

# Congress and the Stability of the Cost-Benefit Analysis Consensus

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*First Branch, Second Thoughts – What Is Congress’s Proper Role in the  
Administrative State?*

CONGRESS AND THE STABILITY OF THE COST-BENEFIT ANALYSIS CONSENSUS

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*A consensus has developed around agency practice of cost-benefit analysis (CBA). Congress passes broad laws and cedes the implementation details to agencies staffed with subject-matter and technical experts. Longstanding presidential executive orders require these agencies to conduct CBA, in recognition of the tool's useful role in overseeing the vast network of federal agencies and in encouraging the application of evidence-based expertise in rulemaking. And courts increasingly recognize that appropriate agency regulation requires at least some assessment of the regulation's expected costs and benefits, and they examine agency CBAs to ensure that agencies disclose and explain their technical and policy choices.*

*This Article has three objectives. First, it identifies and explains several emerging threats to the stability of this CBA consensus. Presidential support for the practice may be at risk in light of recent attention to the substantive constraints it imposes on agency action. In addition, more than half of the justices of the Supreme Court of the United States have signaled their willingness to reconsider the constitutional contours of the nondelegation doctrine, potentially calling into question the validity of broad statutory language that currently supports agency use of CBA. And an increasing number of scholars are questioning the legitimacy of searching judicial review of agency decisionmaking, which supports quality CBA.*

*In each case, relevant actors often make implicit assumptions about the likely effect the threatened disruption would have on the agency rulemaking consensus. But the likely congressional response, if any, to these disruptions tends to be ignored. While scholars have offered theoretical reasons for congressional support of CBA, no one has systematically examined congressional directives related to CBA. Congress is a central player in this dynamic scheme, and there is*

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*untapped value in examining its record on CBA over time. The second objective of this Article is to examine Congress’s empirical record.*

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

*Finally, the Article examines the implications of the findings to the future of CBA, providing some reasons for optimism. For example, it argues that calls to reject searching judicial review of agency decisionmaking should be rejected. When it comes to CBA, at least, Congress trades off some of its control in exchange for agency application of its expertise. Courts, as the guardians of statutory bargains, should ensure that agencies adhere to the terms of their bargain with Congress by taking a long and hard look at agency decisionmaking. The examination also helps explain why Congress has failed to pass statutes such as the Regulatory Accountability Act or extend requirements to independent agencies, and it proposes congressional actions that might be more successful.*

I. INTRODUCTION .....	2
II. THE CBA CONSENSUS .....	7
III. THREATS TO THE CBA CONSENSUS .....	10
A. Waning Presidential Support .....	10
B. “Soft Look” Judicial Review .....	13
C. Shaky Authorization .....	15
IV. CONGRESS AND CBA.....	19
A. Benefits and Costs.....	19
1. Oversight, Efficiency, and Ossification .....	20
2. Context.....	22
B. Congressional CBA Directives.....	24
V. FUTURE OF COST-BENEFIT ANALYSIS .....	34

## I. INTRODUCTION

In *Corrosion Proof Fittings*, the U.S. Court of Appeals for the Fifth Circuit invalidated an attempt by the Environmental Protection Agency (EPA) to ban asbestos under the Toxic Substances Control Act (TSCA).<sup>1</sup> Congress had directed EPA to adopt the “least burdensome” approach to regulating a chemical after considering both benefits and costs.<sup>2</sup> Although the agency conducted what is known as a cost-benefit analysis (CBA) to support its ban, the Court found that the analysis did not adequately evaluate the tradeoffs involved and made several methodological errors; in particular, the analysis neglected to evaluate important effects of the ban, such as whether known alternatives to asbestos would present health risks. The Court vacated the regulation and remanded to the agency for further analysis.<sup>3</sup>

After the Fifth Circuit invalidated EPA’s attempt, the agency altogether abandoned its efforts to ban asbestos. In fact, EPA barely used its authority under TSCA to ban any chemical. In 2016, the Republican-controlled Congress, under pressure from the chemical industry seeking federal regulation to preempt inconsistent state laws, passed the Frank R. Lautenberg Chemical Safety Act.<sup>4</sup> The Act removed the requirement that the agency consider costs when deciding whether to regulate, but it retained the requirement that the agency consider benefits and costs when evaluating possible approaches.<sup>5</sup> Based on the statements of several members of Congress, both Democrats and Republicans, the amendment was at least in part a rejection of CBA and the Fifth Circuit’s review of it. Many legislators appeared to blame TSCA’s CBA requirement for the slow progress of chemical regulation in the United States. For example, Representative Rob Woodall (Republican, Georgia) stated that CBA was “far too high a bar to meet when it comes to protecting our children’s safety,”<sup>6</sup> and Representative Frank Pallone (Democrat, New Jersey) highlighted the importance of deciding whether to regulate a chemical “based purely on the risk it poses” without considering costs.<sup>7</sup> In fact,

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<sup>1</sup> *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1229-30 (5th Cir. 1991).

<sup>2</sup> 15 U.S.C. § 2601 *et seq.* (1976).

<sup>3</sup> *Corrosion Proof Fittings*, 947 F.2d 1201 at 1230.

<sup>4</sup> Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114-182, 133 Stat. 448, 15 U.S.C. § 2605; Valerie J. Watnick, *The Lautenberg Chemical Safety Act of 2016: Cancer, Industry Pressure, and a Proactive Approach*, 43 HARV. ENVTL. L. REV. 373, 389 (2019); Jessica Miller, Note, *Spread Too Thin: How the Preemption Provisions in the 2016 Amendments to TSCA Weakened the Federal Government's Regulation of Chemical Manufacturing*, 9 GEO. WASH. J. ENERGY & ENVTL. L. 162, 166 (2019).

<sup>5</sup> 15 U.S.C. § 2605(b)(4)(F)(iii) (2016).

<sup>6</sup> 162 CONG. REC. H2975-02, H2977 (2016) (statement of Representative Woodall).

<sup>7</sup> 161 CONG. REC. H4551-01, H4556-57 (2016) (“For the first time, the decision of whether a chemical needs to be regulated will be based purely on the risk it poses.”).

