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INTRODUCTION

Almost fifty years of presidential direction and agency practice, combined with ten years of increasing encouragement from the Supreme Court, suggest that the cost-benefit state[1] has not only arrived, but is well past its introductory season. Benefit-cost balancing is now a dominant paradigm in administrative law for evaluating federal agencies' exercise of delegated regulatory discretion. In response to increased scrutiny upon judicial review, agencies have taken steps to firm up their benefit-cost analyses. Still, despite multiple Executive Orders and supplementary guidance, neither executive nor legislative action has produced a clear set of justiciable standards against which courts can evaluate agency analyses for adequacy.

Some agencies have recently initiated rulemakings to codify their own analytical procedures under particular laws. While this statute-by-statute interpretive approach may be useful, it is unlikely to provide consistency across government or broadly-applicable tools for courts to use in varying regulatory domains. The time might be right to develop judicially-enforceable, government-wide standards for the use of benefit-cost analysis in rulemaking.

Others have examined theories of judicial authority to require and to review agency benefit-cost balancing in rulemaking. In this article we focus instead on the executive's authority to write a cross-government "rule-on-rules" to govern regulatory analysis, including benefit-cost analysis and the courts' authority to enforce such a rule. While such a rule would probably

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[*] Both authors are research professors at The George Washington University Regulatory Studies Center, and both have served in the Office of Information and Regulatory Affairs at the Office of Management and Budget – Mannix from its founding in 1981 to 1987, and Dooling from 2007 to 2018. We are grateful for support from the C. Boyden Gray Center for the Study of the Administrative State and for feedback on an early draft from participants in a workshop it hosted. We also appreciate constructive comments from our colleagues at the GW Regulatory Studies Center. Remaining errors are ours, and we continue to welcome corrections and feedback from readers.

[1] Cass R. Sunstein, The Cost-Benefit State (Coase-Sandor Institute for Law & Economics Working Paper No. 39) (1996); CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (2018).

lack direct statutory authorization under current law, we offer the example of the Council on Environmental Quality's regulations, which govern agencies' use of Environmental Impact Statements, to illustrate how the absence of express statutory authority is not necessarily fatal to the project, particularly when it promises to produce tools that judges will find useful in carrying out their Article III responsibilities.

In Section I, we review the rise of the cost-benefit state as a result of its development in the executive branch and its treatment by the courts. In Section II, we examine theories of judicial authority to require benefit-cost analysis[2] (BCA). Section III describes a nascent efforts by one agency to codify its own use of BCA, presents the question of whether a broader, cross-cutting "rule-on-rules" that lacks clear statutory authority would be judicially enforceable, and describes the CEQ analog as a potential precedent. In Section IV, we review the constitutional authorities that might support a cross-cutting BCA rule, and present two theories to support judicial enforcement of such a rule.

I. THE RISE OF THE COST-BENEFIT STATE

The origins of benefit-cost analysis in U.S. policymaking date back more than a century, to Congressional debates about the funding of navigational improvements. Faced with requests from multiple port cities, who were competing for shares of the very same trade, Congress, in a series Acts starting with the River and Harbor Act of 1902, directed the U.S. Army Corps of Engineers to identify the incremental benefits and costs of each of the available options.[3] Later, the need for cost-effective logistical support during World War II drove the military services to develop more advanced mathematical techniques to optimize the allocation of available resources. These optimization methods became part of the BCA toolbox and, when

[2] In conformance with the practice of economists we use "benefit-cost" analysis; however, in deference to Cass Sunstein and other legal scholars, we will also use the phrase "cost-benefit" state, as in our title. It is a distinction without a difference.

[3] *See, e.g.*, River and Harbor Act of 1902 § 3, 32 Stat. 331 (1902). Under that statute, the Corps was required to consider "the amount and character of commerce existing or reasonably prospective which will be benefited by the improvement and the relative of the ultimate cost of such work, both as to cost of construction, continuance, or maintenance at the expense of the United States." *Id*. *See also* Douglas W. Lipton et al., Economic Valuation of Natural Resources: A Handbook for Coastal Resources Policymakers (NOAA Coastal Ocean Program Decision Analysis Series No. 5.), available at http://www.mdsg.umd.edu/sites/seagrant/files/files/Economic%20Valuation%20of%20Natural%20Resources.pdf.

combined with modern welfare economics as it developed in the 1940s, established BCA in its current form as a rigorous, if necessarily imperfect, means of defining what it means to promote the general welfare as economists understand it.[4]

In the regulatory domain, benefit-cost analysis is "a primary tool used for regulatory analysis."[5] Regulatory analysis is a catch-all term for the techniques that agencies use "to anticipate and evaluate the likely consequences of rules."[6] Those consequences usually include a blend of benefits and costs, some of which are quantifiable and some of which are not. The goal of benefit-cost analysis is to articulate and weigh the costs and the benefits to see if the proposed action is, on balance, worth it. When benefits exceed costs, even if those benefits are not quantifiable,[7] the policy is said to have positive "net benefits."

The roots of presidential review of agency regulations runs back at least to President Richard Nixon, who instituted a White House "Quality of Life Review" for certain draft regulations.[8] That review was coordinated by the Office of Management and Budget (OMB) and included consideration of a rule's objectives, alternatives, benefits, and costs.[9] Presidents Gerald R. Ford

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[4] *See* John Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939); Nicholas Kaldor, *Welfare Propositions in Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939).

[5] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4 ON REGULATORY ANALYSIS 2 (2003), https://www.reginfo.gov/public/jsp/Utilities/a-4.pdf.

[6] *Id*. at 1.

[7] The challenges of quantification are one of the main critiques of the use of benefit-cost analysis in regulatory decision-making. *See, e.g.*, Lisa Heinzerling, *Environmental Law and the Present Future*, 87 GEO. L.J. 2025, 2042-52 (1999); Daniel A. Farber, *Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 383, 388-94 (2019). *See also* THOMAS O. MCGARITY, REINVENTING RATIONALITY 124-75, 304-05 (1991) (discussing some of the practical limits of quantitative analysis). These challenges are not fatal. *See generally* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008).

[8] STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 348 (2008); Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 44-50 (2011).

[9] Tozzi, *supra* note 8, at 44-50; Memorandum from George P. Shultz, Dir, Office of Mgmt. & Budget, to the Heads of Departments and Agencies, Agency Regulations, Standards, and Guidelines Pertaining to Environmental Quality, Consumer Protection, and Occupational and Public Health and Safety (Oct. 5, 1971), available at http://thecre.com/ombpapers/QualityofLife1.htm.

and Jimmy Carter kept this review.[10] President Ronald Reagan was the first to direct agencies to regulate "with the aim of maximizing the aggregate net benefits to society."[11] Although there have been changes on the margin, the general policy principle—that regulatory benefits should exceed regulatory costs—has remained the same, surviving six presidents of differing parties, differing regulatory philosophies and approaches, and during increasingly partisan times. It is this cascade through history that Professor and former OIRA Administrator Cass R. Sunstein has called the "Cost-Benefit Revolution" of the last fifty years.[12]

The courts, given their role in reviewing executive branch regulatory actions, have grappled with the role of benefit-cost analysis in agency decision-making, but have settled into a trend that supports and sometimes requires its use. The last decade of Supreme Court jurisprudence bears this out, as does a scan of decisions from the Courts of Appeals.[13]

For its part, Congress has occasionally legislated to require or prohibit aspects of benefit-cost analysis on particular issues,[14] but it has not enacted overarching legislation governing benefit-cost analysis.[15] Therefore, this

[10] Exec. Order No. 11,821 (1974); Exec. Order No. 12,044 (1978). *See* Thomas D. Hopkins, *The Evolution of Regulatory Oversight—CWPS to OIRA*, 63 ADMIN. L. REV. 71, 72-74 (2011).

[11] Exec. Order No. 12,291 § 2(e) (1981).

[12] *See generally* CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (2018). Professor Sunstein, who served as OIRA Administrator from 2009-2012, has consistently tracked these issues. *See, e.g.*, Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247 (1995-1996); Cass R. Sunstein, The Cost-Benefit State (Coase-Sandor Institute for Law & Economics Working Paper No. 39) (1996); Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651 (2001); CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2003); Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVIR. L. REV. 1 (2017); CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (2018).

[13] *See infra* Section I.B.

[14] For example, the ambient air quality standards issued under the Clean Air Act have been interpreted to prohibit consideration of costs. 42 U.S.C. § 7409(b)(1). *See* Robert L. Glicksman, *Michigan v. Environmental Protection Agency*, GEO. WASH. L. REV. DOCKET (Oct. Term 2014) (July 2, 2015) ("That provision does not on its face preclude consideration of cost, but the Court reasoned that it specifies the exclusive, relevant considerations (public health protection), and those do not include cost."), http://www.gwlr.org/michigan-v-environmental-protection-agency/. Also, certain occupational safety and health rules must be set using a feasibility standard rather than a benefit-cost standard. 29 U.S.C. § 655(b)(5).

[15] The Regulatory Accountability Act, which was introduced in the 115th Congress, included a provision that would have required agencies to do benefit-cost analysis. Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. § 103(b) (2017). See also Independent Agency Regulatory Analysis Act, 114th Cong. (2015); Principled Rulemaking Act, S. 1818, 114th Cong. (2015); Regulatory Accountability Act, H.R. 185, 114th Cong.

Section focuses on executive actions and judicial review to illustrate the rise of the cost-benefit state.

A. Presidential Actions

A robust line of executive orders, shown in Table 1, traces the development and staying power of regulatory analysis.[16]

Table 1. Significant Executive Orders on Regulatory Analysis

	Executive Order No.	Title
Ford (1974)	11,821	Inflation Impact Statements
Ford (1976)	11,949	Economic Impact Statements
Carter (1978)	12,044	Improving Government Regulations
Reagan (1981)	12,291	Federal Regulation
Clinton (1993)	12,866	Regulatory Planning and Review
Bush (2007)	13,422	Further Amendment to Executive Order 12866 on Regulatory Planning and Review
Obama (2011)	13,563	Improving Regulation and Regulatory Review
Trump (2017)	13,771	Reducing Regulation and Controlling Regulatory Costs

The first four executive orders in the table have now been revoked but they provided a foundation for subsequent orders because they directed agencies to evaluate and consider the potential future effects of regulations.[17] Another important milestone occurred at the end of the Carter administration:

(2015); Regulatory Accountability Act, H.R. 2122, 113th Cong. (2013); Regulatory Accountability Act, 112th Cong. (2011).

