enf't (June 15, 2012) (on file with Dep't of Homeland Sec.).

the program,[172] but a 2020 Supreme Court decision reinstated it.[173] In 2022, DHS issued a rule that sought to entrench the deferred action program, and for the first time the program was subject to cost-benefit analysis.[174] DHS's analysis revealed that the deferred action program had benefits that dramatically exceeded its costs. Relative to the baseline of the pre-DACA status quo, DHS estimated that the program would have annual monetized benefits of $20.7 billion to $21.9 billion (as compared to annual monetized costs of $480.8 million to $494.9 million), and monetized benefits over a twenty-year period of $403.2 to $455.0 billion (as compared to monetized costs of $9.4 billion to $10.1 billion).[175] Put simply, the benefits of the deferred action rule overwhelmingly exceeded its costs.

As of this writing, the durability of the deferred action rulemaking remains to be seen, but consider the choices that a policy like the deferred action rule presents to its opponents. They could attempt to counter the existing cost-benefit analysis, arguing that in fact the rule has negative net benefits. But even under different modeling assumptions, such a conclusion is likely implausible, given the overwhelming extent to which benefits dwarfed costs in the Biden Administration's economic analysis of the policy. Alternatively, opponents of deferred action programs could simply argue that such programs are unlawful on the grounds that DHS does not have the statutory authority to create such programs. This argument garnered three votes on the Supreme Court in the past,[176] and it might command a majority in the future given the Court's rightward turn.[177] If opponents were to successfully challenge deferred action

172. Memorandum from Elaine C. Duke, Acting Sec'y of Homeland Sec., on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca; Memorandum from Kirstjen M. Nielsen, Sec'y of Homeland Sec. (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf.

173. *See* Dep't. Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1901 (2020) (holding that the agency violated the Administrative Procedure Act when it rescinded DACA and accordingly vacating the rescission).

174. Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53,152, 53,152, 53,271 (Aug. 30, 2022) (to be codified at 8 C.F.R. pts. 106, 236, & 274a).

175. Deferred Action for Childhood Arrivals, 87 Fed. Reg. at 53,265 tbl. 5 (reporting these figures, with the ranges arising from the use of multiple discount rates).

176. *Regents*, 140 S. Ct. at 1918–19 (Thomas, J., concurring in the judgment in part and dissenting in part) (arguing that "DHS created DACA during the Obama administration without any statutory authorization" and "[a]s a result, the program was unlawful from its inception").

177. Litigation was ongoing as of this Article's publication. *See* Texas v. United States,

on legal grounds, they would be spared the need to engage at all with a cost-benefit analysis that decisively favored the program.

Deregulatory constitutional doctrine has likewise sometimes been a means of circumventing cost-benefit analyses that favor regulation. Litigation over graphic warnings on tobacco products shows how courts can use constitutional law to limit agency power even in the face of favorable cost-benefit analysis. In 2011, the Food and Drug Administration (FDA) issued a rule requiring that cigarette packaging contain graphic warnings (text accompanied by images) to emphasize the dangers of smoking.[178] The FDA mandated graphic warnings based on "evidence in the scientific literature that larger, graphic health warnings promote greater understanding of the health risks of smoking and would help to reduce [tobacco] consumption."[179] The agency calculated that the graphic warnings requirement would have had annualized net benefits in the hundreds of millions of dollars.[180] Cigarette companies sued to enjoin the rule, but their complaint focused almost entirely on a First Amendment claim—alleging that the labeling requirements amounted to unconstitutional compelled speech—and did not challenge or even mention the agency's cost-benefit analysis.[181] Taking its cues from the plaintiffs, the D.C. Circuit vacated the graphic warning requirement on First Amendment grounds.[182]

The graphic warnings litigation demonstrates how constitutional law provides yet another way to pursue deregulation outside of a cost-benefit framework. Scholars have documented how First Amendment rights to free

No. 1:18-CV-00068, 2023 WL 5951196, at *16 (S.D. Tex. Sept. 13, 2023) (finding DACA unlawful on the ground that "only Congress has the authority to implement a permanent DACA-like program").

178. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (2011).

179. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,629.

180. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,707 ("Our primary estimate of annualized net benefits equals $601.4 million, with a 3% discount rate, or $184.5 million, with a 7% discount rate.").

181. *See* Complaint at 3–4, R.J. Reynolds Tobacco Co. v. FDA, No. 1:11-cv-01482-RJL (D.C. Cir. Aug. 16, 2011).

182. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1221–22 (D.C. Cir. 2012).

speech[183] and free exercise of religion,[184] along with the Fifth Amendment's Takings Clause,[185] all provide means of curbing regulation. A federal judiciary skeptical of government regulation—especially at the Supreme Court level—provides opponents of a given regulation the option of simply ignoring a cost-benefit analysis favorable to that regulation and instead arguing against the regulation on constitutional grounds.

A focus on legal restraints rather than economic analysis likely portends how courts will go about deregulatory efforts in the future. Just as the Supreme Court narrowly read the Clean Air Act in rejecting the CPP, it has likewise read regulatory statutes such as the Clean Water Act,[186] the Occupational Safety and Health Act[187] and Public Health Service Act[188] in ways that constrain agency power.[189] When the courts construe regulatory statutes narrowly, the fact that the regulations they foreclose would pass

183. *See, e.g.*, Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 134 (2015) ("Commercial interests are increasingly laying claim, often successfully, to First Amendment protections. . . . Once the mainstay of political liberty, the First Amendment has emerged as a powerful deregulatory engine.").

184. *See, e.g.*, Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1455 (2015) ("Today, businesses, scholars, and courts increasingly incorporate the central premises of *Lochner* into religious liberty doctrine . . . pos[ing] a threat to the regulatory state.").

185. *See, e.g.*, MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW 170 (2020) (noting "mutterings about how restrictions on the reach of intellectual property, such as patents and trademarks, might amount to takings of IP rights"); Robin Kundis Craig, *Constitutional Environmental Law, or, the Constitutional Consequences of Insisting That the Environment Is Everybody's Business*, 49 ENV'T L. 703, 731–32 (2019) (arguing the regulatory takings doctrine "potentially limits any environmental regulatory scheme that can interfere with private land use").

186. *See* Sackett v. EPA, 143 S. Ct. 1322 (2023) (narrowly interpreting the statute to limit the types of waters that the EPA could regulate).

187. *See* Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (finding that the statute did not authorize a vaccine-or-test mandate during the COVID-19 pandemic).

188. *See* Ala. Ass'n of Realtors v. Health & Hum. Servs., 141 S. Ct. 2485 (2021) (finding that the statute did not authorize an eviction moratorium during the COVID-19 pandemic).

189. On the trend of judicial use of the major questions doctrine to constrain agency power, see generally Mila Sohoni, Comment, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1 (2023). On the ways in which the Supreme Court has at times blended the inquiries into whether an agency action is authorized by statute and whether it is arbitrary and capricious, see Alexander Mechanick, *The Interpretive Foundations of Arbitrary or Capricious Review*, 111 KY. L.J. 477, 528–34 (2023).

muster under cost-benefit analysis is simply immaterial.[190] The same holds when the courts find that a regulation violates the Constitution. Opponents of regulation, in short, will at times be more successful in pursuing their goals through statutory or constitutional arguments rather than by challenging underlying cost-benefit analyses.

C. Slowing Down Regulation

All of this gives rise to a question: why, given the many reasons for Republicans to weaken their commitment to cost-benefit analysis, have Republicans not turned against the method en masse? If the foregoing discussion is correct that cost-benefit analysis is often unnecessary to achieving deregulatory agendas and, in some instances, even favors greater regulation, one might think that the Republican Party would abandon it. After all, during the same period when the right initially embraced cost-benefit analysis, it also embraced judicial deference to agency legal interpretations. But changing politics led conservatives to turn against such deference during the 2010s.[191] Why has the same not happened for cost-benefit analysis?

One answer is that there is a single critical respect in which cost-benefit analysis still advances anti-regulatory agendas: the method imposes a

190. For a version of this argument, see Masur & Posner, *supra* note 86, at 1113 (noting that "the Trump Administration did not appear willing to bite the bullet and acknowledge that it chose policies that fail cost-benefit analysis" but instead argued "that deregulation is not merely a policy choice but is also *legally required* by the underlying regulatory statute"). Masur and Posner focus their analysis on the intersection of cost-benefit analysis and the deference doctrine announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Given the current Supreme Court's disinclination to apply *Chevron*, however (and the possibility that the case will soon be overruled), it seems more likely that courts that in the future read statutes to preclude regulation of a given type (regardless of net benefits) will do so instead through de novo interpretations of underlying statutes rather than through deference to Executive Branch legal interpretations. The distinction matters because while an agency could in the future adopt a new (and more permissive) legal interpretation under *Chevron*, *see* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs. 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."), a court's de novo interpretation of a regulatory statute does not leave agencies with the option of later adopting a different interpretation.

191. *See* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 525–34 (2022) (describing shifts in attitudes toward *Chevron* deference among Republicans).

significant resource tax on agencies seeking to issue rules.[192] A requirement that agencies perform cost-benefit analysis consumes a tremendous amount of agency resources. Empirical studies have shown that completing a rigorous regulatory cost-benefit analysis can take years and require the agency to complete staff- and resource-intensive studies.[193] This is especially true in domains that require high levels of technical expertise. The EPA, for example, has reported that developing a strong cost-benefit analysis for a major Clean Air Act rule "takes considerable Agency resources often spanning a year or more and frequently involves the development of policy-relevant emissions inventories, photochemical air quality modeling, engineering research assessments and analyses, engineering cost assessments, and benefits assessments for human health, climate, visibility, ecological and/or other categories of benefits."[194]

Even when cost-benefit analysis is strictly economic in character and does not implicate other sorts of scientific evidence, doing cost-benefit analysis well is sufficiently time- and labor-intensive that it can slow agency action. Consider the aftermath of *Business Roundtable v. SEC*,[195] a D.C. Circuit

192. *See, e.g.*, David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 394 (2006) ("The forms of [cost-benefit analysis] most widely touted by regulatory reformers and used or proposed in practice benefit polluters by slowing down regulation."); Michael A. Livermore, *Cause or Cure? Cost-Benefit Analysis and Regulatory Gridlock*, 17 N.Y.U. ENV'T. L.J. 107 (2008) ("Cost-benefit analysis slows down the regulatory state by serving as an obstacle to new regulation while rarely acting to spur administrative action."); Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7, 26 (1998) ("The exceedingly detailed risk assessments envisioned by many regulatory reformers have a huge potential to consume scarce agency resources and delay rulemaking initiatives.").

193. *See, e.g.*, Stuart Shapiro & John Morrall, *Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis?*, 48 ADMIN. & SOC'Y 367, 373 (2016) ("The average time between issuing a proposal and finalizing a rule was nineteen months with a range of two months to ninety six months."); CONG. BUDGET OFF., *Regulatory Impact Analysis: Costs at Selected Agencies and Implications for the Legislative Process* at viii (1997) (summarizing results of a multiagency study concluding that regulatory impact analyses took "an average of three years and a range of six weeks to more than 12 years").

194. Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 86 Fed. Reg. 26,406 (May 14, 2021) (codified at 40 C.F.R. pt. 83). *See also* David Michaels & Jordan Barab, *The Occupational Safety and Health Administration at 50: Protecting Workers in a Changing Economy*, 110 AM. J. PUB. HEALTH 631, 632 (2020) (noting that "it takes years or even decades, and huge resources, to issue new [OSHA] standards able to withstand strong [anti-regulatory] political opposition and well-funded industry lawsuits," resulting in "few up-to-date standards for protecting workers from chemical exposures or safety hazards").

195. 647 F.3d 1144 (D.C. Cir. 2011).

decision that vacated a Securities and Exchange Commission (SEC) rule on the grounds of weakness in the Commission's reporting of benefits and costs. After the decision came down, the Commission's Chairperson told Congress that the SEC did not try to back the vacated rule with a stronger evidence base and reissue it, because "[w]e don't have the capacity to take that on at this time."[196] The decision had a far-reaching impact: one corporate law scholar reported that in its aftermath, "the pace of SEC rulemaking has slowed by about half, largely due to the agency's effort to analyze costs and benefits more comprehensively."[197] The decision may have also had an effect beyond rulemaking: in a world of finite resources, the sharp increase in resources that the SEC put toward economic analysis after *Business Roundtable* means that those resources were not available for enforcement or other activities.[198]

Cost-benefit analysis should, therefore, be understood as a resource tax and a hurdle that agencies must clear before making rules. Nicholas Bagley has argued that "any legally mandated procedure raises the costs of agency action," since "[i]nstead of devoting their limited resources to those tasks that they believe will best advance their legislatively assigned mission, agencies must attend to procedural obligations that they might otherwise have dispensed with."[199] Given rapidly changing economic, technological, and social conditions, a requirement that agencies conduct cost-benefit analysis risks having an anti-regulatory impact: making rulemakings more labor-intensive means that agencies can engage in fewer overall rulemakings to

196. Edward Wyatt, *At House Hearing, Schapiro Says Cost Analyses Are Slowing S.E.C.'s Work*, N.Y. TIMES: DEALBOOK (Apr. 25, 2012, 3:35 PM), http:// dealbook.nytimes.com/2012/04/25/at-house-hearing-schapiro-says-cost-analyses-are-slowing-s-e-c-s-work/ (quoting SEC Chair Mary L. Schapiro).

197. Jill E. Fisch, *The Long Road Back:* Business Roundtable *and the Future of SEC Rulemaking*, 36 SEATTLE U.L. REV. 695, 709 (2013) (citing Steven Sloan, *Schapiro Says SEC Will Change Cost Calculation of Regulation*, BLOOMBERG (Apr. 17, 2012, 7:58 AM), http://www.bloomberg.com/news/2012-04-17/schapirosayssec-will-change-cost-calculation-of-regulation-1-.html); *see also* Donna M. Nagy, *The Costs of Mandatory Cost-Benefit Analysis in SEC Rulemaking*, 130 ARIZ. L. REV. 129, 149–51 (2015) (describing "SEC paralysis" arising from the use of cost-benefit analysis).

198. *Cf.* Joshua T. White, *The Evolving Role of Economic Analysis in SEC Rulemaking*, 50 GA. L. REV. 293, 307–10 (2017) (documenting a sharp increase in SEC spending on "economic and risk analysis" in the aftermath of *Business Roundtable*, with flat or declining investment in other areas of the Commission's work).

199. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 360 (2019).

respond to changing conditions.[200] The political utility of cost-benefit analysis on the right may be less a method of economic reasoning but rather a means of slowing down agency action.[201]

This understanding of cost-benefit analysis as a hurdle to agency rulemaking helps explain conservative efforts to entrench the method. Beginning during the Obama Administration, congressional Republicans (together with small numbers of conservative Democrats) have repeatedly introduced and sought to pass legislation called the "Regulatory Accountability Act."[202] The proposed legislation would require that agencies engage in cost-benefit analysis.[203] It would also impose other new mandates on agencies, including mandates that agencies hold public hearings before issuing certain rules,[204] consider the costs and benefits not only of proposed rules but also of alternative possible rules,[205] and provide for substantial evidence review of certain rules by federal courts.[206] Viewing calls to require

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200. *Cf. id.* at 364. The use of contractors to augment agency capacity is one way in which agencies have tried to mitigate the resource tax imposed by cost-benefit requirements. *Cf.* Livermore, *supra* note 63, at 633–34 (noting EPA awards of grants and contracts to scholars of environmental economics). But the use of contractors does not eliminate the resource tax, given both the resource-intensive nature of contract management for agency officials and the lack of expertise that many contractors have in regulatory cost-benefit analysis. *See* Bridget C.E. Dooling & Rachel Augustine Potter, *Rulemaking by Contract*, 74 ADMIN. L. REV. 703, 742 (2022) (discussing both of these issues).