Senate Democrats explicitly tied removal of the “least burdensome” language to a rejection of CBA.<sup>8</sup>

This story is revealing in several ways. First, it reveals the important role CBA has played in agency risk-management decisions. CBA is a decisionmaking procedure that requires an agency to identify and monetize all important effects of the agency’s decision as compared to the status quo and reasonable alternatives, to the extent possible based on available scientific evidence. It allows the agency to then choose the approach that maximizes net benefits to society. The practice of CBA is widespread within federal agencies, even without an express requirement from Congress, promoted by long-standing executive orders from presidents of both political parties.<sup>9</sup> Second, it highlights the role of the judiciary in overseeing and promoting CBA-based regulation. Although the Fifth Circuit’s review in *Corrosion Proof Fittings* was particularly searching, courts have been willing to evaluate agency CBAs, especially their scope and their transparency, if not their choice of specific assumptions and methodology.<sup>10</sup> Courts have also played a role in encouraging agencies to conduct CBA, especially independent agencies not subject to executive-order requirements.<sup>11</sup> This support for some kind of CBA has reached even the Supreme Court; in fact, in 2015, all nine justices of the Supreme Court agreed that “appropriate” agency regulation requires some consideration of costs in addition to benefits.<sup>12</sup> And finally, it supports the general impression that Congress is at most ambivalent, and perhaps even hostile, toward the robust CBA practice among agencies. But notwithstanding Congress’s ambivalence, CBA practice has

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<sup>8</sup> 162 CONG. REC. S3511-01, S3517 (2016) (arguing that argued that striking the “least burdensome” language was necessary to guarantee that the EPA was not required to weigh benefits against costs when regulating toxic chemicals).

<sup>9</sup> At least since President Reagan’s executive order requiring agencies to conduct CBA, agencies have generally conducted and often relied on the analysis when making difficult risk-management decisions, as long as it was not explicitly prohibited by Congress. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981). President Reagan’s Order was replaced by President Clinton’s Executive Order 12,866, which remains in force to this day. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). The Order requires agencies to prepare a regulatory impact analysis, which includes CBA.

<sup>10</sup> *See generally* Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575 (2015).

<sup>11</sup> *See, e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011); *Chamber of Commerce of U.S. v. S.E.C.*, 412 F.3d 133, 144 (D.C. Cir. 2005); *American Equity Inv. Life Ins. Co. v. S.E.C.*, 613 F.3d 166, 177 (D.C. Cir. 2010).

<sup>12</sup> Justice Scalia, writing for the Supreme Court’s majority in *Michigan v. EPA*, declared that “[n]o regulation is ‘appropriate’ if it does significantly more harm than good,” *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015), and Justice Kagan, writing for the dissent, agreed that harms of regulation must be considered, *id.* at 2714 (Kagan, J., dissenting) (“I agree with the majority—let there be no doubt about this—that EPA’s power plant regulation would be unreasonable if ‘[t]he Agency gave cost no thought at all.’”).

proliferated over the last forty years, often relying on Congress’s acquiescence.<sup>13</sup> And although Congress may (sometimes) not like it, it rarely pulls CBA authority completely and so its views on the matter have been (generally) safe to ignore. Perhaps this is why scholars have devoted considerable energy to evaluating agency practice of CBA and the resulting judicial review,<sup>14</sup> but little scholarly attention to examining wider implications of specific congressional requirements for agencies to conduct, consider, or rely on CBA in their decisionmaking.<sup>15</sup>

This Article has three objectives. First, it identifies and describes several emerging threats to the consensus surrounding agency practice of CBA within agencies and among courts. CBA has enjoyed bipartisan presidential support to date, but it might not be able to rely on this support going forward. If presidents view CBA’s substantive and procedural constraints as a burden that outweighs CBA’s beneficial role in helping the president oversee agency action, then presidents may abandon the longstanding executive orders requiring use of CBA. In addition, courts may renounce their role in overseeing and encouraging high-quality

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<sup>13</sup> See Paul R. Noe & John D. Graham, *The Ascendancy of the Cost-Benefit State?*, 5-3 ADMIN. L. REV. ACCORD, [http://www.administrativelawreview.org/wp-content/uploads/2020/01/Ascendancy-of-the-Cost-Benefit-State\\_Accord-5.3\\_Final.pdf](http://www.administrativelawreview.org/wp-content/uploads/2020/01/Ascendancy-of-the-Cost-Benefit-State_Accord-5.3_Final.pdf). (discussing where CBA is already used and where it could be used given broad statutory language).

<sup>14</sup> The literature is full of important theoretical and practical critiques of CBA practice. See generally MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006) (responding to theoretical critiques); RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (responding to practical critiques). For work on prevalence and quality, see, e.g., Caroline Cecot et al., *An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the US and the EU*, 2 REG. & GOVERNANCE 405, 405–24 (2008); Jerry Ellig, Patrick A. McLaughlin & John F. Morrall III, *Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across U.S. Administrations*, 7 REG. & GOVERNANCE 153, 153–73 (2013); Jerry Ellig & Patrick A. McLaughlin, *The Quality and Use of Regulatory Analysis in 2008*, 32 RISK ANALYSIS 855, 855–80 (2012); Robert W. Hahn et al., *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12866*, 23 HARV. J. L. & PUB. POL’Y. 859, 859–71 (2000); Robert W. Hahn & Patrick Dudley, *How Well Does the Government Do Cost-Benefit Analysis?*, 1 REV. ENVTL. ECON. & POL’Y. 192, 192–211 (2007); Robert W. Hahn & Robert Litan, *Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe*, 8 J. INT’L ECON. L. 473, 473–508 (2005); Stuart Shapiro & John F. Morrall III, *The Triumph of Regulatory Politics: Benefit-Cost Analysis and Political Salience*, 6 REG. & GOVERNANCE 189, 189–206 (2012); Caroline Cecot & Robert W. Hahn, *Transparency in Cost-Benefit Analysis*, 72 ADMIN. L. REV. 157 (2020). More recently, scholars have analyzed how courts review agency CBAs and the effect of judicial review on agency practice. See, e.g., Cecot & Viscusi, *supra* note 10. Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 1 (2017); Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593 (2019); Jonathan S. Masur & Eric A. Posner, *Chevronizing Around Cost-Benefit Analysis*; 70 DUKE L.J. (forthcoming 2021).