[16] This list is a subset of all executive orders related to regulation. For example, it excludes several other executive orders that are closely related to regulatory analysis. *E.g.*, Exec. Order No. 12,498 (1985) (requiring agencies to compile an annual regulatory plan), Exec. Order No. 13,579 (2011) (encouraging independent regulatory agencies to comply with Executive Order 13,563), Exec. Order No. 13,777 (establishing regulatory reform officers) (2017).

[17] For a summary of initiatives during the Carter Administration, see George Eads, Remembering Charlie Schultze (Commentary) (Nov. 8, 2016), available at https://regulatorystudies.columbian.gwu.edu/remembering-charlie-schultze.

Congress enacted the Paperwork Reduction Act (PRA),[18] which, among other things, created the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget.[19] Although the PRA had only limited provisions directly affecting regulatory analysis, and no provisions affecting OIRA's regulatory review procedures, it did create a permanent professional career staff within the Executive Office of the President with expertise in regulatory policy.

President Reagan's Executive Order 12,291 took a major step forward, directing agencies to make regulatory changes only if "the potential benefits to society for the regulation outweigh the potential costs to society" and tasking OMB with coordination of centralized regulatory review.[20] This ushered in the modern role of BCA in regulatory decision-making. While many viewed the order in a positive light,[21] it was "extremely controversial."[22] At the start of President William J. Clinton's first term, "there was considerable speculation that, given what the Democrats perceived as the deficiencies of E.O. 12,291, the President should and would scrap [it]."[23]

He did not. Instead, President Clinton issued Executive Order 12,866, which replaced Executive Order 12,291 with a number of reforms to the process that remain in effect today.[24] It directs agencies to "assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[25] This action did not eliminate criticism of benefit-cost analysis, but it deflated it.[26] Writing a few years later in 1996, Professor

[18] Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. § 3501 et seq.).

[19] 44 U.S.C. § 3503.

[20] Exec. Order No. 12,291 § 2(b), 3(e)(1) (1981).

[21] *See, e.g.*, Murray L. Weidenbaum, *Regulatory Reform: A Report Card for the Reagan Administration* (1983); available at https://openscholarship.wustl.edu.

[22] Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 4, 4-6 (1995). *See generally Symposium, Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order 12,291*, 23 ARIZ. L. REV. 1195 (1981) (featuring articles from Morton Rosenberg, Professors Peter Shane and Cass R. Sunstein, and Mark Sagoff).

[23] Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 104 (2011).

[24] *Id*. at 104-06.

[25] Exec. Order No. 12,866 § 1(b)(6).

[26] *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 ENVTL L. REV.

Sunstein wrote that "[g]radually and in fits and starts, the American regulatory state is becoming a cost-benefit state. By this I mean that government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation."[27] Criticism, constructive and otherwise, of the methods of benefit-cost analysis continue to this day, but President Clinton's action "made clear that cost-benefit analysis, to the extent permitted by the relevant statute, would continue to serve as the basic criterion in assessing regulatory decisions."[28]

Subsequent presidents affirmed the principles of Executive Order 12,866 while making only incremental changes. President Obama directed the OMB Director to make recommendations for a new executive order on regulatory review, to include "suggestions for the relationship between OIRA and the agencies; provide guidance on disclosure and transparency; encourage public participation in agency regulatory processes; offer suggestions on the role of cost-benefit analysis; address the role of distributional considerations, fairness, and concern for the interests of future generations; identify methods of ensuring that regulatory review does not produce undue delay; clarify the role of the behavioral sciences in formulating regulatory policy; and identify the best tools for achieving public goals through the regulatory process."[29] This prompted commentary from some skeptical of, for example, the merits of incorporating "behavioral economics" into the regulatory review framework.[30] The subsequent executive order, however, was "supplemental to and reaffirm[ed]" Executive Order 12,866, as well as adding other provisions.[31]

325, 333 (2014) (noting disappointment after EO 12,866 "that OIRA and cost-benefit analysis would continue to play a large role in determining regulatory policy"). Benefit-cost analysis was "considered a 'conservative' decision procedure because of its association with President Reagan. Its survival across Democratic administrations has put that myth to rest." Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 980 (2018).

[27] Cass R. Sunstein, The Cost-Benefit State 1 (Coase-Sandor Institute for Law & Economics Working Paper No. 39) (1996)

[28] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2285-86 (2001).

[29] Presidential Memorandum Regarding Regulatory Review (Jan. 30, 2009), 74 Fed. Reg. 5977, 5977 (Feb. 3, 2009).

[30] Brian Mannix, The Troubling Prospect of "Behavioral" Regulation (Regulatory Policy Commentary) (Apr. 19, 2010), available at https://regulatorystudies.columbian.gwu.edu/troubling-prospect-%E2%80%9Cbehavioral%E2%80%9D-regulation.

[31] Exec. Order No. 13,563 § 1(b).

President Donald J. Trump's primary innovation in regulatory policy has been to impose a regulatory cap and a cost budget.[32] Although similar concepts have been explored before in the U.S.,[33] and implemented both overseas[34] and in some states,[35] this was the first time a regulatory cap and cost budget was implemented in the U.S. In doing so, he did not revoke or amend Executive Order 12,866, but left it intact. OMB has clarified in guidance to the agencies that "agencies must continue to assess and consider both benefits and costs and comply with all existing requirements and guidance, including but not limited to those in EO 12866 and OMB Circular A-4."[36]

Overall, while presidents have left their own marks on regulatory policy, the story of executive action on regulatory analysis, and benefit-cost analysis in particular, is one of remarkable consistency.

B. Judicial Review

Executive branch use of regulatory analysis, including benefit-cost analysis, does not occur in a vacuum. Agency decisions about regulations are generally reviewable in court.[37] As explained below, both Supreme Court decisions and those of the U.S. Courts of Appeals demonstrate that benefit-cost analysis in agency decision-making is an active front in litigation. Although courts have grappled with the role of benefit-cost analysis, since 2009 the Supreme Court has settled into a trend that supports and sometimes requires its use.

In 2001, however, this was not the case. That year, in *Whitman v. American Trucking Associations, Inc.*,[38] the Court held that section 109 of the Clean Air Act did not permit the Environmental Protection Agency (EPA) to use benefit-cost analysis to inform its decision about national air quality

[32] Exec. Order No. 13,771 (2017).

[33] *See, e.g.*, Jeffrey Rosen & Brian Callahan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 835 (2014).

[34] [Cite Canada & UK]

[35] [Cite]

[36] Memorandum for Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors at Certain Agencies and Commissions from Dominic J. Mancini, Acting Administrator, Office of Information and Regulatory Affairs, Guidance Implementing Executive Order 12771, Titled "Reducing Regulation and Controlling Regulatory Costs" (M-17-21) at p.13 (Apr. 5, 2017).

[37] 5 U.S.C. § 702.

[38] 531 U.S. 457 (2001).

standards.[39] The statutory language directed EPA to select the standards based on "such criteria and allowing an adequate margin of safety" that "are requisite to protect the public health."[40] Justice Antonin Scalia, writing for the Court, did not see a clear "textual commitment" to consideration of costs, and declined to read it in.[41]

Justice Scalia changed tack in 2009, writing for the Court in *Entergy Corp. v. Riverkeeper, Inc*.[42] There, the Court applied *Chevron* deference to allow the EPA to consider costs and benefits in regulating under section 316(b) of the Clean Water Act.[43] The statute directed EPA to issue regulations that "reflect the best technology available for minimizing adverse environmental impact."[44] The Court was persuaded that the "best" technology could be the one that is most efficient, such that it includes consideration of costs.[45] It continued that "it was well within the bounds of reasonable interpretation for the EPA to conclude that benefit-cost analysis is not categorically forbidden" in setting a standard under the Clean Water Act.[46] This decision was greeted as a major turning point. One scholar suggested it created "a new presumption for the interpretation of ambiguous . . . regulatory provisions on the use of [cost-benefit analysis]."[47] Others agreed, calling it "a shift in Clean Water Act jurisprudence that previously has deemphasized the role of economics."[48]

In a somewhat similar vein, the Court decided *Environmental Protection Agency v. EME Homer City Generation*[49] in 2013. There, the Court reviewed

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[39] *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 486 (2001).

[40] 42 U.S.C. § 7409(b)(1).

[41] *American Trucking*, 531 U.S. at 468. In a concurring opinion, however, Justice Stephen Breyer argued that "other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation." He goes on to find that "other things are not equal" in this case, because "legislative history, along with the statute's structure, indicates that § 109's language reflects a congressional decision not to delegate to the agency the legal authority to consider economic costs of compliance." *American Trucking*, 531 U.S. at 490 (Breyer, J., concurring).

[42] 556 U.S. 208 (2009).

[43] *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 212, 226 (2009).

[44] 33 U.S.C. § 1326(b).

[45] *Riverkeeper*, 556 U.S. at 218.

[46] *Riverkeeper*, 556 U.S. at 223.

[47] Jonathan Cannon, *The Sounds of Silence: Cost-Benefit Canons in* Entergy Corp. v. Riverkeeper, Inc., 34 HARV. ENVTL. L. REV 425, 459 (2010).

[48] Paul N. Singarella & Marc T. Campopiano, *The Role of Economics in Environmental, Health, and Safety Regulation after Entergy*, 35 ENVIRONS ENVTL. L. & POL'Y J. 101, 105 (2011).