201. This line of thinking is less prominent than it should be, but it has long been recognized by at least some critics of cost-benefit analysis requirements for new regulations. *See, e.g.*, MCGARITY, *supra* note 119, at 138 (noting, in discussing cost-benefit analysis in the 1980s, that "the time it takes to draft a good regulatory analysis can mean delay" and documenting the resources needed to produce such analysis).

202. *See* H.R. 3010, 112th Cong. (2011); S. 1606, 112th Congress (2011); H.R. 2122, 113th Cong. (2013); S. 1029, 113th Cong. (2013); H.R. 185, 114th Cong. (2015); S. 2006, 114th Cong (2015); H.R. 5, 115th Cong. (2017); H.R. 45, 115th Cong. (2017); S. 951, 115th Cong. (2017); S. 3208, 116th Cong. (2020); S. 2278, 117th Cong. (2021); *see also* Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, 94 CHI.-KENT L. REV. 487 (2019) (describing and critiquing some of the Act's proposed reforms).

203. *See, e.g.*, S. 2278, § 3 (proposing amending § 553 of the APA to require that "[f]or any major rule or high-impact rule," agencies must analyze and report "the direct costs and benefits," "the nature and degree of risks addressed by the rule and the countervailing risks that might be posed by agency action," and "to the extent practicable, the cumulative costs and benefits . . . on entities that purchase products or services from, sell products or services to, or otherwise conduct business with entities to which the rule will apply").

204. *See id.*

205. *See id.*

206. *See id.*

regulatory cost-benefit analysis alongside these other proposed mandates illustrates the function that the method plays for opponents of regulation—as sand in the gears of the regulatory state.

Republican members of Congress have rarely put their advocacy for cost-benefit analysis in precisely these terms, but they have suggested that their support for the method is designed to slow down regulation, especially by agencies that they dislike. One Republican member of Congress, for example, argued that the Consumer Financial Protection Bureau (CFPB) should be statutorily required to use cost-benefit analysis because doing so "will help stop regulatory overreach by the CFPB[] and provide regulatory relief to small businesses, community banks, and credit unions."[207] Democratic legislators have been more explicit about the link between conservative members' efforts to impose cost-benefit mandates and those same members' desire to slow down agency rulemakings. When the House was considering imposing cost-benefit requirements on the SEC, for instance, one senior Democratic legislator said that though the bill "comes in the guise of requiring the SEC to undertake a cost-benefit analysis of regulations . . . it is really a prescription for paralysis of the SEC's ability to protect our investors and our markets."[208]

The resource tax imposed by cost-benefit requirements burdens the parties asymmetrically, based on the asymmetry of their regulatory agendas. Democratic presidential administrations have more ambitious regulatory agendas than their Republican counterparts, and the "gap is especially pronounced for the regulatory and social welfare agencies—such as the EPA and the Departments of Education, Energy, Health and Human Services, Labor, and Transportation—all of which have witnessed far more regulatory activity under Democrats than Republican administrations."[209] When this is the case, any requirements that slow down agency action (including cost-benefit requirements) will, in the aggregate, advantage Republican agendas more than Democratic ones.[210] It therefore makes sense that legislation or

207. Press Release, Off. of Rep. Alexander Mooney, Congressman Mooney Re-Introduces Transparency in Consumer Financial Protection Bureau (CFPB) Cost-Benefit Analysis Act (Mar. 2, 2023), https://mooney.house.gov/congressman-mooney-re-introduces-transparency-in-consumer-financial-protection-bureau-cfpb-cost-benefit-analysis-act.

208. 159 Cong. Rec. H2733 (daily ed. May 17, 2013) (statement of Rep. Carolyn Maloney (D-NY)).

209. *See* Elinson & Gould, *supra* note 191, at 542; *see also id.* at 540–44 (documenting this asymmetry and discussing its implications).

210. That is, even if the procedural requirements slow down some regulatory proposals in both Democratic and Republican administrations, such slowdowns will do more to impede Democratic policymaking than Republican policymaking on account of the parties'

judicial decisions that would impose greater cost-benefit requirements on agencies would come from the political right.

* * *

Cost-benefit analysis has an evolving relationship with deregulatory agendas. While the method was once viewed as straightforwardly favoring deregulation, the relationship has become more complex. Cost-benefit analysis will sometimes favor stricter regulations. When this occurs, opponents of regulation can turn to other tools—in the Executive Branch or the courts—to thwart regulation. And cost-benefit analysis, even when its merits would support new regulation, still slows down the regulatory process. Republicans, in other words, have reason to retain cost-benefit analysis not primarily because it aids deregulatory efforts when they are in power, but rather because it hampers attempts to enact new regulations when Democrats control the White House.[211] I turn next to the politics of cost-benefit analysis among Democrats.

III. DEMOCRATIC POLITICS AND COST-BENEFIT ANALYSIS

A. Making Cost-Benefit Analysis Bipartisan

The politics of cost-benefit analysis look very different for Democrats. The contemporary Democratic Party supports regulation to advance the public interest across a host of substantive areas, including protections for workers, consumers, and the environment. In the face of congressional inaction, Democratic administrations often use rulemakings that deploy old statutes to address contemporary policy challenges.[212] As a result, recent Democratic

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asymmetric reliance on rulemaking to advance their agendas. *Cf.* Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 65 (2022) (discussing how public law institutions "disadvantage a political or ideological faction and its policy agenda . . . even when the arrangements are ostensibly neutral with respect to party, ideology, and policy").

211. Another answer, resting less on strategic considerations, is that at least some Republicans and conservatives have failed to fully recognize the extent to which cost-benefit analysis favors many progressive regulations. On this view, support for the method on the right is a hangover from an earlier era, and the right will ultimately realize this fact and turn against cost-benefit analysis, just as it turned against *Chevron*. Time will tell whether this proves to be correct, but this Part has treated Republican and conservative political actors as rational, and asked what reasons they might have, given their substantive policy goals, for continuing to support cost-benefit analysis.

212. *See generally* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (making this argument with a focus on environmental and energy issues).

administrations have had more ambitious regulatory agendas than their Republican counterparts.[213] The question for Democrats, then, is whether cost-benefit analysis helps or hinders their regulatory agendas.

Democrats have long had a conflicted relationship with cost-benefit analysis. On the one hand, many of the roots of cost-benefit analysis lie in the Democratic Party, and three consecutive Democratic presidents have reaffirmed the centrality of cost-benefit analysis to regulatory policymaking. Yet many progressives have reservations about cost-benefit analysis, and Democrats outside of the Executive Branch—most notably progressive interest groups, but also Democrats in Congress—have been more critical of the method. This Part first traces each of these dynamics and then considers why, despite arguments made by progressive detractors, Democratic administrations have not abandoned cost-benefit analysis.

While many attribute the rise of modern cost-benefit analysis to the Reagan Administration's Executive Order 12,291, its origins arguably lie as much with Democrats as with Republicans. Elizabeth Popp Berman has traced the rise of an "economic style" of reasoning in U.S. public policy that found plenty of proponents in the Democratic Party.[214] The passage of new regulatory statutes in the 1960s and 1970s was quickly followed by economists associated with the Democratic Party calling for the use of cost-benefit analysis to evaluate new regulatory mandates, on the grounds that doing so promoted efficiency.[215] Economic analysis of regulations had technocratic roots, with organizations like the Urban Institute—established during the administration of a Democrat, President Lyndon Johnson—playing a critical role in developing and disseminating the method.[216]

Actions taken under the Carter Administration exemplify the Democratic Party's support for economic analysis of regulations. The Carter Administration "oversaw the most significant expansion of economic reasoning in social regulation to date," led by a White House chief economist who "was determined to create a new review process to regain control of social regulation—by rationalizing it through economic analysis."[217] Most notably, the Administration's Executive Order 12,044, issued in 1978,

213. *See supra* note 209 and accompanying text (discussing this asymmetry).

214. *See generally* ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY (2022) (documenting the rise of the economic style in the mid-twentieth century).

215. *See id.* at 154–55.

216. *See id.* at 113–15.

217. *Id.* at 166.

required that agencies prepare regulatory analyses of major regulations.[218] Though not precisely the same as cost-benefit analysis as it exists today,[219] the Executive Order's formulation foreshadowed mandates from later administrations: "an analysis of the economic consequences of each [regulatory] alternative[] and a detailed explanation of the reasons for choosing one alternative over the others."[220] In language that could have been written by a Republican White House, the Carter Executive Order repeatedly referred to the need to reduce regulatory burdens.[221]

One might have imagined that the Reagan Administration's use of cost-benefit analysis as a tool of deregulation would have soured future Democratic administrations on the method, but each of the next three Democratic administrations reaffirmed the method's centrality to regulatory policymaking. The most important moment in the bipartisan ratification of cost-benefit analysis was the Clinton Administration's issuance of Executive Order 12,866 in 1993.[222] The order announced that "[i]n deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating"[223] and provided general guidance about how agencies were to go about conducting cost-benefit analysis.[224] Executive Order 12,866 "affirmed the essentials" of the Reagan Administration's approach and had a "'regulatory philosophy' [that was] close to what Reagan had embraced."[225] The Clinton Administration also tasked proponents of cost-benefit analysis with leading OIRA.[226] The Clinton Administration could have put an end to regulatory

218. Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978). The executive order's definition of major included "regulations which will result in (a) an annual effect on the economy of $100 million or more; or (b) a major increase in costs or prices for individual industries, levels of government[,] or geographic regions." *See id.* § 3(a)(1), 43 Fed. Reg. at 12,663.

219. *See* POPP BERMAN, *supra* note 214, at 167 (explaining the mandate more closely resembles what is now referred to as "cost-effectiveness analysis").

220. Exec. Order No. 12,044, § 3(b)(1), 43 Fed. Reg. at 12,663.

221. *See id.* §§ 1, 2(d)(3), 2(d)(6), 4, 43 Fed. Reg. at 12,661, 12,662, 12,663. The executive order led to tension between the White House and regulatory agencies, with the main point of dispute being the extent to which agencies were imposing unnecessary costs on private business. *See* Fuchs & Anderson, *supra* note 25, at 30.

222. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

223. *Id.* § 1(a), 58 Fed. Reg. at 51,735.

224. *Id.* § 1(b), 58 Fed. Reg. at 51,735–36.

225. SUNSTEIN, *supra* note 4, at 15.

226. *See, e.g.*, Sally Katzen, *Cost-Benefit Analysis: Where Should We Go from Here?*, 33

cost-benefit analysis—a change in party control of the White House would have provided a natural occasion to do so—but instead, it gave the method a bipartisan endorsement.

The Clinton Administration's support for cost-benefit analysis can be understood in light of the politics of the time. The Administration was a product of a neoliberal age, and President Clinton himself sought to triangulate between the two parties' traditional agendas—describing himself as "neither liberal nor conservative but both and different."[227] Senior Administration posts were staffed by veterans of the private sector, most notably Wall Street.[228] The result is that while the Clinton Administration did propose new regulatory programs in some domains, like tobacco regulation, at the same time it rolled back regulation in others, like financial regulation.[229] Its general attitude toward regulation focused on "lighten[ing] the load for regulated industries and mak[ing] government regulations that are needed more cost-effective," a statement of regulatory philosophy that one commenter noted "could have been made by either Ronald Reagan or George Bush."[230] Given the Clinton Administration's orientation toward business and regulation as a general matter, and given the corporate world's support for cost-benefit analysis,[231] it should be no surprise that the Clinton Administration endorsed the method.

While the Clinton Administration's approach to cost-benefit analysis is much more a story of continuity than change, the Administration did seek to reduce some of the most overt anti-regulatory biases of cost-benefit analysis as practiced during the 1980s, framing its version of cost-benefit analysis as

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FORDHAM URB. L.J. 1313, 1313 (2006) ("I am pro-CBA. I believe CBA is a sensible and important input to rational decision making.").

227. STEPHEN SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISE AND REAPPRAISAL 106 (2d rev. ed. 2011).

228. NELSON LICHTENSTEIN & JUDITH STEIN, A FABULOUS FAILURE: THE CLINTON PRESIDENCY AND THE TRANSFORMATION OF AMERICAN CAPITALISM 187–95 (2023) (discussing the influence of Wall Street veterans in the Clinton Administration).

229. *See* Elinson & Gould, *supra* note 191, at 519–20 (discussing these examples and the Clinton Administration's regulatory record more broadly); *see also* LICHTENSTEIN & STEIN, *supra* note 228, at 403–34 (documenting in detail financial deregulation during the Clinton Administration).

230. Robert J. Duffy, *Regulatory Oversight in the Clinton Administration*, 27 PRESIDENTIAL STUD. Q. 71, 75–76 (1997) (quoting Stephen Barr, *White House Shifts Role in Rule-Making*, WASH. POST, Oct. 1, 1993, at 12).

231. *See supra* notes 122–127 and accompanying text.

part of a quest for neutrality in policy analysis.[232] Executive Order 12,866 described net benefits as "including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity"[233] and expressly recognized that "some regulatory costs and benefits are difficult to quantify."[234] The result was a softening of some of the more deregulatory aspects of cost-benefit analysis, though with the method's fundamental character remaining unchanged.

Later Democratic administrations followed much the same playbook. President Obama personally viewed cost-benefit analysis as an important part of regulatory policy, defending the method in his memoir on the grounds that "[s]ome regulations really did cost more than they were worth" and linking the method to government's "obligation to pay attention to the real-world impact of our decisions."[235] Consequently, his executive order on regulatory review expressly endorsed cost-benefit analysis[236] and reaffirmed Executive Order 12,866.[237] It helped entrench what his former OIRA Administrator, Cass Sunstein, has called the "cost-benefit state."[238] The Biden Administration likewise reaffirmed Executive Order 12,866 and the basic architecture of cost-benefit analysis, even as it reformed how the method operates in practice.[239] And both the Obama and Biden

232. *See* Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 105 (2011) (describing Executive Order 12,866 as having given "benefits . . . as much prominence (and weight) as costs," which was "one of the clearest examples of a different philosophy for OIRA—namely, an entity that would implement neutral principles to achieve smart or sensible regulations rather than advance a decidedly [anti-regulatory] agenda").

233. Exec. Order No. 12,866, § 1(a), 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993). This represents a far broader range of relevant benefits than that provided for in the Reagan Administration's executive order.

234. *Id.* § 1(b)(6), 58 Fed. Reg. at 51,736. President Clinton's OIRA Administrator emphasized this point in communication with other Executive Branch officials. *See* Memorandum from Sally Katzen, Adm'r, Office of Info. & Reg'y Aff., to Reg'y Pol'y Advisors 12 (May 2, 1994), https://clinton.presidentiallibraries.us/items/show/22047 ("[T]he Executive Order stresses not only that the anticipated effects of a regulation should be quantified to the extent possible, but also that those that cannot be quantified—whether they be benefits or costs—should nevertheless be considered. This underscores that the decision-maker should consider *all* of the anticipated effects in deciding whether, on balance, society as a whole will benefit from the proposed regulatory action.").

235. BARACK OBAMA, A PROMISED LAND 496–97 (2020).

236. Exec. Order No. 13,563, § 1(a)-(c), 76 Fed. Reg. 3,821, 3,821 (Jan. 18, 2011).

237. *Id.* § 1(b), 76 Fed. Reg. at 3,821.