<sup>15</sup> Instead, scholars have argued why CBA should (or should not) be allowed under more general congressional directives to promote “the public interest,” issue regulations that are “appropriate and necessary,” or act to the extent “practicable.”

agency CBA. Several prominent scholars, such as Richard Epstein and Jeffrey Pojanowski, are advocating for replacing “hard look” review with extreme judicial deference toward agency factfinding, while rejecting deference on issues of law. The lack of a judicial quality check on CBA (especially if combined with weak White House review) would diminish the reliability and value of CBA. And finally, the Supreme Court of the United States might rethink the constitutional contours of acceptable delegation of authority to agencies.<sup>16</sup> If it determines that Congress must be more explicit when authorizing use of CBA in risk-management decisionmaking, then much of the agency discretion for conducting CBA would evaporate.

The second objective of the Article is to undertake a long overdue examination of the congressional record on CBA—in particular, an examination of the explicit congressional CBA directives since 1981. Congressional action could eliminate all of these threats to the consensus. But the conventional wisdom has been that Congress is, at best, indifferent to CBA and its value in agency decisionmaking. Congress has failed to pass legislation codifying the executive-order-based CBA requirements and has failed to extend these requirements to independent agencies that are not currently subject to them, despite realistic opportunities to do so. In fact, the few salient stories about Congress and CBA are all negative. In addition to the discussion surrounding the TSCA amendments, critics point to Congress’s decision to prohibit CBA in setting a standard for cryptosporidium under the Safe Drinking Water Act after a public-health crisis involving that particular pollutant, despite allowing CBA for other pollutants.<sup>17</sup>

This Article evaluates the record comprehensively. The analysis reveals important clarifications and promising trends. As an initial matter, so-called explicit rejections of CBA have often turned out to be overstated. In fact, in contexts where competing tradeoffs are most salient, such as public-health crises, the legislative record suggests that Congress values the neutral and expertise-forcing substantive constraint of CBA. Congress has also acted in several ways that suggest it values CBA for oversight purposes. It has passed laws such as the Unfunded

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<sup>16</sup> Five justices have expressed an interest in rethinking the nondelegation doctrine: Justices Alito, Gorsuch, Kavanaugh, and Thomas, and Chief Justice Roberts. Justice Gorsuch, in a dissent joined by Chief Justice Roberts and Justice Thomas, directly advocated for a more robust enforcement of the nondelegation doctrine. *See, e.g., Gundy v. United States*, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting) (“In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation’s chief prosecutor the power to write his own criminal code.”). Justice Alito wrote a separate concurrence, indicating that he would be willing to revisit the doctrine in a future case. *See id. at 2131* (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”). Finally, Justice Kavanaugh signaled support for reconsidering the doctrine in a recent denial of cert. *See Paul v. United States*, 140 S. Ct. 342 (2019) (cert. denied) (Kavanaugh, J., statement on denial of cert) (“Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”).

<sup>17</sup> 42 U.S.C.A. § 300g-1.

Mandate Reform Act and the Congressional Review Act. It has also passed laws requiring executive agencies to conduct CBA, especially during times of divided government. These agencies were already subject to executive-order requirements at the time these laws were passed; the reinforced, statutory obligations suggest CBA's particular value to Congress when applied to agencies controlled by the President. And Congress has recognized CBA's value in prioritizing projects when funding is scarce.

The final objective of the Article extracts takeaways from this examination to inform conversations about the future of CBA. I argue that the examination provides evidence to be wary of extreme judicial deference to agency decisionmaking, especially its factfinding. When it comes to CBA, at least, congressional practice suggests a knowing tradeoff between control and expertise. Courts, as the guardians of the bargains reflected in enacted legislation, should ensure that agencies reasonably apply their expertise in exercising the authority granted to them by Congress. The examination also helps explain why Congress has failed to pass statutes such as the Regulatory Accountability Act of 2017<sup>18</sup> or extend requirements to independent agencies, and it proposes congressional actions that might be more successful.

This Article proceeds as follows. Part II briefly describes the current CBA consensus. It defines CBA and outlines its increasing importance in agency rulemakings in light of executive directives and judicial interpretations of statutory language. Part III implements the first objective, identifying and analyzing the recent threats to the continuing vitality of comprehensive CBA in agency rulemakings. Part IV implements the second objective, evaluating Congress's relationship with CBA. It first outlines the theoretical reasons for congressional support of CBA in different contexts. It then analyses explicit congressional directives requiring agencies to prepare, consider, rely on, or report CBA over the last forty years, drawing lessons from this history. Part V implements the third objective, discussing the implications of the analysis for the continued vitality of CBA in agency decisionmaking. CBA has long played an influential role in agency decisionmaking. Although supporters should recognize emerging threats to this consensus, the congressional record reveals reasons for optimism.

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<sup>18</sup> Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

## II. THE CBA CONSENSUS

Congress often requires agencies to make important risk-management decisions. Under TSCA, for example, after EPA identifies a chemical as posing significant risks to human health, it must decide how stringently to regulate it.<sup>19</sup> Should it ban the chemical completely or should it limit its use to certain contexts? Should it consider available precautions, technology, and substitutes? How should it tradeoff between the value of the chemical and its potential harm? Although several approaches are available, agencies often conduct CBA to help them make these risk management decisions.<sup>20</sup> CBA has its origins in welfare economics. Economic theory identifies the socially desirable level of environmental quality as the level that maximizes the satisfaction of individual preferences.<sup>21</sup> CBA sheds light on policies that potentially improve aggregate welfare by converting gains (the value of the benefits to the beneficiaries) and losses (the costs to those who are burdened) into a monetary scale.<sup>22</sup> It forces the agency to consider these effects of its chosen regulatory action against the status quo and reasonable alternatives. The analysis could then be used to guide agency decisionmaking. For example, if the monetized costs turn out to be substantial and the benefits—most of which the agency believes are monetized—are low or highly uncertain, the agency might decide not to regulate at all at this time. Or, the results of the analysis might not only support regulatory action but support more stringent action. One example of the latter scenario is the Reagan administration’s imposition of a stricter standard for phasing out lead in gasoline based on the results of CBA.<sup>23</sup>

Congress can explicitly require or forbid agencies to base decisions on CBA, but in many cases, Congress is essentially silent on the appropriate risk-management framework. And in these contexts, agencies increasingly use their discretion to conduct and rely on CBA to inform their decisionmaking.<sup>24</sup>

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<sup>19</sup> 15 U.S.C. § 2601 *et seq.*

<sup>20</sup> Other risk-management approaches include feasibility analysis, a no-risk threshold, risk-risk analysis. *See* LESTER B. LAVE, *THE STRATEGY OF SOCIAL REGULATION: DECISION FRAMEWORKS FOR POLICY* 24–25 (Brookings Institution 1981).