[49] 572 U.S. 489 (2013)

agency construction of the Good Neighbor Provision of the Clean Air Act.[50] That provision was silent with regard to cost.[51] The Court permitted EPA to consider cost in construing this provision, with Justice Ruth Bader Ginsburg writing for the Court that the decision to consider costs "makes good sense."[52]

Building on this reasoning, in 2015 in *Michigan v. Environmental Protection Agency*[53] the Court read the phrase "appropriate and necessary" in a section of the Clean Air Act as a statutory mandate requiring EPA to weigh costs against benefits.[54] Justice Scalia wrote for the majority that "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. . . . No regulation is 'appropriate' if it does significantly more harm than good."[55] Writing in dissent, Justice Elena Kagan voiced significant support for consideration of benefits and costs in regulatory decision-making: "Cost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, . . . an agency must take costs into account in some manner before imposing significant regulatory burdens."[56] Although *Michigan* was a 5-4 decision, between Justice Scalia's opinion for the majority, Justice Thomas' concurrence, and Justice Kagan's dissent, *Michigan* actually counted nine votes for the principle that costs cannot be ignored.[57]

Taking these cases together, in ten years,[58] the Court shifted from needing a clear "textual commitment" permitting consideration of costs to finding that

[50] *Id*. at 506.

[51] 42 U.S.C. § 7410(a)(2)(D)(i).

[52] *Environmental Protection Agency v. EME Homer City Generation*, 572 U.S. 489, 519 (2013).

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

[54] *Michigan v. Environmental Protection Agency*, 135 S. Ct. 2699, 2712 (2015).

[55] *Michigan*, 135 S Ct. at 2707.

[56] *Id*. at 2716 (Kagan, J. dissenting) (internal citations omitted).

[57] *Id*. at 2703; Brian F. Mannix, *Benefit-Cost Analysis as a Check on Administrative Discretion*, 24 SUP. CT. ECON. REV. 155, 157 (2016).

[58] The roots of the courts' embrace of regulatory analysis and benefit-cost analysis may well run deeper. Professor Sunstein has written about two influential circuit court decisions: *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991) and *AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992). In *Corrosion Proof Fittings*, the U.S. Court of Appeals for the Fifth Circuit held that the Environmental Protection Agency failed to consider alternatives as required by the relevant statute. *Corrosion Proof Fittings*, 947 F.2d at 1229-30. In *AFL-CIO*, the U.S. Court of Appeals held that OSHA erred in setting permissible exposure limits for 428 substances without adequate risk-based justification. *AFO-CIO*, 965 F.2d at 986-87.

Professors Jonathan S. Masur and Eric A. Posner more recently argued that *Corrosion-Proof Fittings* and was a "harbinger[] of an era of enhanced judicial review of CBA." Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI.

a statute that did not mention costs nevertheless required their consideration. This was, to put it mildly, "a significant evolution."[59] As summarized by Professors Caroline Cecot and W. Kip Viscusi, "it is difficult not to get the impression that the Court has become more receptive to the use of BCA in the thirteen years since *American Trucking* was decided."[60] Professor Robert L. Glicksman, while calling the decision in *Michigan v. EPA* "not only blinkered, but nonsensical" also acknowledged that it "establishes some clear ground rules" with respect to the consideration of costs.[61]

The lower courts have followed a similar path towards benefit-cost analysis, but over a longer time horizon. Significantly, the U.S. Court of Appeals for the District of Columbia, which is a specialist on matters of administrative law,[62] produced a series of decisions involving various regulations from the Securities and Exchange Commission.[63] The decisions were written mostly by former OIRA Administrator Judge Douglas Ginsburg and "promot[ed] rigorous [benefit-cost analysis] of financial regulations."[64] Professor Richard L. Revesz tracked this line of cases back to 1993 in *Timpinaro v. SEC*,[65] in which the court remanded a rule "to address the balance of benefits and costs associated" with it.[66] Professor Revesz cites the 2005 case of *U.S. Chamber of Commerce v. Securities and Exchange Commission*[67] and 2010 case of *American Equity Investment Life Insurance*

L. REV. 935, 970 (2018).

[59] Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 975 (2018). Others heralded it as a "paradigm shift." John D. Graham & Paul R. Noe, A Paradigm Shift in the Cost-Benefit State, The Regulatory Review (Opinion) (Apr. 26, 2016), https://www.theregreview.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/.

[60] Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 586-87 (2015).

[61] *See* Robert L. Glicksman, *Michigan v. Environmental Protection Agency*, GEO. WASH. L. REV. DOCKET (Oct. Term 2014) (July 2, 2015), http://www.gwlr.org/michigan-v-environmental-protection-agency/.

[62] *See* Patricia M. Wald, Thirty Years of Administrative Law in the D.C. Circuit, Harold Leventhal Talk at the District of Columbia Bar (July 1, 1997).

[63] *See generally* Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 N.Y.U. L. REV. 1983 (2013).

[64] Cecot & Viscusi, *supra* note 60 at 587.

[65] 2 F.3d 453 (D.C. Cir. 1993) (Ginsburg, J. writing for the court).

[66] *Timpinaro*, 2 F.3d at 458; Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services*, 34 YALE J. ON REG. 545, 565 (2017).

[67] 412 F.3d 133 (D.C. Cir. 2005) (Ginsburg, J. writing for the court) (vacating for failure to adequately consider costs).

Co. v. Securities and Exchange Commission[68] in which the court vacated SEC rules on similar grounds.[69]

These cases provided the backdrop for the court's bombshell decision in *Business Roundtable v. Securities and Exchange Commission*.[70] There, the court found that a 2010 rule on proxy access was arbitrary and capricious under the Administrative Procedure Act.[71] In its decision, the court listed SEC's failure to quantify costs as one of several defects, writing:

> We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once again — as it did most recently in *American Equity Investment Life Insurance Company v. SEC* and before that in *Chamber of Commerce* — adequately to assess the economic effects of a new rule. Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; *failed adequately to quantify the certain costs or to explain why those costs could not be quantified*; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters. For these and other reasons, its decision to apply the rule to investment companies was also arbitrary.[72]

Scholars of financial regulation and administrative law have labored to analyze the meaning and effects of *Business Roundtable*.[73] Professor Adrian

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[68] 613 F.3d 166 (D.C. Cir. 2010) (Sentelle, J. writing for the court) (vacating for failure to adequately consider the rule's effects).

[69] Revesz, *supra* note 66, at 566-67.

[70] 647 F.3d 1144 (D.C. Cir. 2011) (Ginsburg, J. writing for the court). Catherine M. Sharkey, State Farm *"With Teeth:" Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 101, 136 (2014).

[71] 647 F.3d at 1146, 1156.

[72] 647 F.3d at 1148-49 (emphasis added) (internal citations omitted).

[73] *See, e.g.*, James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1840-41 (2012); Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289 (2013); Yoon-Ho Alex Lee, *An Options Approach to Agency Rulemaking*, 65 ADMIN. L. REV. 881 (2013); Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 N.Y.U. L. REV. 1983, 2064 (2013); Catherine M. Sharkey, State Farm *"With Teeth:" Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 101, 135-43 (2014); John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 917-20 (2015); ADRIAN VERMEULE, LAW'S ABNEGATION 163-78 (2016); Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The*

Vermeule surveyed the scholarly landscape to find that "the modal response to *Business Roundtable* among administrative lawyers has been a mix of surprise and dismay."[74] He notes that

> some have taken the case to stand for the proposition that an agency rule is arbitrary and capricious if it is not supported by careful and rigorous cost-benefit analysis, including a detailed statement of any potential costs or benefits that cannot be quantified and a clear statement about how competing estimates of costs were resolved. So interpreted, the case stands for an ambitious form of arbitrariness review that requires cost-benefit analysis to the extent possible, unless statutorily precluded.[75]

Professor Vermeule, himself, is unmoved by this assessment, dismissing Business Roundtable as an outlier.[76] This criticism illustrates the difficulty that courts encounter when they attempt to go beyond merely hortatory language—that considering costs "makes good sense"[77]—to examine the quality and sufficiency of an agency's economic analysis.

Other U.S. Courts of Appeals have grappled with these issues as well. A recent study by Professors Cecot and Viscusi reviewed a sample of 38 judicial decisions related to agency cost-benefit analysis.[78] The sample included cases from ten of thirteen federal appellate courts that "implicate" agency cost-benefit analysis.[79] Among many other findings, the study concludes that courts "generally evaluate whether the BCAs include all relevant aspects of the problem, ensuring that entire categories of benefits or costs are not omitted from the analysis."[80] It goes on to say that "[c]ourts are increasingly requiring agencies to quantify benefits and costs to the extent possible."[81]

Case of Financial Services, 34 YALE J. ON REG. 545, 548 (2017); Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 970-76 (2018).

[74] ADRIAN VERMEULE, LAW'S ABNEGATION 163 (2016).

[75] *Id*. at 163.

[76] *Id*. at 164.

[77] *Environmental Protection Agency v. EME Homer City Generation*, 572 U.S. 489, 519 (2013).

[78] Cecot & Viscusi, *supra* note 60 at 577.

[79] *See* Cecot & Viscusi, *supra* note 60 at 577, 609-11. The sample did not include cases from the U.S. Courts of Appeals for the Federal Eighth, or Third Circuits. *Id*. at 609-11.

[80] *Id*. at 605.

[81] *Id*.

While some have argued that the rise of the cost-benefit state is not normatively desirable,[82] we disagree, as do others.[83] In any event, as a descriptive matter, we do not observe general disagreement that it is happening.[84]

II. THEORIES OF JUDICIAL AUTHORITY TO REQUIRE BCA

As discussed above, there is no general, express statutory requirement for agencies to conduct benefit-cost analysis as part of their rulemaking process. Although Congress has acted in some instances to expressly require or forbid benefit-cost analysis,[85] it has not adopted any of the various bills that sought to codify the requirements of Executive Order 12,866 or otherwise to impose a cross-cutting BCA requirement.[86]

Rather, the requirement for agencies to conduct benefit-cost analysis stems largely from Executive Order 12,866 and its predecessors noted above.[87] In a manner now typical of executive orders, it contains boilerplate language at the end limiting judicial review:

> Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or

[82] *E.g.*, Frank Ackerman & Lisa Heinzerling, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

[83] *E.g.*, CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (2018).

[84] Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services*, 34 YALE J. ON REG. 545, 548 (2017) ("[T]he requirement that the financial regulatory agencies engage in cost-benefit analysis is now likely to become more prevalent."); Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 605 (2015) ("Courts are . . . increasingly requiring agencies to quantify benefits and costs to the extent possible."); Reeve Bull & Jerry Ellig, *Judicial Review of Regulatory Impact Analysis: Why Not the Best?*, 69 ADMIN. L. REV. 725, 728 (2017) ("[f]ederal courts have increasingly come to view as per se irrational an agency action that ignores the economic considerations associated with a contemplated course of action (assuming no statutory prohibition on reviewing such economic considerations exists)."). *But see* Amy Sinden, A *'Cost-Benefit State'? Reports of Its Birth Have Been Greatly Exaggerated*, 45 ENVIR. L. REPORTER 10,933 (2016).