238. SUNSTEIN, *supra* note 4, at 15–18.

239. Exec. Order No. 14,094, § 1(a), 88 Fed. Reg. 21,879, 21,879 (Apr. 6, 2023).

Administrations appointed prominent Democratic proponents of cost-benefit analysis to lead OIRA.[240]

Many progressives have criticized Democratic administrations' endorsements of cost-benefit analysis from the 1990s onward. Scholars have characterized the consensus in support of cost-benefit analysis as part of the broader move toward neoliberalism in the late twentieth and early twenty-first centuries.[241] Many on the left have long expressed concerns that cost-benefit analysis would impede effective regulation to protect the environment and advance public health and safety.[242] More recently, progressive critics have lamented that issues of economic inequality[243] and racial inequality[244] are missing from conventional cost-benefit analysis.

Concerns about the method's potential conservative bias have led to greater polarization around the method in Congress than in the Executive Branch. The Reagan Administration's use of OIRA for deregulatory ends prompted some congressional Democrats to seek to defund the office in the 1980s. "An unjustified over-reliance on cost-benefit analysis," one Senate Democrat wrote in response to Reagan Administration efforts, "not only could add to the present cumbersome nature of the regulatory process but also could jeopardize essential public health and safety regulations."[245] Because OIRA was created

240. *See* Dylan Matthews, *Can Technocracy Be Saved? An Interview with Cass Sunstein*, VOX (Oct. 22, 2018, 9:00 AM), https://www.vox.com/future-perfect/2018/10/22/18001014/cass-sunstein-cost-benefit-analysis-technocracy-liberalism; Jean Chemnick, *Meet Richard Revesz, Biden's Choice for Rules Czar*, E&E NEWS (Sept. 27, 2022, 6:45 AM), https://www.eenews.net/articles/meet-richard-revesz-bidens-choice-for-rules-czar.

241. *See, e.g.*, Cohen, *supra* note 2; Eli Cook, *Efficiently Unequal: The Global Rise of Kaldor-Hicks Neoliberalism*, 7 GLOB. INTELL. HIST. 1, 4 (2022) ("Kaldor-Hicks efficiency was invented by neoclassical economists in the late 1930s, its ascent to policy dominance is part-and-parcel of the neoliberal revolution of the past half century."); Matthew Titolo, *Privatization and the Market Frame*, 60 BUFF. L. REV. 493, 535 (2012) ("The neoliberal project is unthinkable without cost-benefit analysis at its core."). *But see* Samuel Knafo et al., *The Managerial Lineages of Neoliberalism, New Political Economy*, 24 NEW POL. ECON. 235, 236 (2019) (drawing a distinction between neoliberalism and managerialism and arguing that regulatory cost-benefit analysis derived more from the latter than the former).

242. *See generally* ACKERMAN & HEINZERLING, *supra* note 24 (making this argument); KYSAR, *supra* note 48 (same).

243. *See, e.g.*, Liscow, *supra* note 38, at 1685–86 (arguing that cost-benefit analysis can exacerbate existing inequalities between the rich and the poor).

244. *See, e.g.*, James Goodwin, *Cost-Benefit Analysis Is Racist*, CTR. FOR PROGRESSIVE REFORM (Oct. 9, 2020), https://progressivereform.org/publications/cost-benefit-analysis-racist (discussing the racial impacts of cost-benefit analysis).

245. Weiss, *supra* note 128, at 627 (quoting Sen. Thomas Eagleton (D-MO)).

by an act of Congress,[246] the first reauthorization of the statute creating OIRA presented opponents of the office's work a "golden opportunity" to neuter the office.[247] Though some congressional Democrats sought to eliminate OIRA, they failed in those efforts, securing only minor concessions from the Reagan Administration in exchange for reauthorization.[248] Despite this failure, the political contestation of the 1980s revealed the ideological valence of regulatory review with a cost-benefit lens: the practice was generally supported by conservatives and opposed by progressives.

In subsequent decades, proposals to statutorily mandate cost-benefit analysis have typically been offered by Republicans and opposed by nearly all congressional Democrats. Consider the Regulatory Accountability Act, which Congress considered on several occasions during the 2010s.[249] The bill would have codified cost-benefit analysis, making it statutorily required for rulemakings across agencies.[250] It split Congress along party lines, consistently garnering the universal support of Republicans and the opposition of nearly all Democrats.[251] Similar politics prevailed for more targeted efforts to require cost-benefit analysis. The SEC Regulatory Accountability Act,[252] for example, would have required that the benefits of SEC regulations justify their costs and mandated that the agency choose the regulatory approach that maximizes net benefits.[253] The statute passed the House in 2017 over the nay votes of nearly the entire Democratic caucus.[254]

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246. *See* Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812, 2814–15 (codified as amended at 44 U.S.C. § 3503).

247. *See* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, L. & CONTEMP. PROBS., Spring 1994, at 1, 40.

248. *See id.* (describing a 1986 compromise in which Congress reauthorized OIRA while requiring that it make increased public disclosures and subjecting its Administrator to Senate confirmation).

249. *See, e.g.*, Regulatory Accountability Act, H.R. 3010, 112th Cong. (2011); Regulatory Accountability Act, H.R. 185, 114th Cong. (2015); Regulatory Accountability Act, H.R. 5, 115th Cong. (2017).

250. *See, e.g.*, H.R. 5, §§ 103(b)(6), (d)(1)(F)–(G), (f)(3)(B), (f)(4)(C), (f)(4)(I), (k).

251. *See Roll Call 45 Bill Number: H.R. 5,* OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (Jan. 11, 2017, 6:46 PM), https://clerk.house.gov/Votes/201745 (House roll-call vote showing unanimous support among Republicans (233-0) and near-unanimous opposition among Democrats (5-183)).

252. SEC Regulatory Accountability Act, H.R. 78, 115th Cong. (2017).

253. *See id.* § 2.

254. *See Roll Call 51 Bill Number: H.R. 78,* OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (Jan. 12, 2017, 5:12 PM), https://clerk.house.gov/Votes/201751 (House

A similar partisan division existed for the Commodity End-User Relief Act,[255] which would have required the Commodity Futures Trading Commission to conduct cost-benefit analysis of proposed rules.[256]

These efforts show that congressional Democrats, though not categorically opposed to cost-benefit analysis, have long recognized the method's deregulatory potential and have, therefore, opposed efforts to expand or mandate the practice.[257] While congressional Democrats have not tried to excise cost-benefit analysis from the regulatory state entirely, they have at times tried to curb its reach in particular areas. During 2016 debates over possible amendments to the Toxic Substances Control Act (TSCA),[258] "the removal of cost-benefit consideration under § 6 [of the statute] was one of the key changes sought by lead Democrat[ic] negotiators and major environmental groups, as well as EPA officials."[259] Those advocates viewed cost-benefit requirements as an impediment to effective regulation of toxic substances. One Democratic senator distinguished a regime under which "the EPA [must] consider the costs and benefits of regulation when studying the safety of chemicals," from one under which "EPA will have to consider only the health and environmental impacts of a chemical" and "[i]f they demonstrate a risk, EPA will have to regulate."[260] This contrast between cost-benefit analysis and stringent regulation has led many progressive members of Congress to be skeptical of the method. Indeed, it is telling that prior to embracing cost-benefit analysis as President, then-Senator Joe Biden critiqued the method as elitist and inattentive to public values.[261]

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roll call vote showing near-unanimous support among Republicans (234-1) and near-unanimous opposition from Democrats (9-183)).

255. Commodity End-User Relief Act, H.R. 238, 115th Cong. (2017).

256. *See id.* § 202. The bill garnered near-unanimous support among Republicans (232-1) and near-unanimous opposition among Democrats (7-181). *See Roll Call 54 Bill Number: H.R. 238,* OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (Jan. 12, 2017, 5:40 PM), https://clerk.house.gov/Votes/201754.

257. A related reason for Democrats to oppose efforts to codify cost-benefit analysis is that doing so would open the door to greater litigation and perhaps encourage courts to review cost-benefit analyses in an even more searching manner. *Cf. infra* Section III.C.

258. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601-2629).

259. Rachel Rothschild, *Unreasonable Risk: The Failure to Ban Asbestos and the Future of Toxic Substances Regulation*, 47 HARV. ENV'T. L. REV. 529, 536 n.46 (2023).

260. *Id.* at 549 n.111 (quoting 162 Cong. Rec. 7,980 (2016) (statement of Sen. Tom Udall (D-NM)).

261. *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United*

B. Democrats' Political Incentives

Democratic presidential administrations have now supported cost-benefit analysis for decades. The simplest explanation as to why is that Democratic presidents and their senior staffs, including their OIRA administrators, have simply believed that cost-benefit analysis is an important tool for improving the quality of regulatory policymaking. This explanation has some truth to it, and key actors in the Democratic Party have indeed supported cost-benefit analysis out of genuine belief in the method's merits.[262] But other forces are at play as well, and even Democrats inclined toward principled skepticism of cost-benefit analysis are incentivized to hesitate before scrapping the method entirely.

1. The method's progressive potential. — A first development is a realization among many Democrats, most notably Democratic presidential administrations, that many of the party's policy commitments can be incorporated into cost-benefit analysis. Rather than arguing that the party's values, most notably environmental protection and equity, are inconsistent with cost-benefit analysis, some Democrats have made a conscious choice to call for those values to be incorporated into cost-benefit analysis. Such efforts have yielded mixed results, but the possibility of incorporating progressive values into cost-benefit analysis provides one reason for the Democratic Party to stand by the method.

Before turning to more recent developments, a longstanding feature of cost-benefit analysis helps explain why many progressive regulations have positive net benefits. That feature is the value of a statistical life—the monetized amount on the benefit side of the cost-benefit ledger for each life saved by a regulation. The value of a statistical life is often maligned by progressives for putting a price on human life.[263] But if that figure is high enough, it can justify lifesaving regulations favored by those same progressives. The most important impact of many regulations—most notably air pollution regulations and auto safety regulations—is that they save lives.[264] Prior to the advent of the contemporary approach to the value of a statistical life, agencies sometimes

States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. 458 (1994) ("I think it's incredibly presumptuous and elitist . . . to conclude that the American people's cultural values in fact are not ones that lend themselves to a cost-benefit analysis and presume that they would change their cultural values if in fact they were aware of the cost-benefit analysis." (statement of Sen. Joseph R. Biden, Jr. (D-DE))).

262. *See, e.g.*, sources cited *supra* note 240 (citing interviews with OIRA administrators during Democratic administrations).

263. *See, e.g.*, ACKERMAN & HEINZERLING, *supra* note 24, at 61–90.

264. *See* Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. CHI. L. REV. 649, 656, 666–68 tbl. 1 (2022) (providing examples).

valued lives saved only as the benefit of avoiding the "cost of death," defined as the present value of medical costs and lost earnings that would result from fatalities.[265] The shift from this approach to a contemporary approach, using revealed preferences data on the value of mortality risk reductions, at times increased the benefits of lifesaving regulations by as much as an order of magnitude.[266] This does not, of course, mean that the current approach to the value of a statistical life is immune from criticism on either economic or philosophical grounds. It does mean, however, that the approach that agencies take to mortality risk reductions can often yield high net benefits figures for lifesaving regulations favored by progressives.

The changing relationship between environmentalism and cost-benefit analysis also provides a reason for progressives to support the method. Environmentalists have long argued that cost-benefit analysis is likely, at least as traditionally practiced, to give short shrift to ecological values. Those critics emphasized that "there is no natural or useful way to measure [environmental protection] in dollars"[267] and that "incoherence is introduced when environmental judgments are turned into numbers."[268] Environmentalists often preferred "precautionary" approaches as opposed to cost-benefit analysis, arguing that "precautionary approaches can be defended as being particularly well suited to safeguarding life and the environment under conditions of uncertainty and ignorance, as opposed to the conditions of probabilistic sophistication that are presupposed by proponents of the economic approach."[269] For decades, these concerns led many environmentalists to be critics of cost-benefit analysis.

The relationship between environmentalism and cost-benefit analysis began to change during the Obama Administration. In the early 2010s, the federal government, for the first time, placed a price on carbon emissions for use across federal regulations.[270] This price, devised by an interagency

265. *See* W. KIP VISCUSI, PRICING LIVES: GUIDEPOSTS FOR A SAFER SOCIETY 5 (2018).

266. *See id.* at 6 (making this point and providing the example of an OSHA rule requiring that firms label dangerous chemicals used in the workplace).

267. ACKERMAN & HEINZERLING, *supra* note 24, at 18.

268. *Id.* at 177–78; *see also* Arden Rowell, *Quantitative Valuation in Environmental Law*, 96 NOTRE DAME L. REV. 1539, 1542 (2021) ("[T]he skepticism many mainstream environmental scholars feel toward quantification of environmental injury was further reinforced in the early years of regulatory cost-benefit analysis, where—as initially implemented by President Ronald Reagan—quantification methods tended to value environmental impacts low, and thus to justify deregulatory policies that many pro-environmental voices rejected.").

269. KYSAR, *supra* note 48, at 19.

270. *See* Cass R. Sunstein, *Arbitrariness Review and Climate Change*, 170 U. PENN. L. REV. 991, 1011 (2022).

working group staffed by a team of experts, provided a way for carbon emissions to be systematically accounted for in cost-benefit analysis.[271] The Administration's figure—called the social cost of carbon—was calculated to range from five dollars to sixty-five dollars per metric ton of emissions (in 2007 dollars), depending on what modeling assumptions were used.[272] Regulatory impact analyses could thereby monetize the benefits of any rule that reduced carbon emissions and the costs of any rule that increased emissions. Using these figures, the Administration found that rules designed to reduce carbon emissions would have extremely high net benefits. In the Clean Power Plan example discussed earlier, for example, the EPA relied on the social cost of carbon to estimate the rule's benefits.[273] More broadly, the social cost of carbon has been used in regulations that collectively generated more than $1 trillion of benefits for society.[274]

Subsequent administrations have featured contestation over the proper means of calculating the social cost of carbon. Unsurprisingly, Republicans have sought to use a lower value,[275] while Democrats have advocated for a

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271. *See* INTERAGENCY WORKING GRP. ON SOC. COST OF CARBON, U.S. GOV'T, TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866 (Feb. 2010), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf [hereinafter OBAMA INTERAGENCY WORKING GROUP]. On methods for calculating the social cost of carbon, see generally NAT'L ACADS. OF SCI., VALUING CLIMATE DAMAGES: UPDATING ESTIMATION OF THE SOCIAL COST OF CARBON DIOXIDE (2017); William Nordhaus, *Revisiting the Social Cost of Carbon*, 114 PROCEEDINGS NAT'L ACAD. SCI. 1518 (2017); Katharine Ricke et al., *Country-Level Social Cost of Carbon*, 8 NATURE CLIMATE CHANGE 895 (2018); Michael Greenstone, Elizabeth Kopits & Ann Wolverton, *Estimating the Social Cost of Carbon for Use in U.S. Federal Rulemakings: A Summary and Interpretation* (Nat'l Bureau of Econ. Rsch., Working Paper No. 16,913) (March 2011), https://www.nber.org/papers/w16913.

272. OBAMA INTERAGENCY WORKING GROUP, *supra* note 271, at 3 (providing these figures and noting that variation comes from both uncertainty in the precise impacts of climate change and the use of different discount rates).

273. CLEAN POWER PLAN RIA, *supra* note 166, at 4-3 to 4-11.

274. *See* Nordhaus, *supra* note 271, at 1518.

275. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-254, SOCIAL COST OF CARBON: IDENTIFYING A FEDERAL ENTITY TO ADDRESS THE NATIONAL ACADEMIES' RECOMMENDATIONS COULD STRENGTHEN REGULATORY ANALYSIS 14 (2020) (discussing the Trump Administration's use of a lower figure for the social cost of carbon as compared to the Obama Administration, achieved through the former's use of a domestic-only calculation of climate change damages (rather than a global calculation) and discount rates of 3% and 7% (rather than 2.5%, 3%, and 5%)).

higher value.[276] But the very fact that the conflict has taken place within a cost-benefit framework rather than outside of it suggests that the Democratic Party accepts the legitimacy of cost-benefit analysis and believes the method can help advance its climate policy agenda.