<sup>21</sup> For a discussion of general welfare economics, *see* ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, *MICROECONOMIC THEORY* 545–72 (1995); MATTHEW D. ADLER, *WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS* (2011).

<sup>22</sup> CBA identifies the Kaldor-Hicks efficient policy as the one that maximizes the difference between the value of the gains to the winners and the losses to the losers without requiring the winners to compensate the losers.

<sup>23</sup> *See* Statement of CHRISTOPHER DEMUTH, *AMERICAN ECONOMIC POLICY IN THE 1980s* 508 (Martin Feldstein ed., 1994) (“A very fine piece of analysis persuaded everyone that the health harms of leaded gasoline were far greater than we had thought, and we ended up adopting a much tighter program than the one we had inherited.”). For more information about that CBA and the resulting standard, *see* Albert L. Nichols, *Lead in Gasoline*, *ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT* 49–86 (Richard D. Morgenstern ed., 1997).

<sup>24</sup> *See* Noe & Graham, *supra* note 14 (arguing that agencies should rely on CBA as a default given congressional silence).

This extensive use of CBA has been motivated in part by presidential executive orders. In 1981, President Reagan issued Executive Order 12,291 which required agencies to choose the regulatory objective that, according to the analysis, “maximize[d] the net benefits to society.”<sup>25</sup> And importantly, the order required agencies to submit these CBAs to the White House for review.<sup>26</sup> The agencies were to follow this procedure to the extent permitted by law—in other words, as long as Congress has not explicitly prohibited cost consideration. President Clinton continued the practice of CBA, issuing Executive Order 12,866.<sup>27</sup> Like Executive Order 12,291, Clinton’s Order encouraged agencies to “select those approaches that maximize net benefits . . . to the extent permitted by law.”<sup>28</sup> Clinton’s Order also placed more emphasis on accountability, providing several additional ways that transparency would be preserved during the White House review process.<sup>29</sup> Further, it explicitly recognized “that some costs and benefits are difficult to quantify.”<sup>30</sup> Presidents Bush, Obama, and Trump have extended (and sometimes supplemented) Clinton’s Order.<sup>31</sup>

When President Reagan first issued EO 12,291, it was viewed as part of his efforts to reign in the administrative state. The Reagan administration hoped that CBA would support President Reagan’s deregulatory agenda by preventing the issuance of regulations, most of which were thought to be net costly.<sup>32</sup> Agencies would be required to show that their regulations were CBA-justified. It is strange then that President Clinton (and President Obama) would continue these efforts. Unlike the Reagan Administration (or the Trump Administration), those administrations were not focused on reducing regulatory burdens. But CBA is not actually anti-regulatory. It is a neutral decisionmaking rule that neatly summarizes the effects of agency action and, at times, explains the factual basis for agency action.<sup>33</sup> It provides information to presidents that could facilitate their oversight of

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<sup>25</sup> Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981). President Reagan’s Order was not the first presidential requirement for increased agency analysis, but it was the most far-reaching one—requiring all executive agencies to conduct CBA—and its requirements have endured.

<sup>26</sup> *Id.*

<sup>27</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

<sup>28</sup> *Id.* § 1.

<sup>29</sup> *Id.* § 6(b).

<sup>30</sup> *Id.* § 1(b)(6).

<sup>31</sup> See Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017); Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011); Exec. Order No. 13,422, 72 Fed. Reg. 2,763 (Jan. 23, 2007) (revoked by Exec. Order No. 13,497, 74 Fed. Reg. 6,113 (Feb. 4, 2009)).

<sup>32</sup> JOHN F. MORRALL III, RISK REGULATION: A REVIEW OF THE RECORD, Regulation, (November/December 1986); John F. Morrall III, *Saving Lives: A Review of the Record*, 27 NO. 3 J. OF RISK AND UNCERTAINTY (2003).

<sup>33</sup> Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593, 1606-07 (2019).

agencies.<sup>34</sup> In addition, there is independent value to a high-quality CBA demonstrating that a president’s initiatives are welfare-enhancing. President Clinton would take credit for such agency action.<sup>35</sup> And President Obama used CBA to provide justification and support for several costly administrative priorities.<sup>36</sup>

In fact, almost twenty years ago, Cass Sunstein announced a CBA revolution.<sup>37</sup> Although others disagreed with the breadth of his proclamation,<sup>38</sup> there can be no doubt that the procedure is widespread and generally increasing in quality and comprehensiveness.<sup>39</sup> And, perhaps surprisingly, scholars have found that the key elements of economic analysis across presidential administrations have been “generally insulated from politics,” with differences “largely in areas for which there is reasonable debate within the academic community.”<sup>40</sup>

Although there is no judicial review of compliance with these executive orders,<sup>41</sup> courts have played an important role in promoting CBA. First, courts have increasingly interpreted broad language to allow and even require some kind of cost-benefit balancing, even if less formal than full CBA.<sup>42</sup> The Court of Appeals for the D.C. Circuit, for example, interpreted language requiring independent agencies to act in the public interest to require some CBA of their regulations, even though these agencies are not subject to executive-order requirements.<sup>43</sup> And in *Michigan v. EPA*, the Supreme Court unanimously agreed that appropriate regulation requires at least some analysis of cost.<sup>44</sup> Some scholars have even argued that courts might

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<sup>34</sup> See generally, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, (2001); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001). Almost every modern President has expressed frustration over the difficulty of overseeing the vast array of agencies.

<sup>35</sup> Kagan, *supra* note 32, at 2354.