[85] *See supra* note 14.

[86] *See supra* note 15.

[87] Exec. Order No. 12,866 § 1(b)(6) (1993).

> instrumentalities, its officers or employees, or any other person.[88]

Far from inviting judicial review, such language signals that the President does not intend for the language of his executive order to be used upon judicial review.

Another challenge is that the Supreme Court determined in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[89] that "reviewing courts are generally not free to impose [procedural requirements]" if neither Congress nor the agencies have chosen to require or grant them, respectively.[90] The Administrative Procedure Act (APA) "sets forth the full extent of judicial authority to review executive action for procedural correctness."[91]

The absence of an express statutory requirement to conduct benefit-cost analysis, the preclusive language in Executive Order 12,866, and *Vermont Yankee* would seem to be significant obstacles for courts to require agencies to conduct benefit cost analysis. Under what authority does a court vacate or remand an agency action for failure to complete an adequate benefit-cost analysis?

This section considers two theories of judicial authority to require benefit-cost analysis of regulation, finding that both have challenges, but, even setting those aside, neither theory offers courts much in the way of specific tools for courts to use upon judicial review.

A. Failure to Conduct BCA is Arbitrary and Capricious under the APA

One possibility is that the courts are merely applying the APA when they call for benefit-cost analysis, as the U.S. Court of Appeals for the District of Columbia explained in *Business Roundtable*, discussed above. It is also the principal argument proffered by Professor Sunstein,[92] who finds that agencies have "a duty to engage in cost-benefit balancing, taken as an inference from

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[88] Exec. Order No. 12,866 § 10 (1993).

[89] 435 U.S. 519 (1978).

[90] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

[91] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 513 (2009).

[92] CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 147-70 (2018); Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVIR. L. REV. 1 (2017).

the prohibition on arbitrariness."[93] The APA directs reviewing courts to "hold unlawful and set aside agency action, findings, or conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[94] The arbitrariness of an action is a decidedly "elusive" concept in administrative law.[95] The flexibility of the term is part of what makes Professor Sunstein's argument plausible.

As he acknowledges, the APA is silent about the role of benefit-cost analysis,[96] at least in large part because its enactment in 1946 long predates the development of regulatory impact analysis and its component benefit-cost analysis.[97] Professor Adrian Vermeule makes a pointed attack on this issue, calling it "wildly implausible that Congress intends (or could be deemed fictionally to intend) a global default rule requiring cost-benefit analysis."[98] Given that Congress sometimes requires benefit-cost analysis, sometimes leaves it ambiguous, and is sometimes silent on the matter, "[t]here is no legal basis to elevate one of these approaches . . . apart from sectarian preference for one approach or the other."[99] The target of this critique appears to be any suggestion that the APA could be read to require *quantified* benefit-cost analysis, rather than the more typical formulation of benefit-cost analysis as it is practiced today; a blend of quantitative and qualitative techniques. But, the critique has equal sting when applied to this less-stringent concept of benefit-cost-analysis.

Professors Jonathan S. Masur and Eric A. Posner point out that:

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[93] Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVIR. L. REV. 1, 3 (2017).

[94] 5 U.S.C. § 706.

[95] R. George Wright, *Arbitrariness: Why the Most Important Idea in Administrative Law Can't Be Defined, and What this Means for the Law in General*, 44 U. RICH. L. REV. 839, 839 (2010). *See also* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1356 (2016) (describing "arbitrary and capricious" review as a test of rationality); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 14-23 (2009) (describing court application of "arbitrary and capricious" as a search for technocractic reasoning); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 491 (2010) (describing the transformation of "arbitrary and capricious" review to "hard look" review); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 495, 495-504 (2003) (declining to offer a "grand definition" of arbitrariness).

[96] Cass R. Sunstein, Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVIR. L. REV. 1, 7 (2017).

[97] *See supra* Section I.

[98] *See* ADRIAN VERMEULE, LAW'S ABNEGATION 171-72 (YEAR).

[99] *Id*.

> The problem is that none of the opinions in *Michigan v EPA* mention the APA, or even use the words "arbitrary" or "capricious." *Entergy* similarly lacks even a single mention of the APA, or a single appearance of the words "arbitrary" or "capricious." Even *American Trucking* mentions the APA only in relation to whether the agency action in that case is final and reviewable. There is no mention of § 706, and the words "arbitrary" or "capricious" do not appear. It is of course possible to construct a reasonable argument that it would be arbitrary and capricious to promulgate a regulation that does not pass a cost-benefit test. But it is hard to see the APA as the source of the judicial momentum behind CBA without so much as a single mention of the statute.[100]

In short, they argue, "[t]here is no textual hook that connects these cases to the APA."[101] *Business Roundtable*, of course, was an APA case, but the Supreme Court decisions noted above are not grounded in the APA.

Turning to the *Vermont Yankee* issue, Professor Vermeule describes quantified benefit-cost analysis as a "decision-procedure" that runs afoul of *Vermont Yankee*. As noted above, *Vermont Yankee* teaches that courts ought not to create new fetters for the executive, beyond what Congress put into the APA. And, benefit-cost analysis conjures up visions of bureaucrats making calculations and assessments, all of which could seem procedural in nature.[102] Professor Sunstein sidesteps *Vermont Yankee* by positioning benefit-cost analysis as the way to avoid arbitrariness.[103] His argument is that when an agency undertakes benefit-cost analysis at a court's behest to avoid being found arbitrary, that does not transform those steps into "procedures" under *Vermont Yankee*. Rather, they are steps agencies take to ensure lawful action, leaving *Vermont Yankee* "irrelevant."[104] Professors Masur and Posner argue that, as a practical matter, the lack of APA authority and *Vermont Yankee*'s bar on extra-APA procedural requirements have not been fatal for judicially-

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[100] Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 978 (2018) (footnotes omitted).

[101] *Id*. at 979.

[102] The question of whether benefit-cost analysis is a "procedure" under *Vermont Yankee* is an interesting issue that is beyond the scope of this article. The facts in *Vermont Yankee* were about the quasi-judicial formal rulemaking procedures used to gather evidence, particularly cross-examination and discovery. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 528-29 (1978).

[103] SUNSTEIN 155

[104] *Id*.

imposed benefit-cost analysis.[105] They argue that the Court "is well on its way to requiring that agencies balance costs and benefits absent explicit statutory language to the contrary."[106] They conclude that "[i]f *Vermont Yankee* prohibits this, the Court does not appear to care."[107] The same might be true of Executive Order 12,866's preclusive language.[108]

Even if this is correct, the APA theory does not provide judges with practical tools to assess an agency's benefit-cost analysis. To make a determination of arbitrariness, courts

> must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.[109]

The question, as it relates to benefit-cost analysis, is how a court can check an agency's analysis for errors without simply substituting its judgment about the agency's analytical choices. Without additional standards to reference, the APA theory does not offer judges anything specific against which to check an agency's work.

B. Administrative Common Law Attaches to Rulemaking

Unpersuaded on textual grounds by the APA theory outlined above, Professors Masur and Posner instead propose that Federal common law—i.e., judge-made law—better explains and supports judicial review of benefit-cost analysis.[110] They write that "courts have awoken to the value of CBA and have increasingly mandated it because they believe that CBA should play a

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[105] Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 979 n.192 (2018).

[106] *Id*.

[107] *Id*.

[108] It is not entirely clear how to weigh the preclusive language of Executive Order 12,866 in this context. On the one hand, that Order is what directs the agencies to conduct this analysis, and so its terms seem directly relevant to how courts review it. On the other hand, the practice of regulatory analysis, including benefit-cost analysis, can be so intertwined with executive branch decision making that cabining it away from judicial review seems neither advisable not feasible.

[109] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (internal citations omitted).

[110] Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 977-81 (2018).

role in regulation."[111] They also point to the APA, but as a "general authorization to courts to develop a common law of the administrative state."[112] They draw on an analogy to federal antitrust law, pointing to the Supreme Court's reference to Sherman Act as a "common-law statute" and the incremental adoption of economic principles to decide antitrust suits.[113] They briefly survey the regulatory history of the United States, finding convergence across legislative, judicial, and executive branches that "regulatory agencies should normally comply" with benefit-cost analysis.[114]

The idea of a federal common law, or even a federal administrative common law, is not new, as Professors Masur and Posner acknowledge.[115] Professor Jeffrey A. Pojanowski provides a helpful summary of the fault lines in how the common law tradition is viewed, generally:

> Dynamic and strongly purposive interpreters often claim the Anglo-American common law heritage supports their approach to statutory interpretation, and that formalism is an unjustified break from that tradition. Many formalists reply that the common law mindset and methods are obsolete and inimical to a modern legal system of separated powers.[116]

He concludes that "[t]he common law, like all living traditions, is a contested one."[117] This is the same in administrative law, where the common law approach to administrative law remains controversial. Professor Gillian E. Metzger argues for "explicit judicial recognition and acceptance of administrative common law."[118] She notes Professor Jack M. Beermann's observation that courts are "reluctant to be open about their use of common law in the administrative law arena, especially when a statute contains an answer or a germ of an answer,"[119] and argues not only that administrative

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[111] Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 979 (2018).

[112] *Id*. at 979.

[113] *Id*. (quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007)).

[114] *Id*. at 980-81. This presumably means that, although Executive Order 12,866 is what directs agencies to do this, the practice has grown beyond this directive such that the Order's preclusive language does not apply.

[115] *Id*. at 979 nn. 190-91.

[116] *See generally* Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357 (2015).

[117] *Id*. at 1424.

[118] Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1296 (2012).

[119] *Id*. at 1295 (quoting Jack M. Beermann, *Common Law and Statute Law in*

common law is "ubiquitous, inevitable, and legitimate" but that there are benefits to acknowledging it openly.[120] Professor Kathryn E. Kovacs, in turn, pushed back on the idea of the APA as a "superstatute" that justifies a common law approach to administrative law.[121] In short, so long as this is remains an area of active scholarly debate and judicial reluctance, it is not the strongest of reeds upon which to rest a court's authority to require benefit-cost analysis.