This point generalizes beyond the social cost of carbon to other sorts of environmental regulation. "Proregulatory interest groups will often be pleased with the results of properly conducted cost-benefit analysis," Richard Revesz and Michael Livermore have argued.[277] "The benefits of saving lives, preserving nature for future generations, and avoiding environmental catastrophe, properly calculated, will often outweigh the short-term costs of regulation."[278] For regulations for which this holds true, cost-benefit analysis can buttress Democratic administrations' efforts to enact stricter regulations that advance environmentalists' goals of reducing air and water pollution and moving toward greener energy sources.

The Democratic Party has also sought to pursue equity within a cost-benefit framework, rather than outside of it, though progress on that score has been slower than in the environmental domain. Central to the contemporary Democratic Party's agenda are efforts to reduce economic and racial inequality.[279] Because traditional cost-benefit analysis does not consider how the benefits and burdens of a regulation fall based on race or class,[280] some on the left have charged the method with perpetuating inequality.[281] But rather than scrapping cost-benefit analysis for this reason, Democratic administrations have instead sought to incorporate equity issues into a cost-benefit framework.

Democrats have long emphasized the importance of equity in cost-benefit

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276. *See* Exec. Order No. 13,990, § 5(b), 86 Fed. Reg. 7,037, 7,040–41 (Jan. 20, 2021) (Biden Administration executive order reestablishing the interagency working group and directing it to ensure that estimates of the social cost of greenhouse gases reflect the best available science); INTERAGENCY WORKING GRP. ON SOCIAL COST OF GREENHOUSE GASES, U.S. GOV'T, TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON, METHANE, AND NITROUS OXIDE INTERIM ESTIMATES UNDER EXECUTIVE ORDER 13990 (2021) (reporting preliminary estimates produced by the Biden Administration's interagency working group).

277. REVESZ & LIVERMORE, *supra* note 3, at 15.

278. *Id.*

279. *See, e.g.*, 2020 *Democratic Party Platform*, DEMOCRATIC NAT'L CONVENTION 14 (Aug. 18, 2020), https://democrats.org/wp-content/uploads/2020/08/2020-Democratic-Party-Platform.pdf (asserting the Democratic Party's commitment to "enacting fundamental reforms to address structural and systemic racism and entrenched income and wealth inequality in our economy").

280. *See supra* notes 42–43 and accompanying text.

281. *See, e.g.*, Goodwin, *supra* note 244.

analysis. The Clinton Administration's Executive Order 12,866 expressly provided that maximizing net benefits meant taking account of both "distributive impacts" and "equity."[282] The Obama Administration's Executive Order 13,563 reaffirmed this directive[283] and provided that agencies may consider in cost-benefit analysis "values that are difficult or impossible to quantify, including equity . . . fairness, and distributive impacts."[284] Those calls represented an important shift from the Reagan Administration's Executive Order requiring cost-benefit analysis, which did not mention distribution or equity.[285] Further, they are consistent with statements in Circular A-4, which provides that "removing distributional unfairness" is a possible reason for regulation.[286] Relatedly, Circular A-4 also directs that regulatory analysis "should provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decisionmakers can properly consider them along with the effects on economic efficiency."[287]

Despite these directives, most regulatory cost-benefit analyses do not account for distributional effects of regulation. Studies of major rulemakings have shown that "the presidential pronouncements did not move the needle on distributional analysis in any meaningful way,"[288] and agency analysis of distributional impacts often remains perfunctory at best. The Biden Administration responded to these shortfalls by calling for the Office of Management and Budget to "propose procedures that take into account the distributional consequences of regulations, including as part of any quantitative or qualitative analysis of the costs and benefits of regulations, to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities."[289] Part IV contains a more detailed discussion of the Biden Administration's reforms, but for present purposes, the key point is that the

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282. *See* Exec. Order No. 12,866, § 1(a), 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993).

283. *See* Exec. Order No. 13,563, § 1(b)(3), 76 Fed. Reg. 3,821, 3,821 (Jan. 18, 2011).

284. *Id.* § 1(c), 76 Fed. Reg. at 3,821.

285. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

286. *See* ORIGINAL CIRCULAR A-4, *supra* note 28, at 4; *see also* REVISED 2023 CIRCULAR A-4, *supra* note 28, at 15 (describing "promoting distributional fairness and advancing equity" as reasons for regulation).

287. ORIGINAL CIRCULAR A-4, *supra* note 28, at 14. Equity-related issues were central to revisions to Circular A-4 made in 2023. *See infra* Section IV.D.

288. Revesz & Yi, *supra* note 56, at 62; *see also id.* at 62–68 (reviewing relevant literature).

289. *See* Memorandum on Modernizing Regulatory Review, 2021 DAILY COMP. PRES. DOC. 1 (Jan. 20, 2021) [hereinafter Modernizing Regulatory Review] (tasking OMB with making reforms on each of these issues).

Biden Administration, like its Democratic predecessors, responded to concerns about equity and cost-benefit analysis not by scrapping the method but instead by attempting to reform it to better incorporate progressive values.

2. Technocracy and "the party of science". — To reject cost-benefit analysis would also be inconsistent with the Democratic Party's support for technocratic approaches to governance and professed commitments to being the party of science- and evidence-based policymaking. Though the extent to which cost-benefit analysis is actually scientific is contested, the method's technocratic flavor makes it consistent with how the Democratic Party tends to both govern and understand its own identity.

The relationship of the Democratic Party to technocracy is complex, but faith in governance by technical experts has been at least a part of the party's governing philosophy for a century. Some of the New Deal's architects justified new regulatory agencies by reference to the need for expert governance of the economy.[290] As Anne Kornhauser has argued, the newly expanded administrative state "privileged the specialized expertise of unelected officials" and "generated a technocratic rationale to justify its existence."[291] Subsequent decades featured continued technocratic impulses among Democrats, coupled with the rise of a particular mode of economic reasoning that laid the foundations for cost-benefit analysis.[292] More recently, Democratic presidents have expressly endorsed evidence-based policymaking as central to their agendas. The Obama Administration took evidence-based approaches across policy areas,[293] issued several high-profile

290. *See, e.g.*, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23–24 (1938) (arguing that "[w]ith the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, [and] the pursuit of energetic measures upon the appearance of an emergency . . . .").

291. ANNE M. KORNHAUSER, DEBATING THE AMERICAN STATE: LIBERAL ANXIETIES AND THE NEW LEVIATHAN, 1930–1970, at 1–2 (2015).

292. *See supra* notes 214–216 and accompanying text (discussing the work of Elizabeth Popp Berman); *see also* FRANK FISCHER, DEMOCRACY AND EXPERTISE: REORIENTING POLICY INQUIRY 30 (2009) (noting President John F. Kennedy's view that "most of the problems . . . that we now face are technical problems" and Daniel Patrick Moynihan's emphasis on the role of policy expertise in formulating President Lyndon Johnson's Great Society).

293. *See generally* Ron Haskins & Jon Baron, *Building the Connection Between Policy and Evidence: The Obama Evidence-Based Initiatives*, BROOKINGS INST. (Sept. 2011), https://www.brookings.edu/wp-content/uploads/2016/06/0907_evidence_based_policy_haskins.pdf (discussing examples).

memoranda on scientific integrity,[294] and created a bipartisan "Commission on Evidence-Based Policymaking" tasked with "examining all aspects of how to increase the availability and use of government data to build evidence and inform program design."[295] The Biden Administration likewise made evidence-based policymaking central to its agenda. Almost immediately after his inauguration, President Biden published the "Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking."[296] The document built on the Obama-era memoranda, opening by declaring that "it is the policy of my Administration to make evidence-based decisions guided by the best available science and data"[297]—a not-so-subtle rebuke of the Trump Administration.

Outside of government, Democratic political identity has come to include a profession of faith in objective, scientific evidence. On issues ranging from the reality of climate change to the risks of Covid-19 during the pandemic, Democrats have self-identified as the party of science. Science has become more polarized, with survey data showing that Democrats' trust in science is much higher than that of Republicans.[298] Partisan gaps are especially wide in attitudes toward climate science.[299] The centrality of science to many

294. *See* Memorandum on Scientific Integrity, 2009 DAILY COMP. PRES. DOC. 1 (Mar. 9, 2009) (expressing presidential support for scientific integrity principles); Memorandum from John P. Holdren, Asst. to the President for Sci. & Tech., to the Heads of Executive Departments and Agencies (Dec. 17, 2010), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf (providing guidance to implement the presidential memorandum on scientific integrity).

295. *See Commission on Evidence Based Policymaking*, WHITE HOUSE, https://obamawhitehouse.archives.gov/omb/management/commission_evidence (last visited Nov. 11, 2023); *see also* Evidence-Based Policymaking Commission Act of 2016, Pub. L. No. 114-140, 130 Stat. 317.

296. Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking, 2021 DAILY COMP. PRES. DOC. 1 (Jan. 27, 2021).

297. *Id.* at 1. Particular agencies have promulgated their own scientific integrity policies as well. *See, e.g.*, *Scientific Integrity Policy: For Transparent & Objective Science*, U.S ENV'T PROT. AGENCY (last visited Nov. 11, 2023), https://www.epa.gov/sites/default/files/2014-02/documents/scientific_integrity_policy_2012.pdf.

298. *See, e.g.*, Lawrence C. Hamilton, Joel Hartter & Kei Saito, *Trust in Scientists on Climate Change and Vaccines*, SAGE OPEN, July–Aug. 2015 (reporting survey data showing greater trust in scientists among Democrats as compared to Republicans); *Trust in Science is Becoming More Polarized, Survey Finds*, UCHICAGO NEWS (Jan. 28, 2022), https://news.uchicago.edu/story/trust-science-becoming-more-polarized-survey-finds (showing a thirty-point partisan gap in trust in the scientific community, most of which has emerged since 2018).

299. *See, e.g.*, CARY FUNK & BRIAN KENNEDY, PEW RSCH. CTR., THE POLITICS OF

progressives' identities is so strong that a common lawn sign listing progressive commitments includes the line "science is real."[300]

Scholars differ on how scientific cost-benefit analysis in fact is, and one of critics' main charges against the method is that it is far less objective than is commonly thought.[301] But cost-benefit analysis is at least widely *perceived* as scientific,[302] making it a natural fit with certain aspects of the Democratic Party's ideology. So long as this perception holds, rejection of cost-benefit analysis would stand in an awkward relationship with the centrality of economists to the Democratic Party's professional class and the party's identity as valuing evidence-based decisionmaking.[303] For Democratic elected officials and policymakers, rejecting cost-benefit analysis would prompt the hard question of why they would reject one seemingly evidence-based approach to policymaking even as they trumpet others.

C. The Shadow of Judicial Review

The shadow of judicial review by a conservative judiciary can make

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CLIMATE 5 (2016) (finding that 70% of liberal Democrats "trust climate scientists a lot," compared to 15% of conservative Republicans).

300. *See* Amanda Hess, *'In This House' Yard Signs, and Their Curious Power*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/arts/in-this-house-yard-signs.html.

301. *See supra* Part I (discussing the many complications of implementing cost-benefit analysis in practice).

302. *See* DANIEL A. FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 88 (1999) (noting that "[c]ost-benefit analysis provides an aura of certainty" even though it "involve[s] many judgement calls . . . [that] introduce discretion").

303. It could also create tensions with academic economists elsewhere in the White House, who play important policymaking roles in Democratic administrations. The White House's Council of Economic Advisors (CEA) plays an especially key role in evaluating the benefits and costs of regulation. *See* Sunstein, *supra* note 106, at 1867 (describing CEA as often "the agency's most important interlocutor, because of its expertise and central role in economic analysis"); *see also id.* at 1842, 1864 & 1867 n.106. While CEA has existed for decades, its role of elevating economic expertise is likely greater in Democratic than Republican administrations. During the Trump Administration, the chair of CEA was demoted from cabinet-level status, at times the three-member CEA had one or more vacancies, and senior White House officials marginalized CEA advice in the policymaking process. *See* Josh Zumbrun, *Donald Trump's Cabinet Won't Include Chairman of CEA*, WALL ST. J. (Feb. 9, 2017, 3:22 PM), https://www.wsj.com/articles/donald-trumps-cabinet-wont-include-chairman-of-cea-1486670755; Nick Timiraos & Andrew Restuccia, *White House Economist Tested Positive for Covid-19*, WALL ST. J. (June 26, 2020, 7:43 PM), https://www.wsj.com/articles/white-house-economist-tested-positive-for-covid-19-11593212011.

Democrats feel like they have no choice but to retain cost-benefit analysis as a core feature of the regulatory state. A significant fear among Democratic administrations is that their rules risk being vacated by the courts. In this way, judicial review deters Democratic administrations from abandoning cost-benefit analysis entirely, even if those administrations might otherwise have reasons to consider such a reform. The fact that the White House and federal agencies make regulatory policy in the shadow of judicial review provides a central reason for Democratic administrations to retain cost-benefit requirements.

Under the APA, courts set aside regulations that are in excess of an agency's statutory authority or that courts find to be arbitrary and capricious.[304] The Supreme Court has interpreted the arbitrary and capricious standard as allowing courts to set aside agency action when the agency "offer[s] an explanation for its decision that runs counter to the evidence before the agency."[305] The Court has never articulated a standard for whether it would violate the APA for an agency either to decline to conduct a cost-benefit analysis altogether or to conduct one using modeling assumptions that depart from long-standing economic orthodoxy or the dictates of Circular A-4. But Democratic administrations, mindful of the conservative bent of the Supreme Court and many lower federal courts, have good reason to adhere as closely as possible to a traditional cost-benefit approach. Significant departures, the worry goes, could put their regulations at risk.

The concern that failure to conduct a traditional cost-benefit analysis might put rules at risk of judicial invalidation finds support from a range of precedents. Case law from across the federal judiciary shows courts' willingness to scrutinize how agencies evaluate the benefits and costs of their regulatory actions. The D.C. Circuit has found that the SEC acted in an arbitrary and capricious manner when it "inconsistently and opportunistically framed the costs and benefits of [a] rule; failed to adequately quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; [and] contradicted itself" in the course of its analysis.[306] The Fifth Circuit has found that the Consumer Product Safety Commission "erred by failing to take a hard look at the costs and benefits" of

304. *See* 5 U.S.C § 706(2)(A).

305. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (listing this and other criteria for when an agency action is arbitrary and capricious).

306. Bus. Roundtable v. SEC., 647 F.3d 1144, 1148–49 (D.C. Cir. 2011). *See also* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. Chi. L. Rev. 393, 435–46 (2015) (discussing *Business Roundtable*).

toy safety standards,[307] in a rulemaking pursuant to the Consumer Product Safety Improvement Act.[308] In a case with a different ideological valence but a similar judicial emphasis on benefits and costs, the Ninth Circuit has ruled that fuel economy standards were arbitrary and capricious for their "failure to monetize the value of carbon emissions."[309] District courts have likewise vacated regulations for what those courts perceived as failures of cost-benefit analysis, finding against agencies for justifying rules on the basis of "ancillary benefits"[310] and failing to use the discount rates laid out in Circular A-4.[311] These cases together constitute a warning to federal agencies: declining to conduct cost-benefit analysis, or even conducting analysis that departs from cost-benefit orthodoxy, puts rules at risk of being invalidated under the APA's arbitrary and capricious standard.[312]

In other cases, courts read cost-benefit requirements into agencies' authorizing statutes. Consider, in this regard, the Fifth Circuit's decision in *Corrosion Proof Fittings v. EPA*,[313] one of the "most vilified cases in administrative law."[314] The court held that an EPA rulemaking regulating asbestos was inconsistent with the Toxic Substances Control Act (TSCA)[315] and not supported by substantial evidence as required by the APA.[316] The court closely scrutinized the EPA's method for discounting benefits and costs

307. *See* Tex. Ass'n of Mfrs. v. Consumer Prod. Safety Comm'n, 989 F.3d 368, 387 (5th Cir. 2021).