<sup>36</sup> E.g., ENVTL. PROTECTION AGENCY, EPA-452/R-15-003, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE (Aug. 2015).

<sup>37</sup> CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* xi (2002).

<sup>38</sup> See Amy Sinden, *A “Cost-Benefit State”? Reports of Its Birth Have Been Greatly Exaggerated*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10933, 10934 (2016) (noting a gap between the kind of CBA the Supreme Court has endorsed and the CBA identified and advocated by Cass Sunstein).

<sup>39</sup> See *supra*, note 13 (for work on quality).

<sup>40</sup> See Art Fraas & Richard Morgenstern, *Identifying the Analytical Implications of Alternative Regulatory Philosophies*, 5 J. BENEFIT-COST ANALYSIS 137, 142 (2014).

<sup>41</sup> All executive orders assert that there is no judicial review of compliance with them. See Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 12291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

<sup>42</sup> *Bus. Roundtable*, 647 F.3d at 1149-51; *Chamber of Commerce*, 412 F.3d at 136.

<sup>43</sup> See *Bus. Roundtable*, 647 F.3d at 1149-51; *Chamber of Commerce*, 412 F.3d at 136. See Caroline Cecot, *Make Economics at the FCC Great Again*, Technology Policy Institute (April 14, 2017), <https://techpolicyinstitute.org/2017/04/14/make-economics-at-the-fcc-great-again/>.

<sup>44</sup> Justice Scalia, writing for the Supreme Court’s majority in *Michigan v. EPA*, declared that “[n]o regulation is ‘appropriate’ if it does significantly more harm than good,” *Michigan v.*

require CBA as the default risk-management option when Congress has been silent on the approach because of the Administrative Procedure Act’s requirement that the agency not act arbitrarily or capriciously.<sup>45</sup> Second, courts have provided a useful quality check on CBA-based decisionmaking by agencies. Although they’ve often deferred on technical issues, courts have required agencies to disclose and explain important assumptions.<sup>46</sup> And sometimes, as in the case of *Corrosion Proof Fittings*, courts put in considerable effort to chastise an agency for poor analysis.<sup>47</sup>

In other words, when given the discretion to choose a risk-management approach, federal agencies have adopted CBA as the framework of choice. This default or, increasingly, consensus is in part due to executive orders at least since President Reagan requiring executive agencies to conduct CBA when their statutory mandates do not prohibit it. It also reflects increasing judicial approval of CBA as a component of rational decisionmaking. These developments—congressional acquiescence, presidential requirements, and judicial encouragement and oversight—have arguably resulted in relatively stable, predictable, and increasingly efficient agency rules.<sup>48</sup>

### III. THREATS TO THE CBA CONSENSUS

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

#### A. Waning Presidential Support

CBA serves “at will”—at the pleasure of the President—and it will be discontinued the moment it ceases to be net useful to the President. Scholars have

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EPA, 135 S. Ct. 2699, 2707 (2015), and Justice Kagan, writing for the dissent, agreed that harms of regulation must be considered, *id.* at 2714 (Kagan, J., dissenting) (“I agree with the majority— let there be no doubt about this—that EPA’s power plant regulation would be unreasonable if “[t]he Agency gave cost no thought *at all*.”). This evolution in the Supreme Court’s attitude to CBA can be traced in its opinions stretching from *American Trucking to Entergy v. Riverkeeper* to *Michigan v. EPA*, all written by Justice Scalia for the majority. See Noe & Graham (tracing this evolution).

<sup>45</sup> See Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 1 (2017) (noting that where CBA is authorized but not required, agencies typically must now provide nonarbitrary reasons for failing to consider CBA); Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1692 (2001) (describing cost-consideration as a default canon of construction); Noe & Graham, *supra* note 14 (identifying statutes).

<sup>46</sup> See Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 592–605 (2015).

<sup>47</sup> See also Christopher Carrigan, Jerry Ellig & Zhoudan Xie, *Regulatory Impact Analysis and Litigation Risk* 4 (2019), <https://regulatorystudies.columbian.gwu.edu/regulatory-impact-analysis-and-litigation-risk>.

<sup>48</sup> See Cecot, *supra* note 31 (making this argument).

tied presidential support for CBA to their desire for control and oversight of agencies rather than to their support for the substantive constraints of CBA.<sup>49</sup> There are at least three reasons to think that CBA might no longer be perceived to be a net valuable tool for presidents, notwithstanding its usefulness as an oversight tool. First, the Trump Administration has effectively used loyal political appointees to exert control over agency action, making CBA relatively less useful. President Trump has appointed loyal political officials to direct agencies, and if they strayed from the President’s political interests, he has liberally removed them. Terry Moe first proposed “politicization” and “centralization” as two competing ways of overseeing rulemaking.<sup>50</sup> These two strategies act as substitutes because if one strategy works, the other is less important.<sup>51</sup> Moreover, politicization, if it works, is preferable because it avoids adding a layer of oversight that is costly and may generate errors.<sup>52</sup> In the past, there have been limits on using politicization effectively—both in confirming a president’s preferred candidate and in removing the candidate if the relationship ceases to benefit the president. The Trump Administration has revealed that the perceived political constraints on the effective use of politicization have been overstated. The value of CBA is lower given the more effective alternative.

Second, CBA has proven to be more of a substantive constraint on agency decisionmaking than in the past. [Include examples of prominent CBA-based losses of federal agencies, especially failure to evaluate climate-change impacts.<sup>53</sup>] Courts are more becoming more comfortable evaluating CBAs and pushing back against unexplained or suspect choices in CBAs. I have previously argued that agency reliance on high-quality CBA results in increased regulatory stability because it is more difficult to reasonably justify switching course from prior CBA-justified actions (and more difficult to get away with poor-quality analyses).<sup>54</sup> This prediction

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<sup>49</sup> See Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001); Susan Dudley, The Office of Information and Regulatory Affairs and the durability of regulatory oversight in the United States, <https://onlinelibrary.wiley.com/doi/abs/10.1111/rego.12337>.

<sup>50</sup> TERRY M. MOE, THE POLITICIZED PRESIDENCY, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235, 256 (John E. Chubb & Paul E. Peterson eds., 1985). “Politicization” is using the appointment power is used to fill positions based on loyalty, while “centralization” is overseeing rulemaking via tools such as CBA and White House review.