Either way, like the APA theory discussed above, this theory does not offer judges anything specific against which to check an agency's work. In fact, it seems to ask the judges to craft those specifics on their own. Most judges are not economists, and asking them to craft technical standards for benefit-cost analysis on a case-by-case basis is not likely to provide a workable set of standards for the public, the government, or the courts. Even if Professors Masur and Posner are correct that federal common law undergirds judicial authority to require benefit-cost analysis, the courts still need a set of justiciable standards.

C. Theories Aside, A Remaining Need

We have just summarized the two main arguments for judicial authority to require that agencies conduct benefit-cost analysis. Both have some challenges, but holding aside the persuasiveness of either theory, neither confers upon courts much in the way of specific standards against which agency benefit-cost analysis can be evaluated. Futhermore, despite the accumulation of 50 years of administrative practice, it is difficult to point to any blackletter law that enables judges to give consistent scrutiny to regulatory agencies' use of benefit-cost analysis. This bears itself out in judicial decisions, which tend to use vague hortatory phrases, such as noting that considering costs "makes good sense."[122] While good sense surely makes good law, it does not give courts tools to evaluate the substantive choices that agencies make when analyzing their regulatory options and justifying their regulatory decisions.

III. STATUTORY CONSIDERATIONS FOR A RULE ON RULES

Administrative Law, 63 ADMIN. L. REV. 1, 3 (2011))

[120] *Id*. at 1297.

[121] Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1237-60 (2015) (applying the "superstatute" theory from WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010) to the APA).

[122] *Environmental Protection Agency v. EME Homer City Generation*, 572 U.S. 489, 519 (2013).

As discussed above, both the executive and the judiciary have embraced benefit-cost balancing as a broadly applicable tool for evaluating regulatory actions. But the executive has done so with somewhat detailed instructions and specifications, and with procedures for review and transparency and public engagement.[123] At the same time the judiciary has not articulated a legal theory that would allow the courts to review agency compliance with the principle in more than a general way.

This prompts us to ask whether the executive might consider a carve-out from the usual executive order boilerplate—"does not create any right or benefit, . . . , enforceable at law"—and proceed to codify well-established benefit-cost balancing principles in a form that courts might enforce. By a "rule on rules," we mean a cross-cutting regulation, issued at the direction of the president by a cognizant agency, most likely OIRA in consultation with the Department of Justice, that is enforceable by the courts, and that instructs agencies how to conduct regulatory analysis and perhaps how to use it to guide their administrative decisions, consistent with statutory law. It could contain, for example a requirement that agencies consider alternatives in addition to the status quo, which is consistent with Executive Order 12,866. The rule would specify that, in the executive's view, an analysis that fails to do that would be arbitrary.[124]

We recognize that a president who contemplates issuing a binding rule on rules would likely be advised that: (1) as the elected chief executive the president has ample authority of his own to direct the agencies, and asking courts to enforce a rule on rules might invite what could at least occasionally be viewed as unwelcome extramural interference; and (2) if a court did decide to enforce such a rule on rules, the court would be enforcing it *against* the executive branch. Many presidents would choose not to invite deeper judicial scrutiny of regulatory analysis procedures. Nonetheless, some presidents might see sufficient merits in a rule on rules to overcome these objections and codify longstanding practices.

We do not envision that a rule on rules would establish standing where it otherwise would not exist. There is a well-established, if still evolving, set

[123] Exec. Order No. 12,866.

[124] We hope this article will spur discussion of other potential provisions, a complete treatment of which could consume an entire article of its own. We note that a rule on rules would need to look very different from Executive Order 12,866 and its appurtenant guidance, to avoid subjecting intramural matters (e.g., timing of submission to OIRA) to judicial review.

of precedent for courts to apply in determining standing to bring suit under the APA. Rather, litigants might use a rule on rules as an adjunct to an APA claim that the action is arbitrary and capricious. The rule on rules could provide a reviewing court with the qualities of regulatory analysis that, in the executive's view, clear the APA's "arbitrary and capricious" hurdle, against which the contents of an agency's final rule could be reviewed by the court.

In this section, we discuss the statutory authorities that might be invoked in support of individual agency rules on regulatory analysis as well as a cross-cutting rule on rules.

A. Individual Agency Rules on Regulatory Analysis

In recent years several agencies, including independent agencies, have taken various steps to bolster their regulatory analysis.[125] For example, agencies have initiated rulemakings that are intended to codify, in judicially-enforceable form, regulatory analysis practices that are already established in OMB and agency guidance. For example, in 2018 the Environmental Protection Agency (EPA) issued an Advanced Notice of Proposed Rulemaking[126] that sought to provide consistency and transparency in the use of economic analysis across the agency's various offices and statutes. Initially, this rulemaking was conducted by EPA's National Center for Environmental Economics, located in the Office of the Administrator. In 2019, however, EPA Administrator Andrew Wheeler restructured the rulemaking, assigning it to individual media offices so that the proposed and final rules might conform more closely to the requirements of the agency's various statutory authorizing statutes.[127] The memo read, in part:

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[125] This includes some efforts that are clearly intended to respond to the U.S. Court of Appeals for the D.C. Circuit's *Business Roundtable* decision in 2011. For example, after that decision the SEC added economists to its staff and issued guidance for the use of economic analysis in rulemaking that is explicitly based on the principles of Executive Order No. 12,866. SEC Division of Risk, Strategy, and Financial Innovation & Office of the General Counsel, Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012), https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf. An external review of subsequent SEC rules found that the agency's economic justification for its decisions was improving as a result of these steps. Jerry Ellig, Improvements in SEC Economic Analysis since Business Roundtable: A Structured Assessment. (Working Paper) (Dec. 2016).

[126] Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process, 83 Fed. Reg.27,524 (June 13, 2018).

[127] Administrator Wheeler Memorandum: Increasing Consistency and Transparency in Considering Benefits and Costs in the Rulemaking Process (May 13, 2019), available at https://www.epa.gov/environmental-economics/administrator-wheeler-memorandum-increasing-consistency-and-transparency.

> Many EPA statutes contemplate the consideration of benefits and costs as part of regulatory decision-making. However, benefits and costs have historically been treated differently depending on the media office and the underlying authority. This has resulted in various concepts of benefits, costs and other factors that may be considered. This memorandum will initiate an effort to rectify these inconsistencies through statute-specific actions. . . .
>
> In developing these regulatory proposals, consistent with applicable laws and regulations, media offices shall be guided by the following principles:
>
> • *Ensuring the agency balances benefits and costs in regulatory decision-making.* The EPA should evaluate and consider both benefits and costs in decision-making.
> • *Increasing consistency in the interpretation of statutory terminology.* The EPA media offices should evaluate benefits and costs in a manner that applies consistent interpretations of key terms and concepts for specific statutes (e.g. "practical," "appropriate," "reasonable" and "feasible").
> • *Providing transparency in the weight assigned to various factors in regulatory decisions.* Media offices should transparently identify which factors were and were not considered in regulatory analysis and how these factors were weighed to arrive at a particular regulatory outcome.
> • *Promoting adherence to best practices in conducting the technical analysis used to inform decisions.* The EPA's technical analyses should follow sound economic and scientific principles and adhere to existing guidance and best practices for benefit-cost analysis, including the EPA's *Guidelines for Preparing Economic Analyses* and other peer-reviewed standards of practice that are applicable to rulemaking.[128]

This EPA memorandum illustrates the tension between two competing objectives: (1) the desire to achieve greater consistency across the agency in the use of economic analysis, and (2) the need to base a rule on a particular statutory authority if it is to be judicially enforceable. That tension is at least an order of magnitude greater when contemplating a cross-government rule

[128] *Id.*

on rules. We now turn to the question of whether cross-cutting statutory authority exists to support a cross-cutting rule.

B. Cross-Cutting Rule on Rules

Agency rulemakings are subject to multiple cross-cutting requirements that are grounded in statutes (or in treaties or in the Constitution), and thus are already subject to judicial review. These include the National Environmental Policy Act (NEPA, discussed in detail in subsection C), the Paperwork Reduction Act (PRA, which created OIRA), the Information Quality Act (IQA), the Small Business Regulatory Enforcement Fairness Act (SBREFA), the Congressional Review Act (CRA), the Administrative Procedure Act (APA), and others.

Some of these cross-cutting statutes explicitly call for OIRA to issue binding regulations (the PRA), or "guidance" whose judicial enforceability is unclear (the IQA); but many of them are silent on the question of implementing regulations. In *Youngstown Sheet & Tube Co. v. Sawyer*,[129] the Supreme Court acknowledged that statutory authority could be express or implied.[130] There is no statute that expressly directs OIRA or any other entity to issue a rule on regulatory analysis. Indeed, in recent years Congress has considered, but not enacted, several bills[131] that would have codified aspects of EO 12866, OIRA's role in enforcing it, and the availability of judicial review.

The closest express rulemaking authority is in the Paperwork Reduction Act, which directs OMB "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter."[132] This references chapter 35 of title 44 of the U.S. Code, which is entitled "Coordination of Federal Information Policy."[133] Most of its provisions deal with the federal government's collection of data and its information security policies.[134] Although some of the government's regulations surely fall within this chapter, the vast majority (e.g., health and safety rules) do not. Therefore,

[129] 343 U.S. 579 (1952).

[130] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 ("There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied.").

[131] *See, e.g.*, *supra* note 15.

[132] 44 U.S.C § 3516.

[133] 44 U.S.C. Ch. 35.

[134] *See generally id.*

the Paperwork Reduction Act's rulemaking authority is not easily read to be an express, or implied, source of authority for a rule on rules.

Turning to other potential sources of implied authority, the Congressional Review Act (CRA)[135] would appear to hold some promise. The CRA, *inter alia*, directs OIRA to determine which agency rules are "major" and therefore subject to certain procedural requirements.[136] It is not unreasonable to think that OIRA could, or perhaps should, use a rulemaking to implement these definitions and procedures though it would be limited to CRA-related matters. Like the PRA, the CRA applies to independent agencies, as well as those under direct presidential supervision.