308. Pub. L. No. 110-314, 122 Stat. 3016 (codified as amended in scattered sections of 15 U.S.C. §§ 2051-2089) (2008).

309. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1181 (9th Cir. 2008); *see also id.* at 1198 (finding that the agency "cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards").

310. *See, e.g.*, Wyoming v. Dep't of Interior, 493 F. Supp. 3d 1046, 1080 (D. Wyo. 2020) ("Absent the ancillary benefits monetized . . . the Waste Prevention Rule is arbitrary and capricious, as it will cost likely more than double what it saves annually.").

311. *See* Louisiana v. Biden, 585 F. Supp. 3d 840, 867 (W.D. La. 2022) (enjoining the Biden Administration's use of interim social cost of greenhouse gas figures on several grounds and approvingly citing plaintiffs' allegation that departures from the discount rates laid out in Circular A-4 rendered the interim figures arbitrary and capricious), *vacated on other grounds*, Louisiana v. Biden, No. 22-30087, 2022 WL 866282 (5th Cir. Mar. 16, 2022).

312. For additional discussion and examples, see Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575 (2015).

313. Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991).

314. Jonathan S. Masur & Eric Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 935 (2018).

315. Pub. L. No. 94-469, 90 Stat. 2003 (codified as amended at 15 U.S.C. §§ 260I-2692) (1976).

316. *See Corrosion Proof Fittings*, 947 F.2d at 1207.

and its invocation of unquantified benefits,[317] "without even a nod to the extensive economic and philosophical literature" relevant to the analysis.[318] The court concluded that under the TSCA, "the EPA must balance the costs of its regulations against their benefits" and argued that the statute "rejected the notion that the EPA should pursue the reduction of workplace risk at any cost."[319] At the Supreme Court level, the Court has sometimes read statutes to require agencies to weigh the benefits and costs of their actions, even when professing to not read statutes to require a full cost-benefit analysis.[320]

Given this legal backdrop, consider the incentives of a federal agency during a Democratic administration seeking to enact a health and safety regulation, consumer protection regulation, environmental regulation, or other progressive measure. The agency could move forward with the regulation without analysis showing that monetized benefits exceed monetized costs. But this approach would expose the regulation to legal risk. A cautious agency general counsel reading decisions like those just discussed could reasonably think that the best way to safeguard a rulemaking from judicial invalidation is to hew as closely to traditional cost-benefit analysis as possible. If the proposed regulation can be plausibly justified on cost-benefit grounds, doing so substantially reduces legal risk.[321] The only apparent downside of cost-benefit analysis in such a circumstance is time and resources. Conducting detailed regulatory impact analysis consumes a large amount of staff time, which limits agency capacity, which in turn (all else

317. *See id.* at 1218–19.

318. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1423 (1992).

319. *See Corrosion Proof Fittings*, 947 F.2d at 1222. For a critique of the court's approach and its implications, see Rothschild, *supra* note 259, at 538–43. *See also id.* at 559 (arguing that "[i]f EPA had performed a cost-benefit analysis that further quantified and monetized the health benefits of banning asbestos, it would have been able to show that a ban was warranted").

320. In *Michigan v. EPA*, 576 U.S. 743 (2015), the Supreme Court interpreted the statutory language "appropriate and necessary" to require the agency to consider the costs of a rule, reasoning that "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Id.* at 752. Despite this conclusion, the majority contended that "[w]e need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value," allowing that "[i]t will be up to the Agency to decide . . . how to account for cost." *Id.* at 759.

321. Failure to defend a regulation on cost-benefit grounds might expose it to political criticism as well; no agency wants to publicly admit that the costs of one of its proposed actions exceed the benefits.

equal) means less regulatory activity overall.[322] Democratic administrations have historically been inattentive to this point,[323] viewing the risks of eschewing cost-benefit analysis as greater than the benefits of a more streamlined regulatory process. But even if Democrats were more focused on regulatory capacity issues, the concern that individual rules might be voided by the courts almost certainly incentivizes continued use of cost-benefit methods.

IV. MAPPING DIVISIONS OVER COST-BENEFIT ANALYSIS

Though presidential administrations of both parties have retained cost-benefit analysis, their shared acceptance of the method should not obscure their divergent regulatory policy agendas. This Part shows how the parties seek to advance their agendas by taking different approaches to how cost-benefit analysis should operate in practice. It does not evaluate the merits of different approaches to cost-benefit analysis—a significant body of existing literature already does just that—but rather seeks to map the terrain of political and legal conflict over cost-benefit analysis. In so doing, it shows how cost-benefit analysis has become a key terrain on which partisan battles over regulatory policy play out.

A. The Reach of Cost-Benefit Requirements

A first issue is the proper reach of cost-benefit analysis. Because cost-benefit analysis can slow regulatory action, Republican administrations and members of Congress have sought to extend its reach. Democrats have largely pushed back on these efforts to expand the footprint of cost-benefit analysis and, in at least one instance, have sought to reduce the number of rules subject to formal cost-benefit analysis. The tug of war between the parties on which rules are subject to cost-benefit analysis matters because more analytic requirements, all else equal, mean reduced agency capacity.

Perhaps the most divisive point concerning cost-benefit analysis's reach is whether rulemakings undertaken by independent agencies should be subject to the same analytic requirements as those undertaken by executive agencies.

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322. *See supra* notes 192–201 and accompanying text (discussing this dynamic).

323. *Cf.* Bagley, *supra* note 199, at 348 ("When Democrats held both Congress and the White House in 2009 and 2010, they didn't press to streamline or rethink administrative law."). For a rare example of a Democratic administration being attentive to the labor-intensive nature of cost-benefit analysis, see *infra* text accompanying notes 336–342 (discussing the Biden Administration's increase in the economic significant threshold above which cost-benefit analysis is required).

Executive orders on regulatory review by presidents of both parties have historically declined to extend cost-benefit requirements to independent agencies.[324] But some, mostly on the political right, have sought to extend cost-benefit analysis to independent agencies. Though the Reagan Administration did not subject independent agencies to the requirements of Executive Order 12,291, this reflected concerns about the legality of doing so, not a policy view, as reflected by the fact that the Administration asked independent agencies to voluntarily comply with the order's requirements.[325] As noted above, proposed legislation that would have required independent agencies to conduct cost-benefit analysis has divided the parties, with Republicans generally in support and Democrats generally opposed.[326] Business interests and the corporate bar have supported congressional efforts to subject independent agencies' rules to cost-benefit requirements.[327] The Trump Administration's Office of Legal Counsel authored an opinion concluding that it would be lawful for the President to direct independent agencies to evaluate their proposed regulations based on cost-benefit analysis.[328] Though the Obama Administration did encourage independent agencies to use cost-benefit analysis,[329] efforts to extend the reach of cost-benefit analysis to independent agencies have come more from conservatives than from progressives.[330]

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324. *See* Clark Nardinelli & Susan E. Dudley, *Extending Executive Order 12866 to Independent Regulatory Agencies*, GEO. WASH. UNIV. REG. STUD. CTR. (Feb. 3, 2021), https://regulatorystudies.columbian.gwu.edu/extending-executive-order-12866-independent-regulatory-agencies (noting the exclusion of independent agencies from the regulatory review executive orders issued by the Reagan, Clinton, Obama, and Trump Administrations).

325. Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1506 (2002).

326. *See supra* text accompanying notes 250–261 (discussing legislative proposals).

327. *See* Levin, *supra* note 202, at 528.

328. Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies, 43 Op. O.L.C. (Oct. 8, 2019) (slip op. at 10), https://www.justice.gov/olc/file/1349716/download ("[U]nder his constitutional authority to supervise the execution of federal law, the President may establish both general principles for agencies to follow in rulemaking, such as cost-benefit principles, and administrative mechanisms to effectuate those principles, such as centralized regulatory review." (internal citation omitted)).

329. Exec. Order No. 13,579, § 1(c), 76 Fed. Reg. 41,587, 41,587 (July 11, 2011) (providing that, "[t]o the extent permitted by law, independent regulatory agencies should comply with" the provisions of Executive Order 13,563, which directs agencies to conduct cost-benefit analysis).

330. It bears emphasizing that independent agencies sometimes conduct cost-benefit analysis of major regulations even through not required to do so by Executive Order, in part

Another area of possible conflict is the proper role of cost-benefit analysis for rules with the primary goal of transferring resources between groups rather than improving overall social welfare. Consider a rule that either expands or contracts eligibility for public benefits like Supplemental Nutrition Assistance Programs or Social Security Disability Benefits. Such rules have historically not been subject to anything close to full-scale cost-benefit analysis.[331] The same goes for tax regulations, which increase or decrease the federal government's receipt of revenue from private parties. But the scope of these carve-outs provides a forum for political contestation. The Trump Administration sought to bring cost-benefit analysis into the tax regulatory process,[332] an effort that was met with criticism by some progressives and reversed by the Biden Administration.[333] Conversely, the Biden Administration sought to give agencies greater flexibility in accounting for transfers separately from benefits and costs.[334] The parties are highly polarized on numerous issues relating to the transfer of resources, including issues relating to welfare state programs, other federal spending, and tax policy. This polarization likely portends partisan division over what counts as a transfer and how to evaluate such transfers in cost-benefit analysis. So long as different analytic requirements apply to different sorts of regulations, there is room for contestation over the proper scope of different categories of rules.

Democrats have rarely sought to narrow the reach of cost-benefit analysis.

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because doing so helps safeguard their rules against legal challenges. *See supra* notes 195–198 and accompanying text (discussing the SEC and *Business Roundtable*).

331. *See* Sunstein, *supra* note 106, at 1868–69 (discussing OIRA's approach to transfer rules); *see also* Eric A. Posner, *Transfer Regulations and Cost-Effectiveness Analysis*, 53 DUKE L.J. 1067, 1069 (2003) (noting that for rules that transfer resources from taxpayers to a particular beneficiary, non-zero administrative costs mean that "a conventional cost-benefit analysis of a transfer regulation will always yield a negative outcome").

332. *See* Farber, *supra* note 139, at 406–08 (discussing the issue of OIRA jurisdiction over tax regulations); *see also* Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455 (2018) (discussing the issue in detail).

333. *See* Memorandum of Agreement, The Department of the Treasury and the Office of Management and Budget, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), https://home.treasury.gov/system/files/131/2023-MOA-EO12866.pdf; *see also* Greg Leiserson, *Cost-Benefit Analysis of U.S. Tax Regulations Has Failed. What Should Come Next?* WASH. CTR. FOR EQUITABLE GROWTH 1, 2 (Sept. 2020), https://equitablegrowth.org/research-paper/cost-benefit-analysis-of-u-s-tax-regulations-has-failed-what-should-come-next (arguing that "[i]n a period of incredible regulatory activity from the Treasury Department and the [Internal Revenue Service], the cost-benefit analyses released alongside proposed and final regulations provide little information relevant to assessing the merits of those regulations").

334. *See* REVISED 2023 CIRCULAR A-4, *supra* note 28, at 57–59.

Their focus has instead largely been on fighting Republican efforts to require greater use of cost-benefit analysis.[335] An important exception is the Biden Administration's Executive Order 14,094, which attempted to reverse one way cost-benefit analysis crept into an ever-greater share of regulations during the prior generation. The executive orders on regulatory review by the Reagan and Clinton Administrations both require cost-benefit analysis for rules with annual economic impacts greater than $100 million.[336] But neither executive order provided that the $100 million threshold should be adjusted for inflation.[337] The result is that the real value of the economic significance threshold fell for decades, which in turn meant that agencies were required to prepare cost-benefit analyses for an ever-larger share of their rules.[338] To the extent that requirements that agencies conduct detailed analysis are likely to exert a disproportionate resource tax on administrations with more ambitious regulatory agendas, the shirking real value of the $100 million threshold almost certainly harms Democrats more than Republicans.[339] The Biden Administration tried to reverse this trend by raising the economic significance threshold to $200 million and providing that the threshold be keyed to gross domestic product (inflation plus real growth) and adjusted every three years.[340] The Biden Administration

335. *See supra* notes 249–261 and accompanying text (discussing congressional debates over cost-benefit mandates).

336. *See* Exec. Order No. 12,291, §§ 1(b)(1), 3(d), 46 Fed. Reg. 13,193, 13,193, 13,194 (Feb. 17, 1981); Exec. Order No. 12,866, §§ 2(f)(1), 6(a)(3)(B)-(C), 58 Fed. Reg. 51,735, 51,738, 51,742 (Sept. 30, 1993).

337. By contrast, the trigger for the analytic requirements of the Unfunded Mandates Reform Act (UMRA), Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified as amended in scattered sections of 2 U.S.C.), is a threshold of $100 million (in costs to subnational governments or the private sector), but UMRA expressly provides that the threshold should be "adjusted annually for inflation," 2 U.S.C. § 1532(a).

338. Though many regulatory actions reviewed by OIRA are reviewed for reasons other than economic significance, the Clinton and Reagan executive orders subject economically significant rules to more extensive analytic requirements than other regulatory actions. *See* Exec. Order No. 12,291, §§ 1(b)(1), 3(d), 46 Fed. Reg. at 13,193, 13,194; Exec. Order No. 12,866, §§ 3(f)(1), 6(a)(3)(B)-(C), 58 Fed. Reg. at 51,738, 51,742; *see also* Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447, 461 (2014).

339. *Cf. supra* Section II.C (discussing the relationship between cost-benefit analysis and the parties' asymmetric regulatory ambitions).

340. *See* Exec. Order No. 14,094, § 1(b), 88 Fed. Reg. 21,879, 21,879 (Apr. 6, 2023) (setting the economic significance threshold as "an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of OIRA for changes in gross

designed the change to reduce the number of regulations subject to formal cost-benefit analysis.[341] It can thereby be seen as a counterweight to attempts to expand the reach of cost-benefit analysis; while Republicans have sought to expand the number of rules subject to cost-benefit analysis to reduce regulatory policymaking, the Biden Administration sought to contract the reach of cost-benefit analysis to make rulemakings more efficient and focus analytic resources on the most important rules.[342]

B. Who Counts in Cost-Benefit Analysis?

Another key issue that divides the two parties—and will likely continue to be a source of division—is the issue of who counts in cost-benefit analysis. The most divisive issue of scope at present is a geographic question: whether and how to count regulatory benefits and costs that accrue outside of the United States. But one can easily imagine other points of controversy in the future: how to value the lives of persons of different ages, the intersection of cost-benefit analysis with questions of when life begins, and the proper valuation of the lives of nonhuman animals.

The issue of global impacts matters because many U.S. regulatory policy issues have considerable impacts beyond the nation's borders. The most significant example is regulations that seek to limit greenhouse gas emissions, given that the costs of such regulations fall primarily domestically, but there are significant domestic *and* nondomestic benefits to reducing emissions.[343] For this reason, the place of nondomestic impacts in cost-benefit analysis polarizes the parties. The Bush Administration's Circular A-4 directed

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domestic product)"); Memorandum from Richard L. Revesz, Adm'r, Office of Info. & Reg'y Aff., to Reg'y Pol'y Officers at Exec. Departs. and Agencies 2–3 (April 6, 2023) (noting that "$200 million in annual benefits, or costs, or transfers is sufficient to make an action significant" under this provision).