<sup>51</sup> See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1347–48 (discussing the substitutability of the two strategies).

<sup>52</sup> See Yair Listokin, *Bounded Institutions*, 124 YALE L.J. 336, 355 (2014) (arguing that when an agent shares the principal’s preferences “unbounded institutional structures are preferable”); see also Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 646 (2010) (noting that the president’s “strongest possible control over an agency” is “placing a clone in the position of agency head”); Kagan, *supra* note 8, at 2317–18 (speculating on President George W. Bush’s likely approach).

<sup>53</sup> See, e.g., *High Country Conservation Advocates v. USFS* (D. Colo. 2014); *California v. Bernhardt* (N.D. Cal., July 15, 2020) (rejecting BLM methane waste prevention rule because it used a low Social Cost of Carbon (SCC) that omitted impacts outside the USA).

<sup>54</sup> See Cecot, *supra* note 31.

has been borne out in the evidence. In fact, agencies under the Trump Administration have performed particularly badly in adhering to even basic procedural requirements.<sup>55</sup> The costs of CBA are higher, constraining the President’s preferred strategy.

Third, the Trump Administration has attempted to erode CBA norms in order to implement its deregulatory agenda.<sup>56</sup> Michael Livermore and Richard Revesz comprehensively document a variety of these moves by the administration over the last few years.<sup>57</sup> For example, the administration has tried to limit the scientific evidence that can be considered by agencies in these analyses and has at times truncated the consideration of beneficial impacts of regulations.<sup>58</sup> At every turn, its moves were met with widespread and unequivocal condemnation by the scientific community, limiting some of their ultimate effectiveness.<sup>59</sup> Nonetheless, the damage may have been done. The administration’s attempts may have lowered trust in CBA’s neutrality and increased perceptions of the manipulability of CBA’s substantive conclusions,<sup>60</sup> even if the actions were ultimately unsuccessful in courts

For these reasons, it is not as clear that a future Donald Trump or Joe Biden Administration—or, more generally, a future Democratic or Republican administration—would continue to support CBA as administrations of both political parties have in the past. The benefits are lower, the costs are higher, and public support is potentially lower on both sides—conservatives who saw it thwart many

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<sup>55</sup> See Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. (2019); Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks*, 38 ENERGY L.J. 269 (2017); John Graham & Keith Belton, “Trump’s Deregulation Record: Is It Working?” *Administrative Law Review* 71(4): 803–880 (Fall 2019). *Compare* [Bethany’s tracker] (86% loss rate of the Trump Administration), *with* [Chris Walker] (70% win rate of prior administrations). It is possible there is a tradeoff between complying with procedural requirements and obtaining political control of agencies.

<sup>56</sup> See Michael A. Livermore & Richard L. Revesz, *Reviving Rationality: Saving Cost-Benefit Analysis for the Sake of the Environment and Our Health* (forthcoming 2020) (describing how the Trump Administration eroded CBA norms when it could not get the analysis to support its regulatory agenda).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* See, e.g., EPA transparency rule.

<sup>59</sup> See Livermore & Revesz, *supra* note 52.

<sup>60</sup> CBA has historically faced such criticisms. *E.g.*, Amy Sinden, *Cass Sunstein’s Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENVTL. L. 191, 194 (2011) (book review) (“The danger of CBA . . . lies in its false promise of determinacy, its pretense of objectivity and scientific accuracy . . . [which] renders CBA . . . vulnerable to manipulation . . .”); Karl Coplan, *Pruitt’s Arbitrary Cost Accounting is Built into the Concept of Cost Benefit Analysis*, GREEN L. (Oct. 10, 2017), <https://greenlaw.blogs.pace.edu/2017/10/10/pruitts-arbitrary-cost-accounting-is-built-into-the-concept-of-cost-benefit-analysis> [<https://perma.cc/7UP3-8MNR>] (“[T]he manipulability of cost benefit analysis is an inherent feature of an analysis that seeks to apply monetized accounting concepts to values for which there are no dollar values and no accounting rules. Which argues against ever relying on cost benefit analysis for regulatory rulemaking in the first place.”); *Cooking the Books* headlines.

Trump Administration policies and liberals who already were skeptical of its value. In fact, the Center for Progressive Reform has already released several reports calling for a future Biden Administration to revamp the Office of Information and Regulatory Affairs, the office responsible for reviewing agency CBA, and end reliance on CBA more generally.<sup>61</sup>

*B. “Soft Look” Judicial Review*

Although compliance with the CBA-related executive orders is not judicially reviewable, courts evaluate the reasons agencies give for their actions to ensure compliance with the Administrative Procedure Act (APA)—that is, to ensure the decisionmaking is not arbitrary and capricious.<sup>62</sup> More than thirty years ago, the National Highway Traffic Safety Administration (NHTSA) rescinded a passive-restraint requirement for motor vehicles that it had previously promulgated.<sup>63</sup> The resulting litigation defined the contours of review under the “arbitrary and capricious” standard.<sup>64</sup> In *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.* (“*State Farm*”), the Supreme Court held that NHTSA had failed to adequately explain why it had rescinded the passive-restraint requirement.<sup>65</sup> Specifically, the Court held that “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”<sup>66</sup> Further, the Court reasoned that “[i]f Congress established a presumption from which judicial review should start, that presumption . . . is not against safety regulation, but against changes in current policy that are not justified by the rulemaking record.”<sup>67</sup> The Court emphasized that “the direction in which an agency chooses to move does not alter the standard of judicial review established by law.”<sup>68</sup> This judicial review has allowed courts to push back effectively against some recent agency actions, especially when the accompanying CBAs have raised questions about the agency’s choices to rescind prior rules or loosen standards.<sup>69</sup> But such review has not been limited to CBA-justified action.