Another possible source of implied authority for a rule on rules is the APA. The APA predates the use of BCA in rulemaking and OIRA by several decades, and as such it could not have referred to them.[137] It does not give express authority for any entity to issue policies or regulations to implement it; rather, it contains a significant section on judicial review.[138] This includes the criteria a court can use to "hold unlawful and set aside agency action, findings, and conclusions" if they are

> found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the [APA's hearing requirements]; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."[139]

There are perhaps three ways the APA could be read to confer implied rulemaking authority. First, an agency might want executive direction to help it steer clear of the APA's judicial review icebergs listed above. This was certainly true when the APA was enacted. Agencies requested enough advice from the U.S. Department of Justice that it led to the Attorney General's

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[135] 5 U.S.C. Ch. 8.

[136] 5 U.S.C. § 804(2)(C).

[137] *See supra* note 96-97. When the APA was enacted, there were also many fewer regulatory agencies than today, and they were more often established as independent agencies.

[138] 5 U.S.C. § 706.

[139] 5 U.S.C. § 706(2).

Manual on the Administrative Procedure Act in 1947,[140] a major reference manual that is still consulted today. This manual places the APA's provisions into historical context by linking it to both the APA's legislative history and prior case law, providing rich citations for both. Despite its many virtues, it did not offer agencies an analytical approach to making decisions that would help their actions survive judicial review. In many ways the agencies are still operating without that advice, delivered as it is now on an ad hoc basis via consultations with their attorneys and DOJ.[141] An agency's pragmatic need for guidance however, may not be enough to imply authority for the president to give it in the form of a rule.

Second, and as noted above in Section I.B., courts handling APA cases have somewhat recently begun to interpret the "arbitrary and capricious" standard as rooted in economics principles, such as analyzing costs and benefits of proposed actions. As Professor Sunstein has argued, perhaps the APA can be understood to instruct agencies to conduct benefit-cost analysis and other regulatory analyses. That, in turn, could imply that the president has the authority to issue policies or rules to guide those analyses, as part of his supervision of the executive branch. This reasoning may be too attenuated to imply rulemaking authority. An equally plausible reading is that the APA leaves the agencies to navigate administrative procedure on their own, with no implied role for the president. Such an approach might be inefficient in the short run, but it might be defensible on the grounds that it also encourages agencies to try different techniques that can be tested by the courts, resulting in the body of case law that we see today.

Third, setting more modern developments aside, it's long been understood that the APA offers an orderly, transparent approach to government decision making. A rule on rules could be in line with that overarching goal by providing transparency into the assumptions and

[140] AG Manual. "Government agencies were calling upon us for advice on the meaning of various provisions of the Act. We endeavored to furnish that advice promptly and in detail to every agency which consulted us. At length I decided that we could offer a definite service by preparing a general analysis of provisions of the Act in the light of our experience. This manual is the result of that effort. It does not purport to be exhaustive. It was intended primarily as a guide to the agencies in adjusting their procedures to the requirements of the Act. … While the manual was intended originally for distribution only to Government agencies, public demand for it has been so great that I have decided to make it generally available." *Id*. at 6-7.

[141] Although Executive Order 12866 and OMB's Circular A-4 offer principles for sound agency analysis and decision-making on regulatory matters, those policies were grounded more in concerns about substantive regulatory choices, and less in their ability to help improve judicial outcomes.

judgments that agencies are feeding into their regulatory decisions. Given the need for consistent and coherent[142] enforcement of administrative law, a case can be made that a rule on rules would help ensure orderly and consistent compliance with the APA. It could allow the public to better comment on proposals and make for a better record on judicial review. But, while courts and litigants might welcome such a rule for those reasons, it is also possible that prescribing detailed requirements for economic analysis based on the 1946 APA text might be seen as too much of a stretch.

These three arguments suggest a rule on rules would be consistent with both current and longstanding interpretations of the APA. But as such they offer something more like a "pull" factors that encourage such a rule rather than a clear statement of statutory authority. Might the courts nonetheless enforce a rule on rules? There is one encouraging precedent, to which we now turn.

C. The Precedent of the Cross-Cutting NEPA Rule

The National Environmental Policy Act (NEPA) was enacted in 1970,[143] and was "the first of the major environmental laws enacted in the environmental decade of the 1970s."[144] At 5 pages, it was not especially lengthy. Its most well-known provision created the requirement for agencies to undertake environmental impact assessments (EIAs)[145] in support of administrative decisions. It also created the Council on Environmental Quality (CEQ) inside the Executive Office of the President, with duties to gather and report information and make policy recommendations to the president.[146] Two months after the statute was enacted, President Richard Nixon signed Executive Order 11,514 which specified additional responsibilities for CEQ, including issuance of "guidelines to Federal agencies for . . . Federal actions affecting the environment" and "instructions to agencies . . . as may be required to carry out the Council's responsibilities under the Act."[147]

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[142] "Coherence is an aspect of faithful execution of the laws; it denotes an administrative consistency, not just across time and place, but also across hundreds of different regulatory programs busily pursuing inconsistent aims." Brian Mannix, *Coherence in the Executive*, 2016. https://www.lawliberty.org/liberty-forum/coherence-in-the-executive/

[143] Pub. L. 91-190 (Jan. 1, 1970). https://www.govinfo.gov/content/pkg/STATUTE-83/pdf/STATUTE-83-Pg852.pdf. 42 U.S.C. § 4321 *et seq*.

[144] Dinah Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 Environmental Law Reporter 10,060 (Feb. 1989) [hereinafter *NEPA Primer*].

[145] NEPA § 102.

[146] NEPA § 204.

[147] Executive Order 11,514, Protection and Enhancement of Environmental Quality §

CEQ issued interim guidelines April 1970, which did not have a public comment period, but set a December 1, 1970 deadline for agencies to report to CEQ "problem areas and suggestions for revision or clarification of these guidelines to achieve effective coordination of views on environmental aspects (and alternatives, where appropriate) of proposed actions[148] without imposing unproductive administrative procedures."[149] CEQ finalized the guidelines early in 1971, including an ongoing call for feedback on "problem areas and suggestions."[150]

Over the 1970s, the NEPA process "acquired some unfortunate 'barnacles'"[151] including criticism for delays, and a spike in NEPA litigation.[152] NEPA applied to a wide variety of agency actions under hundreds of different statutes, and compliance with NEPA was reviewed in federal district courts, resulting in widespread, conflicting decisions that were then appealed to higher courts.[153]

To address the confusion, President Jimmy Carter issued Executive Order 11,991 in May 1977.[154] It had only two provisions. Section 1 directed CEQ to issue regulations.[155] Section 2 directed agencies, in "carrying out their

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3(h)-(i) (Mar. 5, 1970), at 35 Fed. Reg. 4247 (Mar. 7, 1070), https://cdn.loc.gov/service/ll/fedreg/fr035/fr035046/fr035046.pdf.

[148] In this context "proposed actions" covers a wide variety of agency actions that might affect the environment. Generally, agency rulemakings are covered by NEPA; however, Congress amended the Clean Air Act (Pub. L. No. 91-604) to exempt its implementing regulations, which are promulgated with procedures believed to be "NEPA equivalent." Several other categories of rulemaking are today considered exempt under the NEPA equivalence doctrine.

[149] Council on Environmental Quality, Interim Guidelines: Statements on Proposed Federal Actions Affecting the Environment (Apr. 30, 1970), published in 35 Fed. Reg. 7390 (May 12, 1970), https://cdn.loc.gov/service/ll/fedreg/fr035/fr035092/fr035092.pdf.

[150] Council on Environmental Quality, Guidelines: Statements on Proposed Federal Actions Affecting the Environment (date unknown), published in 36 Fed. Reg. 7724 (Apr. 23, 1971), https://cdn.loc.gov/service/ll/fedreg/fr036/fr036079/fr036079.pdf.

[151] Bear, *NEPA Primer* at 10,062.

[152] *See* Bear, *NEPA Primer* at 10,062.

[153] *See generally* Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 483 (2009). *See also* Council on Environmental Quality, Final Regulations, National Environmental Policy Act—Implementation of Procedural Provisions, 43 Fed. Reg. 55,978, 55978 (Nov. 29, 1978), https://cdn.loc.gov/service/ll/fedreg/fr043/fr043230/fr043230.pdf (referring to agency and court inconsistency in applying NEPA to agency actions).

[154] Executive Order 11,911, Relating to Protection and Enhancement of Environmental Quality (May 24, 1977), at 42 Fed. Reg. 26,967 (May 25, 1977), https://cdn.loc.gov/service/ll/fedreg/fr042/fr042101/fr042101.pdf.

[155] E.O. 11,991 § 1.

responsibilities under [NEPA] and this Order" to comply with CEQ's regulations, except "where such compliance would be inconsistent with statutory requirements."[156]

By June 1978, CEQ published a proposed rule entitled "Proposed Implementation of Procedural Provisions."[157] CEQ issued its final rule in November 1978.[158] The preamble of the final rule goes to great lengths to explain the basis of the rule in a way that the proposed rule preamble did not.[159] The public comments have been lost to time, most likely, but the extensive redrafting suggests that the comments may have challenged CEQ's authority to issue a binding rule.

In *Andrus* v. *Sierra Club*,[160] the Supreme Court took favorable notice of the CEQ regulations and, in dicta, asserted that they warranted deference:

> Issue regulations to Federal agencies for the implementation of the procedural provisions of the Act. Such regulations shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. They will be designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives. They will require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses. The Council shall include in its regulations procedures (1) for the early preparation of environmental impact statements, and (2) for the referral to the Council of conflicts between agencies concerning the implementation of the National Environmental Policy Act of 1969, as amended, and Section 309 of the Clean Air Act, as amended, for the Council's recommendation as to their prompt resolution.

Id. (internal citation omitted).

[156] E.O. 11,991 § 2.

[157] Council on Environmental Quality, Proposed Regulations, National Environmental Policy Act—Implementation of Procedural Provisions, 43 Fed. Reg. 25,230 (June 9, 1978), https://cdn.loc.gov/service/ll/fedreg/fr043/fr043112/fr043112.pdf.