341. *See* Resources for the Future, *Modernizing Regulatory Review: Exploring OMB's Updated Benefit-Cost Guidance*, RFF LIVE (Apr. 11, 2023), https://rff.org/events/rff-live/modernizing-regulatory-review-exploring-ombs-updated-benefit-cost-guidance (video at 35:10 to 35:45) (OIRA Administrator Richard Revesz describing the effects of the change as "not trivial" and noting that the goal is to "bring down to roughly the same number [as when the threshold was established] the number of regulations that get this full RIA treatment").

342. Even with the increase in the economic significance threshold, agencies are still legally required to provide sufficient analysis to survive arbitrary and capricious scrutiny, *see supra* notes 308–323 and accompanying text, and to comply with other statutory mandates, such as UMRA, *see supra* notes 59 & 337.

343. Additional examples of regulations with impacts beyond U.S. borders include regulations relating to immigration and trade, among other topics.

agencies to focus primarily on domestic effects of regulation, even when regulating on topics of obvious cross-border relevance.[344] In the two decades between the promulgation and revision of Circular A-4, the parties took opposing views on whether and how to account for global impacts of regulation in cost-benefit analysis, especially in the context of emissions regulation. The Obama Administration described climate change as involving a "global externality" and therefore contended that "to address the global nature of the problem, the [social cost of carbon] must incorporate the full (global) damages caused by emissions."[345] The Trump Administration reversed course and used domestic-only figures to calculate the impacts of rules concerning carbon and methane emissions.[346] The Biden Administration restored the Obama-era approach of accounting for global impacts of emissions,[347] and it gave guidance in its revised Circular A-4 that would make it easier to count global impacts in cost-benefit analysis.[348]

Both parties' approaches to the domestic-versus-global question have been challenged in litigation, but courts have not definitively settled the question of which figure is appropriate. In 2020, a federal district court in California found the Trump Administration's use of a "domestic only" social

344. *See* ORIGINAL CIRCULAR A-4, *supra* note 28, at 15 (directing agencies that "analysis should focus on benefits and costs that accrue to citizens and residents of the United States" and adding that "[w]here you choose to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects should be reported separately").

345. OBAMA INTERAGENCY WORKING GROUP, *supra* note 271, at 10.

346. *See* Dana Nuccitelli, *The Trump EPA Is Vastly Underestimating the Cost of Carbon Dioxide Pollution to Society, New Research Finds*, YALE CLIMATE CONNECTIONS (July 30, 2020) (noting that the Trump Administration "consider[ed] only domestic, rather than global, climate damage costs," a move encouraged by congressional Republicans); Niina H. Farah & Jennifer Hijazi, *'It Cannot Survive.' Why Trump's Rollback of Methane Rule Might Lose in Court*, SCIENCEINSIDER (Aug. 17, 2020) https://www.science.org/content/article/it-cannot-survive-why-trump-s-rollback-methane-rule-might-lose-court (noting that the Trump Administration drew "criticism for its use of an interim domestic social cost of methane estimate that only accounts for harm that occurs within the United States").

347. *See, e.g.*, Heather Boushey, *A Return to Science: Evidence-Based Estimates of the Benefits of Reducing Climate Pollution*, WHITE HOUSE COUNCIL ON ECON. ADVISORS: BLOG (Feb. 26, 2021), https://www.whitehouse.gov/cea/written-materials/2021/02/26/a-return-to-science-evidence-based-estimates-of-the-benefits-of-reducing-climate-pollution (restoring Obama-era social cost of greenhouse gas estimates, noting that "climate actions taken by the United States and other countries under the Paris Agreement will benefit all countries, including the United States," and concluding that "[j]ust as we expect and encourage other countries to consider the climate impact of their actions on us, we should take the global benefits of our actions into account").

348. *See* REVISED 2023 CIRCULAR A-4, *supra* note 28, at 7–10.

cost of methane to be arbitrary and capricious.[349] The court reasoned that no legal authority barred the use of global estimates[350] and that "focusing solely on domestic effects has been soundly rejected by economists as improper and unsupported by science."[351] Conversely, in 2022, a federal district court in Louisiana stayed the Biden Administration's attempt to account for global impacts in calculating the social cost of greenhouse gases on the grounds that the Administration lacked statutory authority to do so.[352] As of this writing, Supreme Court has not weighed in on global impacts, either with respect to what is permissible under arbitrary and capricious review or whether particular statutes require either including or excluding nondomestic effects.

The question of domestic-versus-global impacts is not one with a technocratic answer. It implicates the issue of whether non-U.S. persons should matter in cost-benefit analysis and, if so, how much they should matter relative to U.S. persons. Economics alone does not provide a way of answering this question. The answer, instead, implicates a blend of political theory, statutory interpretation, and raw politics. With respect to political theory, the question is a classic one: what duties do nations have toward persons beyond their borders?[353] As a legal matter, the question is whether particular statutes mandate either domestic-only or global approaches, but most regulatory statutes do not give express direction on that point. And policy preferences are undoubtedly driving attitudes in this area: unsurprisingly, progressive advocates for climate action have pushed for global estimates, while conservative opponents of regulation have opted for domestic-only estimates. For these reasons, the domestic-versus-global

349. *See* California v. Bernhardt, 472 F. Supp. 3d 573, 609–14 (N.D. Cal. 2020).

350. *See id.* at 612.

351. *Id.* at 613. Further, the court concluded that relying on a domestic-only estimate ignores impacts of climate change on millions of U.S. citizens living abroad, billions of dollars of physical assets owned by U.S. companies abroad, U.S. trading partners, global migration, and geopolitical security. *See id.*

352. *See* Louisiana v. Biden, 585 F. Supp. 3d 840, 865 (W.D. La. 2022) (finding that the Biden Administration's approach "contradicts Congress' intent regarding legislative rulemaking by mandating consideration of the global effects"). The district court's decision was later stayed on the grounds that plaintiff states lacked standing. *See* Louisiana v. Biden, No. 22-30087, 2022 WL 866282, at *1 (5th Cir. Mar. 16, 2022) (per curiam).

353. For an overview of global justice debates, see Gillian Brock, *Global Justice*, STAN. ENCYCLOPEDIA OF PHIL. (Mar. 6, 2015), https://plato.stanford.edu/entries/justice-global. For an argument on moral grounds in favor of a global estimate of the social cost of greenhouse gases, see Cass R. Sunstein, *Climate Change Cosmopolitanism*, 39 YALE J. ON REG. 1012, 1034–37 (2022).

debate in cost-benefit analysis will likely remain salient so long as climate change remains at the forefront of regulatory politics.[354]

The domestic-versus-global question is the most prominent recent example of contestation over who counts—who counts at all, and to what degree—for purposes of cost-benefit analysis. But other similar issues may arise in the future. Consider three examples:

- *Age*: A recurrent point of debate in cost-benefit analysis is whether and how to account for age. Regulatory agencies in the United States typically use uniform values of a statistical life regardless of the age of the persons affected by a regulation.[355] However, some scholars have criticized the use of uniform values and advocated for differential values based on age.[356] During the rare instances in which agencies have used nonuniform values of a statistical life based on age, they have at times faced intense public criticism.[357] Agencies may have an incentive to adopt nonuniform values by age when promulgating or rescinding regulations that disproportionately impact either the old or the young since, in such cases, accounting for age could yield a more favorable cost-benefit analysis. If an agency attempted to use nonuniform values of a statistical life based on age in a way that appeared to devalue the lives of older Americans, political controversy would almost certainly ensue.
- *Fetuses*: Another point of possible future controversy is whether and

354. *See* Arden Rowell, *Foreign Impacts and Climate Change*, 39 HARV. ENV'T L. REV. 371, 374 (2015) ("[T]he global versus domestic nature of the benefits assessment will play a central role in setting climate change policy.").

355. *See, e.g.*, Memorandum from Molly J. Moran, Acting Gen. Couns., & Carlos Monje, Assistant Sec'y for Transp. Pol'y, to Secretarial Officers & Modal Adm'rs, *supra* note 36, at 4 ("Prevention of an expected fatality is assigned a single, nationwide value in each year, regardless of the age, income, or other distinct characteristics of the affected population . . . .").

356. *See, e.g.*, Cass R. Sunstein, *Lives, Life-Years and Willingness to Pay*, 104 COLUM. L. REV. 205 (2004) (calling for regulatory analysis based on the value of a statistical life-year rather than the value of a statistical life).

357. *See* Hemel, *supra* note 264, at 716–20 (discussing the "senior death discount" controversy of the late 1990s and early 2000s). This backlash may be unique to proposed changes that would decrease the value of mortality risk reductions for senior citizens, as opposed to those that would increase the value of mortality risk reductions for children. On an example of the latter effort, which did not give rise to public backlash, see Notice of Availability: Proposed Draft Guidance for Estimating Value per Statistical Life, 88 Fed. Reg. 17,826, 17,828 (Mar. 24, 2023) (Consumer Product Safety Commission proposal that the VSL for children be double that of the VSL for adults).

how fetuses count for purposes of cost-benefit analysis. It hardly needs to be said that the proper moral and legal status of fetuses is among the most contested issues in American politics, and the Supreme Court's overruling of *Roe v. Wade*[358] set off a fresh wave of policy and legal debates over abortion.[359] It is easy to imagine contestation about the legal status of fetuses manifesting in the cost-benefit context. Most simply, cost-benefit analysis of a proposed abortion restriction would vary greatly depending on whether fetuses count as much as children (i.e., with the same VSL), some lesser amount (i.e., with a lower VSL), or not at all (i.e., with a VSL of zero). In evaluating such a regulation, Republicans would likely value fetuses more highly than Democrats in cost-benefit analysis. More intriguingly, though, environmental or health-related regulations could plausibly invert this dynamic: Democrats seeking to impose protective regulations would have incentives to count those regulation's impacts on fetuses (to increase the benefits side of the cost-benefit ledger), whereas Republicans averse to such regulations would have incentives not to count impacts on fetuses (to reduce the benefits side of the ledger). Regardless of context, political backlash and litigation could be expected in the face of any effort to account for fetuses in cost-benefit analysis.

- *Nonhuman animals*: As practiced by regulatory agencies, cost-benefit analysis focuses on the welfare of humans. The welfare of nonhuman animals can be relevant indirectly—if, say, humans have a positive willingness to pay to promote the well-being of nonhuman animals—but nonhuman animals typically do not count in their own right.[360] While neither political party currently prioritizes the welfare of nonhuman animals in policymaking, in the future, agencies may seek to value animal welfare and lives in

358. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)).

359. *See generally* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023) (mapping abortion law and politics in the aftermath of *Dobbs*).

360. One study, for example, uses a contingent valuation method to determine dog owners' willingness-to-pay for reductions in mortality risk for pet dogs, but it makes no reference to either the preferences of dogs themselves or the value of canine life outside of the preferences that humans may have. *See* Deven Carlson et al., *Monetizing Bowser: A Contingent Valuation of the Statistical Value of Dog Life*, 11 J. BENEFIT-COST ANALYSIS 131 (2019).

> cost-benefit analysis.[361] If agencies were to make such an effort, controversy would likely emerge about whether and how to account for the interests of nonhuman animals in regulatory analysis.

Issues of who counts and how much in cost-benefit analysis are necessarily normative. Technocratic or economic grounds alone simply cannot provide guidance on how to weigh the interests of non-U.S. persons, persons of different ages, fetuses, or nonhuman animals in cost-benefit analysis. When agencies take on these fraught normative questions in their cost-benefit analyses, political disagreement is inevitable.

C. The Discount Rate

Another point of partisan division is the proper discount rate to use in regulatory analysis. Regulatory analysis employs discount rates in accounting for the impacts (both benefits and costs) of regulatory action that take place in the future.[362] The intuition behind discount rates is that one dollar in the future is worth less than one dollar today, so a one-dollar regulatory benefit or cost in the future should be discounted to some amount less than a dollar for purposes of calculating the present value of that benefit or cost.[363] A lower discount rate means that future impacts are weighted more heavily (because they are discounted less), whereas a higher discount rate means that future impacts are weighted less heavily (because they are discounted more). While most contributors to debates over discount rates have been economists, Thomas Sargentich has emphasized that "[i]t is unrealistic to suggest that decisions about discount rates are unproblematically 'rational,' 'consistent,' and otherwise based on objective, government-wide criteria, as opposed to being significantly based on normative and frankly debatable judgments."[364] For example, the decision to use market data to set discount rates itself

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361. For one proposal, see Andrew Stawasz, *Why and How to Value Nonhuman Animals in Cost-Benefit Analysis* (Aug. 3, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3643473.

362. *See* REVISED 2023 CIRCULAR A-4, *supra* note 28, at 75–82.

363. The original Circular A-4 defended the use of discount rates on three grounds: resources that are invested usually earn positive returns, which makes current consumption more expensive than future consumption; people generally prefer present to future consumption; and if consumption continues to increase over time, the principle of diminishing marginal utility suggests that an increment of consumption will be less valuable in the future as compared to the present. *See* ORIGINAL CIRCULAR A-4, *supra* note 28, at 31–32.

364. Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 33 (2007).

reflects a normative judgment about the appropriateness of setting discount rates on the basis of such data.

The choice of what discount rate to use can have significant consequences for regulatory policy, especially when regulatory impacts will be felt in the distant future. Regulation with an impact on climate change provides a dramatic example. Suppose that climate change, if no action were taken today, would cause $1 trillion of costs (to life, health, property, etc.) in the year 2100. Using a 3% discount rate, it would have been worthwhile, in 2017, to enact a regulation with costs of up to $86 billion to prevent those future harms. Using a 7% discount rate, it would have only been worth preventing those future harms at a cost of $4 billion or less.[365] As this example illustrates, the discount rate has significant stakes for which regulatory policies pass cost-benefit muster and which do not.

So long as the parties are divided about the appropriate scope of regulation on topics with long-term effects, they will have reason to advocate for different discount rates. This is precisely what has happened. The Bush Administration's Circular A-4 directed agencies to use discount rates of both 3% (the rate at which society discounts future consumption) and 7% (an estimate of the average before-tax rate of return to private capital).[366] The Obama Administration's estimates of the social cost of carbon used discount rates of 2.5%, 3%, and 5%.[367] In using these estimates, it acknowledged that the choice of a discount rate "raises highly contested and exceedingly difficult questions of science, economics, philosophy, and law" and that "there is no consensus about what rates to use in this context."[368] The Trump Administration derived a lower social cost of carbon in part because it used

365. *See* Jason Bordoff, *Trump vs. Obama on the Social Cost of Carbon—And Why It Matters*, CTR. FOR GLOB. ENERGY POL'Y (Nov. 15, 2017), https://www.energypolicy.columbia.edu/research/op-ed/trump-vs-obama-social-cost-carbon-and-why-it-matters (providing this example); *see also* Jonathan Baron, *The Discount Rate for the Social Cost of Carbon*, REG'Y REV. (Jan. 18, 2017), https://www.theregreview.org/2017/01/18/baron-discount-rate-social-cost-carbon.

366. *See* ORIGINAL CIRCULAR A-4, *supra* note 28, at 31–37 (noting that some agencies have given additional guidance on discount rates). *See, e.g.*, EPA GUIDELINES, *supra* note 51, at 6-1 to 6-18.

367. OBAMA INTERAGENCY WORKING GROUP, *supra* note 271 at 1, 17–23. The Obama Administration later contended, after completing work on the social cost of carbon, that "the lower discount rate should be at most 2%." COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, DISCOUNTING FOR PUBLIC POLICY: THEORY AND RECENT EVIDENCE ON THE MERITS OF UPDATING THE DISCOUNT RATE 3 (Jan. 2017), https://obamawhitehouse.archives.gov/sites/default/files/page/files/201701_cea_discounting_issue_brief.pdf.