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<sup>61</sup> See Kelsey Brugger, ‘Abolish OIRA’: Left Hopes Biden Would Reform Regs Shop, E&E News (Aug. 28, 2020); James Goodwin, The Progressive Case Against Cost-Benefit Analysis, Center for Progressive Reform, <https://progressivereform.org/our-work/regulatory-policy/progressive-case-against-cost-benefit-analysis/> (August 2020); James Goodwin, Beyond 12866: A Progressive Plan for Reforming the Regulatory System, Center for Progressive Reform, <https://progressivereform.org/our-work/regulatory-policy/progressive-plan-reforming-regulatory-system/> (August 2020).

<sup>62</sup> See Administrative Procedure Act, 5 U.S.C. § 706.

<sup>63</sup> *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 34 (1983).

<sup>64</sup> *Id.* at 42–44.

<sup>65</sup> *Id.* at 34.

<sup>66</sup> *Id.* at 42 (emphasis omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* See also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

<sup>69</sup> See generally Cecot & Viscusi, *supra* note; Cecot, *supra* note 31.

Courts have recently also vacated other agency actions for inadequate explanations of their actions, such as the decision to include a citizenship question on the Census or the reason for rescinding all of DACA.<sup>70</sup> Judicial review of agency rationales has bite; inadequate explanation is one of the most common grounds for judicial reversal and remand.<sup>71</sup>

Some scholars and judges have argued this “hard look” kind of judicial oversight is illegitimate and unwise. In his recent book, Richard Epstein explicitly calls for an end to “hard look” review of agency factfinding.<sup>72</sup> He argues that agencies are like lower courts and that current administrative law doctrine has it backwards—as in the case of lower courts, there should be no deference on questions of law and extreme deference on questions of fact.<sup>73</sup> Jeffrey Pojanowski categorizes this new way of thinking about administrative law as “Neoclassical Administrative Law.”<sup>74</sup> Like Epstein, adherents to Pojanowski’s Neoclassical view argue that current administrative doctrines result in a judicial method that is inappropriately (1) too deferential to agencies on legal questions and (2) not deferential enough on policy questions.<sup>75</sup> They would reject *State Farm* and defer more frequently to agencies on questions of fact and policy—and reject *Chevron* and defer less on questions of law. Pojanowski argues that corners of the federal judiciary agree with this movement, and he is optimistic that this approach might gain ground with the Supreme Court.<sup>76</sup> If so, it would bring an end to the judicial check on CBA.

In addition, at least some judges have questioned longstanding ways that courts have ensured quality CBA. One important judicial check is ensuring that agencies disclose important data and assumptions used in generating CBA estimates.<sup>77</sup> If an agency relies on CBA to justify its actions, an interested party should be able to know and comment on the data and assumptions that informed the analysis. The Court of Appeals for the D.C. Circuit, in its *Portland Cement* decision, has held that agencies must disclose this kind of information in order to

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<sup>70</sup> See *Dept. of Commerce v. NY* (2019) (the Census Case); *Dept. of Homeland Security v. Regents of California* (June 18, 2020) (the DACA Case).

<sup>71</sup> See, e.g., Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1035 tbl.6 (1990) (showing that about 20 percent of remands in 1985 were based on an inadequate agency rationale); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 72 (1997) (suggesting that inadequate agency reasoning is the most frequent ground for judicial rejection of agency decisions).

<sup>72</sup> RICHARD EPSTEIN, *THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW* (2020).

<sup>73</sup> *Id.* at 3-5.

<sup>74</sup> Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 919.

<sup>77</sup> See *Cecot & Viscusi* (describing judicial review of CBA disclosure of data and assumptions).

give parties a meaningful opportunity to comment under the APA.<sup>78</sup> When Justice Kavanaugh was a judge on the D.C. Circuit, he questioned the *Portland Cement* doctrine, arguing that the doctrine inappropriately imposed additional procedural requirements on agencies, in violation of the Supreme Court’s *Vermont Yankee* doctrine.<sup>79</sup> Moreover, he argued that the *Portland Cement* doctrine is ill-advised, too: “The judicially created obstacle course can hinder Executive Branch agencies from rapidly and effectively responding to changing or emerging issues within their authority, such as consumer access to broadband, or effectuating policy or philosophical chances in the Executive’s approach to the subject matter at hand.”<sup>80</sup> His statement is reminiscent of Justice Rehnquist’s partial dissent in *State Farm*, where Justice Rehnquist worried about judicial second-guessing of executive policy choices.<sup>81</sup>

Both the rejection of “hard look” review of agency factfinding and the reinvigoration of *Vermont Yankee*-justified limits on judicial review are founded in a concern that judicial nitpicking is getting in the way of efficient, or at least speedy, agency action. If the Supreme Court adopts either of these views, the current CBA consensus would face a formidable threat. Judicial review serves a valuable role in ensuring that agencies conduct high-quality CBA. In fact, a recent empirical analysis has found that agency action supported by *high-quality* CBA lowers litigation risk, while incomplete CBA increases it.<sup>82</sup> If courts take a hands off approach to agency explanations and, therefore, agency CBA, then the constraint becomes meaningless and ultimately unimportant.

### C. Shaky Authorization

There is an ongoing debate on acceptable agency rulemaking discretion and authority—a debate that often involves implicit assumptions about the effect and desirability of requiring Congress to limit agency discretion. According to some justices of the Supreme Court, the current enforcement of the nondelegation doctrine, which allows an agency to wield broad rulemaking authority as long as Congress provides an intelligible principle to guide the agency’s exercise of discretion, violates the Constitution’s separation of powers by concentrating distinct

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<sup>78</sup> *Portland Cement*. The basis for this requirement is in the APA’s notice and comment provisions. See 5 U.S.C. § 553.

<sup>79</sup> *American Radio Relay League, Inc. vs. FCC*, 524 F.3d 227 (D.C. Cir. 2008).

<sup>80</sup> *American Radio Relay League, Inc. vs. FCC*, 524 F.3d 227 (D.C. Cir. 2008).

<sup>81</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (arguing that “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations[, a]s long as the agency remains within the bounds established by Congress”).