[158] Council on Environmental Quality, Final Regulations, National Environmental Policy Act—Implementation of Procedural Provisions, 43 Fed. Reg. 55,978 (Nov. 29, 1978), https://cdn.loc.gov/service/ll/fedreg/fr043/fr043230/fr043230.pdf.

[159] *Compare* Council on Environmental Quality, Final Regulations, National Environmental Policy Act—Implementation of Procedural Provisions, 43 Fed. Reg. 55,978, 55978 (Nov. 29, 1978), https://cdn.loc.gov/service/ll/fedreg/fr043/fr043230/fr043230.pdf, *with* Council on Environmental Quality, Proposed Regulations, National Environmental Policy Act—Implementation of Procedural Provisions, 43 Fed. Reg. 25,230, 25,230 (June 9, 1978), https://cdn.loc.gov/service/ll/fedreg/fr043/fr043112/fr043112.pdf.

[160] 442 U.S. 347 (1979).

> In 1977, however, President Carter, in order to create a single set of uniform, mandatory regulations, ordered CEQ, "after consultation with affected agencies," to "[i]ssue regulations to Federal agencies for the implementation of the procedural provisions" of NEPA. The President ordered the heads of federal agencies to "comply with the regulations issued by the Council. . . ." CEQ has since issued these regulations, ...
>
> CEQ's interpretation of NEPA is entitled to substantial deference. The Council was created by NEPA, and charged in that statute with the responsibility "to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in . . . this Act . . . and to make recommendations to the President with respect thereto."[161]

This case effectively removed any doubts about CEQ's rulemaking authority.

One reason for the Court's favorable reception of the NEPA regulation, despite its shaky statutory underpinnings, could be that in the face of all the conflicting case law the Court was grateful that someone else—CEQ—had taken responsibility to review the legal and policy questions, sort through them in systematic fashion, and impose some transparency, consistency, and coherence on the NEPA process.

CEQ's NEPA rule is not the only example of a binding regulation promulgated without express statutory authority,[162] but it is an intriguing precedent because of the potential parallels with the rule on rules that we introduce above. NEPA imposes procedural obligations on agencies that very much resemble the requirements of Executive Order 12,866. NEPA also instructs agencies to consider alternatives and weigh their relative merits – including benefits and costs, as long as those are defined to include environmental impacts. Like OIRA, CEQ is an agency within the Executive Office of the President (EOP), acting under the authority of a presidential Executive Order. Despite the absence of statutory text granting rulemaking authority in NEPA, the Supreme Court accepted and blessed CEQ's final rule, and courts have enforced it ever since. Might they do the same for a rule on rulemaking issued by OIRA?

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[161] *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (internal citations omitted).

[162] Professor Peter Strauss has collected several examples of intragovernmental rulemaking that lack specific statutory authority, including some rules governing federal contracts and national secrets. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 572, 587 (1984).

Another similarity is that CEQ's NEPA rule does not apply directly to the general public. It certainly affects them, since it specifies when and how federal agencies must give notice to the public, and accept public comments, about agency decisions and their environmental impacts. But when courts are asked to enforce a provision of the NEPA rule, they are enforcing it against a federal agency. In practice, preparation of an EIS and other aspects of NEPA compliance may be delegated to a state agency, or to a contractor, or an applicant for a federal permit. But the legal duty to comply always lies with the relevant federal agency. In effect, the courts are enforcing the procedural provisions of NEPA itself, as interpreted, in extensive and authoritative detail, by the experts at CEQ.

In many ways, across-cutting rule on rules fits these contours. A rule on rules would never be enforced against a member of the public. It would specify procedures that federal agencies would need to follow when issuing rules, including an obligation to assess the benefits and cost of its decisions. OIRA has the expertise to give consistent guidance to agencies on this topic. Just as President Carter ordered CEQ to write NEPA regulations, and ordered the agencies to comply with them, a president could order OIRA to write a rule on rules, and order agencies to comply.

But there are also differences that may be important. As the Court noted in *Andrus*, CEQ was created by NEPA, with some explicit responsibilities for its implementation. It is not clear how much weight the Court actually gave to that factor. The Court also noted President Carter's executive order, which not only instructing CEQ to write a rule, but also instructed agencies to comply with it. It seems clear, for this reason and others, that, if the executive lacks clear statutory authority, it would need to rely on constitutional authority, an issue to which we now turn.

IV. CONSTITUTIONAL CONSIDERATIONS FOR A RULE ON RULES

In this section we review the constitutional provisions that the president could draw upon to issue a rule on rules. We also consider two theories of judicial enforceability for such a rule.

A. The President's Article II Authority to Issue a Rule on Rules

Any effort to understand the president's authority to supervise the executive branch begins with Article II of the Constitution,[163] which is dense with authorities and responsibilities. It vests "the executive power" in the president.[164] It allows the president to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."[165] It allows the president to nominate and appoint certain judges and officials, with advice and consent from the Senate.[166] It also directs that the president "shall take care that the laws be faithfully executed."[167] The difficulty inherent in applying these words to modern executive branch operations has long made Article II fertile ground for constitutional scholars and the courts. In this section we consider these various authorities, finding that the president, drawing upon Article II, likely has ample authority to issue a rule on rules, as described above in Section III.

One intriguing source of authority for the president to issue a rule on rules is the opinions clause of the Constitution.[168] Using this authority, presidents can require agency officials to explain, "in writing," the expected benefits and costs of their decisions; it is less clear that presidents can compel officials to act in accordance with those findings. Professors Strauss and Sunstein have explained the distinction between procedural supervision and substantive supervision and indicate support for the opinions clause as one basis for requiring benefit-cost analysis as a procedural matter.[169]

But presidents frequently instruct agency officials on the substance of their actions, and agency officials usually comply. The usual explanation for this is the appointments clause.[170] In practice, the president's power of removal is what persuades executive branch officials to comply with

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[163] U.S. Const. Art. II.

[164] U.S. Const. Art. II, § 1, cl. 1. This is referred to as the "vesting" clause.

[165] *Id*. This is referred to as the "opinions" clause.

[166] U.S. Const. Art. II, § 1, cl. 2. This is referred to as the "appointments" clause.

[167] U.S. Const. Art. II, § 3. This is referred to as the "take care" clause.

[168] U.S. Const. Art. II, § 1, cl. 1. *See generally* C. Boyden Gray, The President's Constitutional Power to Order Cost-Benefit Analysis and Centralized Review of Independent Agency Rulemaking (Working Paper), available at https://www.mercatus.org/system/files/mercatus-gray-executive-power-independent-agencies-v1.pdf; Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647 (1996).

[169] Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 200 (1986).

[170] U.S. Const. Art. II, § 1, cl. 2.

presidential directives. Enforcement of the provisions of executive orders, for example, is facilitated by the implied threat of dismissal.

Article II.3.5 obligates the president to "take care that the laws be faithfully executed." This clause is most often interpreted as a duty, preventing the president from only selectively enforcing the laws. It is also one aspect of the president's general executive authority, which also may include implied powers. The scope of this authority is much debated, but the constitution is clear that, whatever its scope, it is vested in the president.

Although it was principally concerned with a question about the president's power to remove an official, the Supreme Court's decision in *Myers v. United States* provides a general discussion of the president's executive authority:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control.[171]

The rule on rules would facilitate presidential supervision and provide guidance to the agencies. As such, whether one focuses on a single aspect of Article II, or read its authorities together, it seems to provide ample authority to support the promulgation of a rule on rules. The more difficult question is not, then, whether the executive could issue such a rule, but whether the judiciary could, or should, enforce it. In the next section we consider two theories that support judicial embrace of a rule on rules.

[171] *Myers v. United States*, 272 U.S. 52, 135 (1926).

B. Two Theories of Judicial Enforceability

We have endeavored to show that the president has constitutional authority to promulgate a rule on rules, even if he or she might lack clear statutory authority for that same act. We turn, now, to the courts' authority to enforce such a rule against the agencies in the course of litigation challenging a regulation. We offer two theories. The first draws heavily on the history of the NEPA regulations, which, we have argued, were embraced by the Supreme Court, at least in part, as a result of their helpfulness and quality, and also on modern theories of executive power. The second offers benefit-cost balancing as a way to address burgeoning nondelegation concerns.

1. Deference to Presidential Authority and Expertise

One way to explain the Court's support of CEQ's NEPA rule, which lacks an express statutory basis, is that the Court was deferring to a mix of executive authority and expertise in an area where the Court found it useful and appropriate. In the context of regulatory analysis and, in particular, benefit-cost analysis, while courts are increasingly turning to benefit-cost analysis to assess agency action, they lack a clear set of standards against which to assess those actions. Therefore, if the president directs OIRA to set standards that the courts can use, and OIRA produces a rule that courts can readily apply, courts might choose, as a matter of rationalizing their own approach to judicial review, to embrace these standards.

Such an embrace is consistent with various modern theories of executive power. Supporters of the "unitary executive" theory of presidential authority argue that the structure of the constitution gives the president plenary authority to direct the use of any powers that Congress has delegated to the executive. As such, they might support judicial enforcement of the standards that the president sets for the executive branch in a rule on rules. And in her 2001 article, *Presidential Administration*, then-Professor Elena Kagan offered a different line of argument, but one that arrived at a similar destination: "I argue that a statutory delegation to an executive agency official—although not to an independent agency head—usually should be read as allowing the President to assert directive authority, as Clinton did, over the exercise of the delegated discretion."[172] Under this line of thinking, by directing OIRA to issue a rule on rules, the president would be exercising

[172] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001).

directive authority of regulatory powers that Congress had delegated, but to different officials within the executive.

She also argues that presidential involvement in agency decisions actually can improve political accountability, and that courts should not treat it with suspicion:

> Recognition of this potential [of presidential control to produce accountable and effective administrative decisions] at the least would give courts a reason, in the event of a legal challenge, to read statutes delegating discretionary authority to executive agency officials as enabling the President, in the absence of any contrary congressional indication, to direct the exercise of this discretion.[173]

Here Professor Kagan argues that courts should be more deferential, not less, when the president's involvement makes agency decisions more accountable and effective. This is precisely the goal of regulatory analysis, and of benefit-cost analysis in particular.