368. OBAMA INTERAGENCY WORKING GROUP, *supra* note 271, at 17.

higher discount rates, reverting to Circular A-4's figures of 3% and 7%.[369] In revising Circular A-4, the Biden Administration opted to base its default discount rate on the social rate of time preference—the rate at which society is willing to trade current consumption for future consumption—which it calculated to be 2% at the time of its revisions to Circular A-4.[370] Some progressives have advocated for even lower discount rates in the climate context: New York State, for instance, directs agencies to use a primary discount rate of 2% while also reporting estimates with a discount rate as low as 1%.[371] The economic merits of the discount rate debate are beyond this Article's scope,[372] but this brief sketch of different approaches shows that the parties perceive—correctly—that the choice of discount rate has high stakes for regulatory policy outcomes.

The importance of the discount rate, coupled with the political contentiousness of climate regulation, means that partisan disagreement around the discount rate will likely endure. Skeptics of climate regulation have an incentive to use higher discount rates, while supporters of climate regulation have an incentive to use lower rates. Republican administrations using high discount rates are open to criticism and perhaps litigation because current research points toward lower rates and using higher rates runs contrary to the direction of the 2023 revisions to Circular A-4. Prior to the Biden Administration's revisions to Circular A-4, Democratic administrations using lower discount rates were open to legal liability on the grounds that they were departing from Circular A-4's then-prevailing guidance on discount rates.[373] Avoiding this legal exposure provides one advantage of many of the Biden Administration's revisions to Circular A-4.

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369. *See supra* note 275.

370. *See* REVISED 2023 CIRCULAR A-4, *supra* note 28, at 76–77 (noting that "[t]his approach produces (as of this writing) a real rate of 1.7 percent per year, to which OMB adds a 0.3 percent per-year rate to reflect inflation," resulting in "an estimate of the social rate of time preference of 2.0 percent per year").

371. N.Y. DEP'T OF ENV'T CONSERVATION, ESTABLISHING A VALUE OF CARBON: GUIDELINES FOR USE BY STATE AGENCIES 4, 17–20 (May 2022), https://www.dec.ny.gov/docs/administration_pdf/vocguid22.pdf.

372. For an overview of approaches to the discount rate and a survey of over two-hundred experts on the topic, see Moritz A. Drupp et al., *Discounting Disentangled*, 10 AM. ECON. J.: ECON. POL'Y 109 (2018).

373. In *Louisiana v. Biden*, 585 F. Supp. 3d 840 (W.D. La. 2022), the district court found that plaintiffs were likely to succeed on the merits of their challenge to the Biden Administration's social cost of greenhouse gas estimates on the grounds that those estimates "depart[ed] from decades of prior Executive Branch cost/benefit practice regarding discount rates," citing Circular A-4. *Id.* at 867–68.

But such revisions could also open a new front in the partisan battles over cost-benefit analysis by leading to a dynamic in which, whenever partisan control of the White House changes, the new administration attempts to revise Circular A-4 to endorse its preferred discount rate.

D. Distributional Considerations

Another flashpoint in debates over cost-benefit analysis is the role of distributional considerations in regulatory analysis. As discussed in Part I, traditional cost-benefit analysis looks only at net benefits without regard to which people receive the benefits and costs.[374] Such calculations of net benefits alone do not illuminate whether and how regulatory benefits and burdens fall differently along the lines of race, ethnicity, sex, age, or geography, among other axes. Efforts to incorporate distribution into cost-benefit analysis raise challenging technocratic questions about how the method should operate in practice, along with novel political and legal questions that have emerged as a point of partisan difference and will likely continue to divide the parties.

Regulatory cost-benefit analysis has historically neglected distributional considerations.[375] But scholars have developed a variety of approaches for incorporating distribution into regulatory analysis. There are two main ways in which cost-benefit analysis could account for the distributive impacts of regulation. One approach uses distributional weights, which more heavily account for benefits and harms accruing to the poor than the rich, reflecting

374. *See supra* notes 27, 42–43 and accompanying text.

375. *See* Revesz & Yi, *supra* note 56, at 55 ("[E]fforts to make distributional analysis a meaningful component of the evaluation of regulation . . . cannot be regarded as anything other than a failure."); *see also* Lisa Robinson, James Hammitt & Richard Zeckhauser, *The Role of Distribution in Regulatory Analysis and Decision Making* 20 (Mossavar-Rahmani Ctr. for Bus. & Gov't Working Paper No. 2014–02, 2014), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Zeckhauser_final.pdf ("U.S. government agencies are currently required to assess the distribution of the impacts of major environmental, health, and safety regulations. We find, however, that they pay little attention to this issue."). Daniel Farber has noted that the longstanding practice of using a uniform VSL for all persons, regardless of income or other characteristics, is itself a form of redistribution toward the poor. *See* Daniel A. Farber, *Inequality and Regulation: Designing Rules to Address Race, Poverty, and Environmental Justice*, 3 AM. J.L. & EQUALITY 2, 28–29 (2023) (arguing that "[c]ompared with the economically 'correct' approach of using lower values for the poor, this [a uniform VSL] amounts to a degree of redistribution in their favor" and defending this practice as "morally justified by the principle of devoting equal resources to prevent equal harms").

that the marginal utility of income is greater for the poor.[376] A second approach is to engage in traditionally weighted cost-benefit analysis in calculating net benefits, but to separately report how a regulation's benefits and costs would fall on different groups (with the relevant groups varying depending on the type of regulation at issue). If a regulation is expected to have disparate effects on particular demographic groups, the agency would report not only overall benefits and costs but also benefits and costs as applied to those groups. Most importantly, in deciding which of several possible courses of action to take, the agency would qualitatively account for the distributional consequences of each possible approach.[377]

Each of these approaches gives rise to a distinctive set of political and legal dynamics. Using distributional weights in regulatory analysis would have the vital advantage of more accurately capturing the effect of regulatory policy on actual people's welfare—given the declining marginal utility of income—and avoiding the distortions of using traditionally weighted benefits and costs.[378] Further, building distributional considerations into the primary estimate of a rule's net benefits signals that preventing bias against the poor—measuring welfare, not just ability to pay—is not an afterthought but rather a core aspect of regulatory analysis. But whatever particular weights were used, political controversy and litigation would almost certainly result, likely mirroring the contestation over the proper discount rate. Progressives would likely call for more aggressive weighting, and conservatives would likely call for less. Moreover, existing scholarship on weighting and experience with weighting abroad have nearly entirely focused on weighting by income.[379]

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376. For discussions of distributional weighting, see, for example, Acland & Greenberg, *supra* note 44; Matthew D. Adler, *Benefit-Cost Analysis and Distributional Weights: An Overview*, 10 REV. ENV'T ECON. & POL'Y 264 (2016); Farber, *supra* note 375, at 24–28; Marc Fleurbaey & Rossi Abi-Rafeh, *The Use of Distributional Weights in Benefit-Cost Analysis: Insights from Welfare Economics*, 10 REV. ENV'T ECON. & POL'Y 286 (2016); David A. Weisbach, *Distributionally Weighted Cost-Benefit Analysis: Welfare Economics Meets Organizational Design*, 7 J. LEGAL ANALYSIS 151 (2015). A key distinction in this area is between weights that correct for the diminishing marginal utility of income, which do not favor the poor but instead simply avoid disfavoring them, and additional weights that inflate the welfare of the poor relative to the wealthy.

377. *See* Revesz & Yi, *supra* note 56, at 90–98 (describing and endorsing this approach).

378. *See, e.g.*, Acland & Greenberg, *supra* note 44, at 69 ("[T]he diminishing marginal utility of income makes [traditionally weighted cost-benefit analysis], as a measure of welfare, biased against the poor.").

379. The most prominent example of weighting in regulatory analysis from abroad comes from the United Kingdom, where agencies are directed to engage in income weighting based on a marginal utility of income estimated at 1.3. *See* HM TREASURY, THE GREEN

Attempting to go beyond income and weight for any other characteristics, like race and sex, would give rise to considerable difficulties. It would be politically toxic to put different numerical values on the relative well-being of different demographic groups, there is likely no analytically sound way to do so, and courts would almost certainly strike down any effort to expressly assign numerical weights based on innate demographic characteristics.[380]

The alternative approach of reporting and considering distributional effects separately from net benefits calculations comes with its own advantages and disadvantages. The main upside of that approach is that it allows regulatory analysis to account for demographic features other than income, and it provides an easily understandable accounting of how the benefits and costs of a proposed rule fall differently on various groups. However, it risks exacerbating political conflict over regulatory policy by highlighting how each regulation creates winners and losers. From the standpoint of a regulatory agency, presenting net benefits alone conveniently hides the fact that the benefits and costs of rules are not evenly distributed across the population. A rule may have $200 million in net benefits, but that might be because it has $250 million in net benefits for Group A and $50 million in net costs for Group B. Or, in a less extreme case, the rule may have net benefits for both groups, but in very different amounts: say, $240 million in net benefits for Group A and only $10 million in net benefits for Group B. In either instance, presenting distributional analysis as part of regulatory analysis might mobilize members of Group B in opposition to the rule. To be sure, even without formal distributional analysis, members of Group B might already know that the rule either hurts their interests or helps them only minimally. But requiring formal distributional analysis highlights the differential effects of regulation on different groups. This could lead to greater interest group mobilization against proposed rules, and it would likely provide the party out of power with distributional arguments against

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BOOK: CENTRAL GOVERNMENT GUIDANCE ON APPRAISAL AND EVALUATION 96–97 (2022). The Biden Administration's revisions to Circular A-4 announced that "1.4 is a reasonable estimate of the absolute value of the income elasticity of marginal utility for use in regulatory analyses." *See* REVISED 2023 CIRCULAR A-4, *supra* note 28, at 66–67.

380. The contemporary Supreme Court's aversion to express government classifications based on race, a position often described as "colorblindness," is most succinctly summarized by Chief Justice John Roberts's statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007). In *Students for Fair Admissions v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023), the Court likewise held that "[e]liminating racial discrimination means eliminating all of it," *id.* at 2161, and concluded that race-based state action is permissible only "in the most extraordinary case[s]," *id.* at 2162–63.

proposed rules. Some progressives might argue that if a rule's benefits disproportionately flow to historically advantaged groups, the rule shouldn't issue even if it has positive net benefits overall. Some conservatives might likewise argue against a rule that benefits urban dwellers but has little or no effect on rural Americans, even if the rule has positive net benefits overall. A requirement that agencies report distributional effects of their regulations in detail could reduce the volume of net-beneficial regulation by empowering parties and interest groups to argue against proposed rules based on where the benefits and harms of those rules fall.

Beyond these political dynamics, making use of distributional considerations in regulatory policymaking could give rise to legal challenges. Imagine an agency that justified a rule with a statement like the following: "Proposal X has higher monetized net benefits, but Proposal Y is better for a particular group that we have reason to care about, so we opt for Proposal Y." That rule could be vulnerable to an arbitrary and capricious challenge for not maximizing net benefits, or a challenge alleging that the rule's approach is not permitted by the underlying statute. Further, if the group favored by the agency is defined based on race, ethnicity, or gender, the courts might find the choice of Proposal Y over Proposal X to be constitutionally suspect as well. Though the law on these questions is not especially well developed, placing distributional analysis alongside a traditional net benefits figure (rather than incorporating distributional considerations into that figure, as through income weighting) could open a new front in litigation over agency rulemaking practices.[381]

The contemporary Democratic Party has good reason to try to incorporate distributional analysis into cost-benefit analysis, given the centrality of equity for historically disadvantaged groups to the party's agenda.[382] The Biden Administration's revisions to Circular A-4 do just that. While the Bush Administration's Circular A-4 mentioned distributional effects only in passing,[383] the Biden Administration's revisions emphasized

381. *See, e.g.*, John Kennerly Davis, *Is It Lawful to Use Regulatory Impact Analysis to Achieve Equity?*, FEDSOC BLOG (Sept. 18, 2023), https://fedsoc.org/commentary/fedsoc-blog/is-it-lawful-to-use-regulatory-impact-analysis-to-achieve-equity (arguing that proposals to take equity into account in cost-benefit analysis "raise serious constitutional issues").

382. For statements of this priority, see, for example, two executive orders signed on the first day of the Biden Administration: Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021) ("Advancing Racial Equity and Support for Underserved Communities Through the Federal Government"); and Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021) ("Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation").

383. *See* ORIGINAL CIRCULAR A-4, *supra* note 28, at 14.

distributional consequences as a key part of regulatory analysis and gave agencies considerable guidance on how to conduct such analyses.[384] The Biden Administration's revisions permit and encourage both sorts of analysis described above—income weighting and separate analysis of distributional effects—but do not require either. This approach has several advantages: it gives agencies flexibility to experiment with different approaches to distributional analysis; it allows distributional considerations to influence regulatory policy outcomes; and it avoids the unnecessary resource tax that would arise from mandating distributional analysis in all cases, given that in some instances such analysis would not affect policy outcomes. Distributional considerations are nonetheless a likely flashpoint: future Republican administrations will probably eschew the Biden Administration's focus on demographic minorities, and it remains to be seen how a conservative judiciary would respond to a rule justified in part on the grounds of its distributional effects rather than its maximization of net benefits as traditionally calculated.

E. Hard-to-Monetize Regulatory Impacts

A final point of division between the left and the right is how to account for effects of regulation that are hard to monetize or that many believe should not be monetized at all. Regulations can impact human dignity, civil liberties, racial equality, voting rights, biodiversity, or other areas of life that are undoubtedly important but that many view as difficult or inappropriate to express in monetized terms in a traditional cost-benefit analysis.[385] Agencies may seek to present a given impact as larger or smaller in magnitude, depending on how important they view that impact relative to other considerations. Debates over whether and how to account for such values in cost-benefit analysis are likely to manifest not in general terms but rather through disagreements about how to consider particular effects in particular rulemakings.

Progressives have long criticized the neglect of hard-to-monetize impacts of regulation as a major flaw of cost-benefit analysis. Empirical studies have shown widespread agency failures to fully monetize the impacts of

384. *See* REVISED 2023 CIRCULAR A-4, *supra* note 28, at 61–67.

385. *See, e.g.*, McGarity, *supra* note 192, at 72 ("Virtues like altruism, dignity, equity, fairness, . . . decency, mutuality, tolerance, and empathy that are highly valued in a civilized society are belittled or ignored entirely in a cost-benefit regulatory regime in which allocative efficiency is the only goal.").

regulation.[386] In summarizing the conventional wisdom on the left, Dan Farber notes that "progressives think that cost-benefit analysis ignores the inherent value of human life and the environment, leaves out issues of social justice and human dignity, and undervalues the interests of future generations."[387] For this reason, guidance on cost-benefit analysis issued by Democratic presidents has expressly underscored the importance of accounting for hard-to-monetize effects of regulation.[388] Relatedly, legal scholars associated with the Democratic Party have explored different ways to account for hard-to-monetize regulatory impacts in cost-benefit analysis.[389]

Any approach to hard-to-monetize regulatory impacts has the potential to be polarizing, at least in particular cases. Not counting a given regulatory impact will be unacceptable to those who care about that impact. Counting it will necessarily rely on imperfect estimates—such is the nature of a hard-to-monetize impact—that some will view as too high and others as too low. For example, consider a regulation with $200 million in annual monetized

386. Jonathan Masur & Eric Posner, *Unquantified Benefits and the Problem of Regulation Under Uncertainty*, 102 CORNELL L. REV. 87, 92 (2016) ("[T]here are countless examples (far more than we can describe) where agencies fail to fully monetize the benefits and costs of regulations."); Amy Sinden, *The Problem of Unquantified Benefits*, 49 ENVIRO. L. 73, 107 (2019) ("All of the forty-five CBAs in that final data set left multiple categories of benefits unmonetized. None indicated that the monetized benefits estimate was complete or included all significant benefits.").