Turning to the regulatory process, Professor Kagan explains that presidential administration "advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion."[174] Through the APA's notice and comment procedures, rulemaking is already highly visible to the public, and we argue that a rule on rules has the potential to facilitate that more by making regulatory analysis more complete. This is in keeping with Professor Kagan's encouragement that administrative law "promote presidential control of administration in its most attractive, which means its most public, form while still appropriately bounding the presidential role."[175] From this perspective, a presidentially-directed rule on rules, incorporating benefit-cost analysis principles that the courts have already embraced, should be welcome.

In sum, the courts need guidance on how to assess agency regulatory analysis, and on matters of rulemaking, it may very well enhance political accountability to accept it from the executive.

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[173] *Id.* at 2364.
[174] *Id.* at 2384.
[175] *Id.* at 2385.

2. The Nondelegation Doctrine

Professor Kagan's article also addresses the nondelegation doctrine, arguing that courts should "count presidential control of agency as a positive factor in nondelegation analysis."[176] She cites a 2000 article, *Nondelegation Canons*, by Professor Sunstein.

While Professor Sunstein relied primarily on the APA as the explanation for judicial embrace of the Cost-Benefit State,[177] he has also presented an interesting, and now more timely, alternative constitutional argument. In a 2000 article[178] he listed a series of "nondelegation canons" of interpretation, as an alternative to the classical nondelegation doctrine. Rather than requiring courts to vacate overly broad or ambiguous statutes, these interpretive nondelegation canons take the form of "clear statement" doctrines that limit administrative agencies' authority to act contrary to certain established legal principles[179] unless they can cite a clear congressional mandate to do so. He includes among these canons an agency obligation to take account of costs.

> In decisions of particular importance for the modern regulatory state, agencies are sometimes forbidden to require very large expenditures for trivial or de minimis gains. If Congress wants to be "absolutist" about safety, it is permitted to do so by explicit statement. But agencies will not be allowed to take ambiguous language in this direction. This is a novel nondelegation principle, a creation of the late twentieth century. It is an evident response to perceived problems in modern regulatory policy.[180]

Eighteen years later, after a series of Supreme Court decisions increasingly favorable to benefit-cost balancing, Professor Sunstein revisited

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[176] *Id.* at 2370.

[177] *See supra* Section II.A.

[178] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

[179] Professor Sunstein describes his nondelegation canons as a judicial presumption, absent a clear statement of statutory authority, against administrative actions that: (1) raise constitutional doubts; (2) preempt state laws; (3) apply statutes retroactively; (4) violate the rule of lenity; (5) involve extraterritorial applicability; (6) intrude on tribal sovereignty; (7) waive sovereign immunity; (8) provide exemptions from taxation; (9) promote anticompetitive practices; (10) restrict veteran's benefits; or (11) incur grossly disproportionate costs. He does not list the exercise of eminent domain, but it appears to fit squarely within his paradigm: agencies may not condemn property without clear authority.

[180] Ibid., 334 – 335.

and expanded upon the "cost-consideration canon" as an application of what he now calls "The American Nondelegation Doctrine."[181]

> As we have seen, the cost-consideration canon holds that unless Congress explicitly says otherwise, an agency must consider costs in deciding whether and how to proceed. The canon has a long history; it grows out of a series of cases in the D.C. Circuit, first allowing and then mandating consideration of cost. In an important decision involving mercury regulation, all nine members of the Supreme Court converged on the new canon.[182]

In some respects, Sunstein's articulation of the cost-consideration canon resembles Masur and Posner's description of administrative common law, but tethers it to Article I of the Constitution and to basic separation-of-powers principles rather than to the common law. He argues that this American nondelegation canon has practical advantages over the classical nondelegation doctrine.

> Time and again, it imposes sharp constraints on the administrative state, not by applying the heavy artillery of the Constitution or the requirements of the Administrative Procedure Act, but by requiring clear congressional authorization for agency action—and by insisting, not rarely, that such authorization cannot be found.[183]

This variant of the nondelegation doctrine contrasts with the classical doctrine in that it is typically applied by vacating agency actions as not clearly authorized, rather than by striking down statutes as facially unconstitutional. Justice Scalia noted that: "[w]e have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."[184] Yet the Court itself frequently adopts limiting constructions that avoid constitutional problems. It is not clear that the executive cannot also do so;[185] at the very least, we expect agencies to try

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[181] *See generally* Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181 (2018).

[182] *Id.* at 1197 (referring to *Michigan v. EPA*, which we discuss *supra* Section I.B.).

[183] *Id.* at 1207-08.

[184] *Whitman v. Am. Trucking Ass'ns*, 121 S. Ct. 903, 912 (2001).

[185] Presidents frequently use signing statements, for example, to adopt an interpretation of a statute so as to avoid a perceived conflict with the Constitution. *See Presidential Signing Statements: Constitutional and Institutional Implications*, Congressional Research Service (multiple editions, Sept. 20, 2006 – Jan. 4, 2012), available at https://www.everycrsreport.com/reports/RL33667.html.

to avoid adopting unconstitutional interpretations of vague statutory language.

What makes Professor Sunstein's formulation of the nondelegation doctrine timely is the Supreme Court's recent decision in *Gundy* v. *United States*, which did not reinvigorate the doctrine, but certainly did highlight the very different perspectives that the justices bring to the question. Justice Elena Kagan's plurality opinion raises the specter of intolerable disruption to the operation of government: "Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional."[186] Justice Neil Gorsuch's dissent states the case for reinvigorating the doctrine: "[E]nforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone."[187]

If another nondelegation case arises, which seems likely, the Court might be eager to find a judicially-administrable limiting principle that preserves the separation of powers, without doing unacceptable violence to the administrative state. Professor Sunstein's cost-consideration canon could play just such a role by offering a default "intelligible principle"[188] that agencies are bound to follow unless directed otherwise.

In that context, a presidentially-directed rule on rules might be helpful. It would be of no use to a court that sought to apply the classical nondelegation doctrine to void statutes. But a rule on rules could help fill in the details of Professor Sunstein's cost-consideration canon—telling agencies, not only that they must interpret statutes to require benefit-cost balancing, but also how to go about it.

Such an interpretation of the nondelegation doctrine would go to the heart of what distinguishes a legislative body from an administrative one, letting Congress make the law, while agencies engage in fact finding that will inform its execution. This should do no significant violence to the existing administrative state. If the courts were to adopt Sunstein's cost-consideration principle as a nondelegation canon, that would tell agencies, "Yes, you have to do it; and, no, not just because the president said so."

Congress would retain the power to legislate, and could order an agency

[186] Gundy v. United States, 139 S. Ct. 2116, 2130 (2019).
[187] *Id.* at 2135.
[188] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

to disregard costs, or benefits for that matter, or to do something else entirely. The only constraint would be the need for a clear statutory statement of what principle the agency is being asked to follow, to overcome what would be a strong presumption in favor of the default benefit-cost principle. This requirement for a "clear statement" serves several purposes. It communicates the statutory mandate unambiguously to the agency, and to any reviewing court. More importantly, however, it lets the public know what decisions their elected representatives are making, at the time that Congress is making them. Again, that goes to the essence of the legislative power, and to the nature of the political accountability that legitimizes that power.

A requirement that the authorizing statement be clear *at the time Congress makes it* can be seen as an example of original-meaning statutory interpretation. In this context, such an interpretive canon might help mitigate another problem, the "temporal delegation problem:" broad congressional delegations of authority at one time period that are later used as a source of authority for agencies to take action that was wholly unanticipated by the enacting Congress or might no longer receive legislative support.[189]

A nondelegation doctrine built around benefit-cost balancing will not resolve all nondelegation cases; indeed, it would likely have had little useful to say to help resolve *Gundy*. In general, however, we could expect such an interpretive rule to generate many fewer cases in which judges are asked to give *Chevron* deference to an agency's expertise in interpreting its statutory mandate. At the same time, we could expect many more cases where judges are asked give deference to the agency's expertise in the analysis of benefits and costs. This should be viewed positively by those who are more comfortable when the courts defer to administrative agencies as finders of fact, rather than as makers of, or interpreters of, law.

Importantly, the obligation to pass a benefit-cost test should serve only as a check on administrative discretion, and not as a source of authority. If agencies need new powers to achieve large benefits, that is an argument for new legislation but it does not suffice to endow themselves with new powers. Relatedly, the courts would need to be on guard against overbroad delegations from Congress that effectively tell an agency they have authority to do anything at all that is net beneficial.

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[189] See Jonathan H. Adler and Christopher Jay Walker, *Delegation and Time* (July 19, 2019). Ohio State Public Law Working Paper No. 492, July 2019; Case Legal Studies Research Paper No. 2019-12. Available at SSRN: https://ssrn.com/abstract=3423062 or http://dx.doi.org/10.2139/ssrn.3423062.

As we explained above in Section II, the two main theories for judicial authority to require agencies to conduct benefit-cost analysis have some challenges. We have no doubt that our ideas offered above have their own. With respect to the first, we have tried to offer a court-centric rationale for a rule on rules, one which seeks to fill a gap in judicial expertise by drawing upon a legitimate and knowledgeable source. With respect to the second, our view is that our approach provides a pathway that protects the administrative state from an invigorated nondelegation doctrine. Either theory, in our view, would allow the executive to promulgate a rule on rules.

Many, if not most, would agree that agencies should be confined to specific ends or goals, specified in statutes. But we reckon many, if not most, would also agree that agencies should also use their properly delegated discretion in ways that demonstrably advance the public interest, unless they are otherwise commanded by Congress. It is reasonable to turn to the courts to enforce this requirement, and courts might find it easier to do so if the executive were to use a rule on rules that both assists them while also codifying well-established regulatory analysis practices.

CONCLUSION

This paper argues that the principles of regulatory analysis found in Executive Order 12,866 could usefully be codified in the Code of Federal Regulations, to help guide judicial review of agency rulemaking. As veterans of OIRA, we recognize that benefit-cost analysis does not answer all of the important questions about an agency action, and it can be distorted to paint a misleading picture. Nonetheless, we are encouraged that the Supreme Court views benefit-cost balancing, in some form, to be a requisite element of administrative decision making. In the absence of congressional action to codify this sensible requirement, an assist from the executive might be welcome.

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