387. *See* Daniel Farber, *Cost-Benefit Analysis: FAQs*, CTR. FOR PROGRESSIVE REFORM (Oct. 25, 2021), https://progressivereform.org/cpr-blog/cost-benefit-analysis-faqs; *see also supra* notes 48, 242–244 and accompanying text (discussing critiques of cost-benefit analysis, including on these grounds).

388. *See supra* notes 233–234 and accompanying text (discussing the Clinton Administration's Executive Order 12,866); Exec. Order No. 13,563, § 1(c), 76 Fed. Reg. 3,821, 3,821 (Jan. 18, 2011) (directing that "[w]here appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts"); Modernizing Regulatory Review, *supra* note 289, § 2(b)(1) (calling for reform to regulatory analysis to "fully account[] for regulatory benefits that are difficult or impossible to quantify . . . .").

389. A symposium in the *California Law Review*, for example, featured contributions from four prominent legal scholars, three of whom have also served in senior regulatory policy roles in Democratic administrations. *See* Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369 (2014); Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 CALIF. L. REV. 1423 (2014); Lisa Heinzerling, *Quality Control: A Reply to Professor Sunstein*, 102 CALIF. L. REV. 1457 (2014); Daniel A. Farber, *Breaking Bad? The Uneasy Case for Regulatory Breakeven Analysis*, 102 CALIF. L. REV. 1469 (2014). Concerns about agencies neglecting hard-to-monetize regulatory impacts have mainly been expressed by progressives, though conservatives have at times raised similar issues. *See infra* note 392 and accompanying text (providing an example).

costs, $175 million in annual monetized benefits, and additional nonmonetized benefits of increasing accessibility of buildings for persons with physical disabilities.[390] Advocates for the interests of persons with disabilities will likely argue that the rule's nonmonetized benefits suffice to overcome the negative monetized net benefits, whereas business owners might argue the opposite. The difficulty of fully monetizing the benefits of greater physical accessibility, which implicates the dignity and inclusion of persons with disabilities, leads directly to possible disagreement about whether the rule should be understood to pass cost-benefit muster.

Political contestation over hard-to-monetize regulatory impacts is likely to play out mainly in the context of particular rulemakings, rather than in the context of executive orders or guidance like Circular A-4. The reason is that generalized direction to agencies to account for hard-to-monetize regulatory impacts—but not to monetize them[391]—is likely to be flexible enough to allow administrations of both parties to pursue their (conflicting) policy goals. In any given rulemaking, however, the party that controls the Executive Branch has an incentive to highlight hard-to-monetize regulatory benefits, whether within or alongside a traditional cost-benefit analysis, while the party out of power stands to gain from emphasizing hard-to-monetize regulatory costs. A Republican Senator's questioning about the role of religious liberty in cost-benefit analysis at a confirmation hearing during the Biden Administration underscores the high political salience of certain types of hard-to-monetize regulatory impacts.[392] As with the other flashpoints just discussed, hard-to-monetize regulatory impacts divide the parties because they can affect the net-benefits calculations of controversial regulations.[393]

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390. *See* Cass R. Sunstein, Essay, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (And Almost as Many Answers)*, 114 COLUM. L. REV. 167, 194–95 n.106 (2014) (providing this stylized example, which is based on Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164 (Sept. 15, 2010) (codified as amended at 28 C.F.R. pt. 35 (2013))).

391. *Cf.* REVISED 2023 CIRCULAR A-4, *supra* note 28, at 44–48.

392. *See Nominations of Robert H. Shriver III to be Deputy Director, Office of Personnel Management, and Richard L. Revesz to be Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget*, U.S. SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS (Sept. 29, 2022), https://www.hsgac.senate.gov/hearings/nominations-of-robert-h-shriver-iii-to-be-deputy-director-office-of-personnel-management-and-richard-l-revesz-to-be-administrator-office-of-information-and-regulatory-affairs-office-of-management-and/ (video at 1:04:50 to 1:07:15) (questioning of OIRA Administrator Nominee Richard L. Revesz by Sen. Joshua Hawley (R-MO)).

393. The flashpoints discussed in this Part are significant in the present and ones that I

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Even if presidential administrations of both parties continue to support cost-benefit requirements, there will be sharp disagreement about how the method should operate in practice as long as the parties are polarized about regulatory policy. Choices about the proper scope of cost-benefit analysis shape the capacity of the administrative state, since requiring more analysis for each new regulation reduces the total number of regulations that agencies are able to produce. The techniques used in assessing regulatory benefits and costs—such as the role of global impacts, the discount rate, and ways of accounting for hard-to-monetize impacts—shape the content of regulation on highly contested issues. And requiring agencies to conduct distributional analysis would help correct for one of the main critiques of how cost-benefit analysis has historically been practiced, but it would also give rise to novel political and legal challenges. Because the parties are divided over regulatory policy, it is natural that each will seek to advance a version of cost-benefit analysis that serves their agenda. Rather than understanding cost-benefit analysis as a neutral method of analysis, it is instead best understood as one of the battlefields on which conflict about regulatory policy takes place.

A final note is in order, on the possibility of more radical change in the future. The foregoing analysis has sought to explain the reasons why cost-benefit analysis has persisted under presidents of both parties, suggest why it may well continue to persist, and project the character of future debates over the method. But it is possible that the future will witness a more definitive break from the past. An administration of either party might attempt to move beyond cost-benefit analysis entirely, by repealing or ignoring the executive orders and other internal Executive Branch documents that have been the foundation of the method for decades. Among Republicans, the Trump Administration's frequent disregard for cost-benefit principles illustrates the impulse among some on the right to treat cost-benefit analysis as a restraint on executive power that ought to be circumvented, at least when they hold the White House.[394] A future Republican administration might go a step further and formally repudiate cost-benefit analysis, rather than simply avoid or distort it in practice. Among Democrats, skepticism of the method among some progressives[395] makes it at least possible that a

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expect will persist into the future. But they are not the only partisan divisions, and the discussion of these flashpoints should not be taken to imply that no other divisions exist. *See, e.g.*, REVESZ & LIVERMORE, *supra* note 3, at 55–66 (discussing controversies over accounting for "ancillary benefits" in cost-benefit analysis).

394. *See supra* notes 137–139 and accompanying text.

395. *See, e.g.*, Goodwin, *supra* note 244.

future Democratic administration might repudiate cost-benefit analysis in ways that past administrations have not.

If the years ahead do witness a presidential administration that more sharply breaks from cost-benefit analysis, this Article's analysis will remain relevant in at least two respects. First, by charting the features that have allowed cost-benefit analysis to persist—including features of the policy landscape, the parties' agendas, and the courts' approaches to judicial review—the Article has at the same time traced out the features that, if they were to change, could make cost-benefit analysis less stable in practice. Second, if either party does repudiate cost-benefit analysis entirely, the foregoing analysis shows the risks of doing so. Most notably: a Republican administration that rejects cost-benefit analysis would create a more streamlined regulatory process that would benefit future Democratic administrations, while a Democratic administration that rejected cost-benefit analysis would put its rules at a considerable risk of judicial invalidation. Unless and until either party makes a full break with the method, however, fights over cost-benefit analysis will continue to play out in the realm of application, with the parties disagreeing about how to implement the method along the lines laid out in this Part.

V. LESSONS FOR PUBLIC LAW

Stepping back, this Article's analysis holds more general lessons for how to think about the intersection of the parties' policy agendas with institutional arrangements and legal doctrines. The politics of cost-benefit analysis thereby provide a case study of broader dynamics applicable to public law more generally.

First, this Article's analysis highlights one way of thinking about how policy outcomes are shaped by public law rules and institutions. In public law scholarship, rules and institutions are frequently evaluated in terms of their relationships with broadly shared values, at least at a high level of generality: democracy, liberty, equality, and so forth. But different institutional arrangements also make different contested policy outcomes more or less likely. They may favor regulation or deregulation, and in so doing, they may make it easier for one party to enact its agenda as compared to the other.[396] As this Article's examples have shown, cost-benefit analysis is more congenial to some sorts of policymaking than others. Even within particular domains—say, environmental regulation or health and safety regulation—cost-benefit analysis can sometimes favor regulation and sometimes not. To be sure, one

396. *See generally* Gould & Pozen, *supra* note 210 (elaborating this insight and applying it to a range of examples).

part of evaluating cost-benefit analysis, or any feature of our public law, is by reference to first-order normative principles. But just as important is a careful look at how different sorts of public law rules and institutions tend to lead to different policy outcomes in practice.

This more realist approach to cost-benefit analysis reflects how most political actors think about the method. Much of the academic work about cost-benefit analysis seeks to justify, condemn, or elaborate the method on its own terms. Cost-benefit analysis plays a different role for political appointees at the White House and federal agencies, members of Congress, and interest groups. Those actors all have substantive agendas: they seek more regulation, less regulation, or different sorts of regulation in particular areas. Most elected officials and policymakers do not hold principled views about cost-benefit analysis, at least not ones that trump their first-order policy preferences. Instead, most public officials' relationship with the method is instrumental: they ask whether cost-benefit analysis helps or hinders them in achieving their policy goals. Any analysis of cost-benefit analysis on solely the method's economic or philosophical merits necessarily misses what most political actors most care about: the method's impact on their agendas.

Second, once a more realist approach to cost-benefit analysis is taken, it becomes clear that the politics of the method will change over time and differently affect the two major parties. The normative goodness or badness of cost-benefit analysis, from the standpoint of an economist or a philosopher, can be expected to remain constant. But its political valance is highly fluid, shifting with the parties' agendas and the policy issues that happen to be most salient at any given time. This sort of ideological drift exists across public law. Free speech rights, free exercise of religion exemptions from generally applicable laws, and government transparency requirements were all once seen mainly as progressive features of American law. Yet each has come to take on a more conservative valence in recent decades.[397] Some scholars have argued that ideological drift in the opposite direction has taken place with respect to cost-benefit analysis: though originally a tool of deregulation, the method can now be harnessed to promote progressive regulation.[398]

The insight that cost-benefit analysis often aids progressive regulatory agendas at the level of individual rules is a powerful and important one. But,

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397. For analysis of each of these areas of law, see Amanda Shanor, *supra* note 183 (First Amendment free speech); Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J.L. & GENDER 1, 18–20 (2015) (religious accommodations); David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018) (transparency law).

398. *See supra* notes 147–151 and accompanying text (discussing this argument).

from the standpoint of progressives, it is insufficient as grounds for endorsing cost-benefit analysis as progressive more generally. The fact that many progressive rules are justified by traditional cost-benefit analysis does not mean that all are. Embracing cost-benefit analysis might reinforce and strengthen some high-impact progressive rules (like climate rules), that pass a traditional cost-benefit analysis with flying colors, while creating roadblocks to other progressive priorities (like some civil rights measures) that might be harder to justify on traditional cost-benefit grounds. Embracing cost-benefit analysis could, in effect even if not in intent, mean prioritizing some parts of the Democratic Party's agenda over others.

Further, the progressive case for or against cost-benefit analysis requires situating the method in the context of administrative law and policy more generally. During Democratic administrations, loosening cost-benefit requirements would increase agency capacity, which in turn could enable agencies to issue more rules than they could in the face of more onerous analytical requirements. But that increased productivity would come at a cost: progressive rules issued without traditional-looking cost-benefit analyses would be vulnerable to being vacated by conservative courts. The threat of judicial review, especially when a large ideological gap exists between the White House and the Supreme Court, constrains the extent to which the Executive Branch will feel empowered to reform or abandon cost-benefit analysis. And even if (counterfactually) a Democratic White House were unconstrained by the courts, loosening or eliminating cost-benefit requirements would ease the work of future Republican administrations in repealing or watering down progressive regulations. For all of these reasons, a rational Democratic administration might well opt for modest reforms to the method over more wholesale changes—even if it ultimately views such modest reforms as either a concession to the courts or as a risk-averse way of guarding against future Republican rule.

The political calculus is somewhat simpler on the right. Given that much of the most important regulatory policymaking during Republican administrations occurs through either preventing enforcement of existing regulations or narrowly construing agency authority, cost-benefit analysis is often not, in practice, central to a deregulatory agenda. To be sure, Republican administrations must often conduct cost-benefit analysis when proposing new rules or when seeking to repeal or modify rules put in place by their Democratic predecessors. As we have seen, however, Republican administrations have many means of achieving their policy objectives outside of a cost-benefit framework. As a result, at least under the political conditions that obtain at the time of this writing, Republican administrations face fewer incentives to reform cost-benefit analysis as compared to their Democratic

counterparts.

Third, and finally, institutions and doctrines can only be understood holistically, rather than in a siloed manner. As we have seen, it is impossible to evaluate the effects of cost-benefit analysis without also looking at broader context: the resource constraints that agencies face; the ways in which statutory mandates set the bounds of which policies agencies can pursue; and the looming threat of judicial review under the APA, agencies' organic statutes, and the Constitution. The question for a realist is not whether cost-benefit analysis is a good decision rule in a vacuum, but rather whether cost-benefit analysis, situated within the broader ecosystem of administrative law and politics, aids or hinders particular agendas. That broader lens has led both Democrats and Republicans to conclude that there is more to be lost by eliminating cost-benefit analysis than there is to be gained. This does not, of course, mean that the two parties agree about the substance of regulation. It does mean, however, that both are being realists about the institutional constraints and incentives that shape policymaking in the administrative state.

Holistic analysis of this sort is important for evaluating any public law institution. While this Article's focus has been on cost-benefit analysis, similar methods could be applied to any of the enduring questions of public law. How should power be divided between federal, state, and local governments? What about between the President and Congress? Under what circumstances should judicial review be more scrutinous as compared to more deferential? These questions cannot be answered in isolation. Instead, evaluating these institutions requires being realists about how they relate to each other and to the parties' agendas.[399]

CONCLUSION

The rules governing how our laws are made and enforced create winners and losers. Different institutional arrangements favor different sorts of outcomes. Parties, interest groups, and others with a stake in policy outcomes accordingly try to tilt the playing field in their favor and against that of their opponents. Precisely this pattern plays out in many areas of administrative law, from debates over presidential removal power to judicial deference to agencies to the nondelegation doctrine.

With that frame in mind, this Article has sought to uncover the politics of cost-benefit analysis. The parties are sharply polarized on regulatory policy. In many areas of regulatory policy—most notably regulations to protect

399. I have sought to take such an approach in recent scholarship, including Elinson & Gould, *supra* note 191; Gould & Pozen, *supra* note 210; and Jonathan S. Gould, *Puzzles of Progressive Constitutionalism*, 135 HARV. L. REV. 2054 (2022).

workers, consumers, and the environment—Democrats want to expand the reach of the administrative state while Republicans want to rein it in. Understanding the parties' regulatory agendas shows why cost-benefit analysis has persisted for as long as it has. During Republican administrations, cost-benefit analysis often does little to hinder deregulatory efforts, and the method's potential to slow down progressive rulemakings gives it enduring appeal for the right. During Democratic administrations, the method's potential to justify government regulation, especially on high-profile issues like climate change, has provided a new progressive defense of the practice. Further, the threat of judicial review by conservative courts means that Democrats may have no choice but to seek to reform cost-benefit analysis rather than eliminate it.

These dynamics point the way toward future conflict over cost-benefit analysis. Republicans will likely continue their efforts to expand the method's reach in order to impede Democrats' regulatory agendas, even as they circumvent the method when it risks impeding their own deregulatory efforts. Democrats will likely continue to seek to reform the method to remove deregulatory bias and account for the environmental, economic inequality, and racial justice issues that animate much of the party's agenda—while being ever-mindful of the constraint imposed by judicial review by a conservative judiciary. The fact that both parties are working within a cost-benefit framework, however, should not mask the parties' polarization on matters of regulatory policy. Our parties are sharply divided in their attitudes about regulation, and cost-benefit analysis is one venue among many in which our divided regulatory politics play out.