<sup>82</sup> Christopher Carrigan, Jerry Ellig & Zhoudan Xie, *Regulatory Impact Analysis and Litigation Risk* 4 (2019), <https://regulatorystudies.columbian.gwu.edu/regulatory-impact-analysis-and-litigation-risk>.

powers in one entity.<sup>83</sup> In particular, it allows an executive agency to prescribe and then apply general rules of private conduct *without going through the cumbersome legislative process*. And, as Justice Gorsuch explains, “the framers went to great lengths to make lawmaking difficult” because “[t]hey believed the new federal government’s most dangerous power was the power to enact laws restricting the people’s liberty”—and “[a]n ‘excess of law-making’ was, in their words, one of ‘the diseases to which our governments are most liable.’”<sup>84</sup> In these justices’ views, rethinking the enforcement of the nondelegation doctrine is required to preserve this intended balance.<sup>85</sup>

CBA has so far played an influential role in encouraging net beneficial and relatively stable regulations, especially in the context of public health and safety. But agencies often conduct and rely on CBA *in their discretion*. Some scholars and judges have suggested that the applicable risk-management framework, however, is exactly the sort of important policy decision that Congress should explicitly make. At its core, the risk-management framework tells agencies how they should balance the costs to those burdened by a policy and the benefits to beneficiaries.

In fact, congressional silence—that is, leaving the risk-management decision up to the agency’s discretion—has previously been criticized as a violation of the nondelegation doctrine. In the *Benzene Case*, the majority held that the Occupational Safety and Health Administration’s stringent standard limiting exposure to benzene in the workplace was invalid because the agency failed to make threshold findings about the significance of current exposure levels.<sup>86</sup> Justice Rehnquist, however, wrote a powerful concurrence, arguing that the regulation is actually invalid because Congress impermissibly delegated the key risk-management decision to the agency.<sup>87</sup> Justice Rehnquist’s arguments in the *Benzene Case* about the limits of constitutional delegation are strikingly similar to Justice Gorsuch’s re-envisioned doctrine in *Gundy*: “Congress [must] lay down the general policy and standards that animate the law, leaving the agency to refine

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<sup>83</sup> See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (“[T]he Constitution proceeded to vest the authority to exercise different aspects of the people’s sovereign power in distinct entities.”); *DOT v. Ass’n of Am. R.R.s*, 575 U.S. 43, 74-86 (2015) (Thomas, J., concurring) (“The Framers’ dedication to the separation of powers has been well documented, if only half-heartedly honored. . . . For whatever reason, the intelligible principle test now requires nothing more than a minimal degree of specificity in the instructions Congress gives to the Executive when it authorizes the Executive to make rules having the force and effect of law.”).

<sup>84</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

<sup>85</sup> This concern is not just reflected in recent non-delegation doctrine jurisprudence. The Court has expressed willingness to enact barriers to agency forms based on its view of which forms best protect liberty. See, e.g., *PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75, 164-200 (then Judge Kavanaugh’s views).

<sup>86</sup> *Indus. Union Dep’t v. Am. Petroleum Inst.* (“the Benzene Case”), 448 U.S. 607 (1980).

<sup>87</sup> *Benzene Case*, 448 U.S. 607, 672 (Rehnquist, J., concurring) (calling this “one of the most difficult issues that could confront a decisionmaker”).

those standards, ‘fill in the blanks,’ or apply the standards to particular cases.”<sup>88</sup> The litigants—and the justices—understood the statute at issue to potentially allow for several different risk-management approaches, including adopting all regulations feasible (a bankruptcy constraint) and all regulations that are cost-benefit justified (a CBA approach). To Justice Rehnquist, the statute did not specify what threshold the agency should use before it decided to regulate and, moreover, did not tell the agency how stringently to regulate. Instead, Congress left this key ambiguity in the statute and passed the risk-management decision on to the agency.<sup>89</sup> Its silence on this “difficult issue[]”—the key risk-management decision—violated the nondelegation doctrine. Similarly, when the D.C. Circuit held that the Clean Air Act violated the nondelegation doctrine, it was for Congress’s failure to articulate a reasonable risk-management standard while forbidding the agency to consider costs.<sup>90</sup> Of course, in that case, the Supreme Court reversed the D.C. Circuit’s decision, holding that the Clean Air Act had a sufficiently intelligible principle guiding the agency’s risk-management decision notwithstanding the prohibition on cost consideration.<sup>91</sup>

Nondelegation doctrine jurisprudence has long recognized practical issues of governance,<sup>92</sup> and normative considerations appear to play a role in the Court’s recent interest in the doctrine’s revitalization and its analysis of the constitutional

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<sup>88</sup> *Id.* Compare *Benzene Case*, 448 U.S. at 674 (Rehnquist, J., concurring), to *Gundy*, 139 S. Ct. 2116 (Gorsuch, J.). Justice Kavanaugh also favorably referred to Justice Rehnquist’s opinion. See also *Paul*, 140 S. Ct. 342 (“Justice Gorsuch’s opinion built on views expressed by then-Justice Rehnquist some 40 years ago in [the *Benzene Case*]. . . . Like Justice Rehnquist’s opinion 40 years ago, Justice Gorsuch’s thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.”).

<sup>89</sup> *Benzene Case*, 448 U.S. at 685-86 (Rehnquist, J., concurring) (“Congress was faced with a clear, if difficult, choice between balancing statistical lives and industrial resources or authorizing the Secretary to elevate human life above all concerns save massive dislocation in an affected industry . . . . That Congress chose, intentionally or unintentionally, to pass this difficult choice on to the Secretary is evident from the spectral quality of the standard it selected . . . . The decision whether the law of diminishing returns should have any place in the regulation of toxic substances is quintessentially one of legislative policy.”).

<sup>90</sup> *American Trucking* in D.C. Circuit.

<sup>91</sup> *American Trucking* in Supreme Court. Because of this decision, the EPA is not allowed to set NAAQS based on CBA and instead sets the stringency level based on other factors. This approach has resulted in levels that are often not stringent enough when comparing the costs against the benefits of further reductions.

<sup>92</sup> See, e.g., *J.W. Hampton & Co. v. United States*, 276 U.S. 394 (1928) (“This is not to say that the three branches are not coordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches . . . . In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.”).

question.<sup>93</sup> Depending on how the Court rethinks enforcement of the nondelegation doctrine, much of current federal rulemaking could be on uncertain ground.<sup>94</sup> For some justices, any resulting abrogation of federal rulemaking would be a normatively desirable consequence of reworking the doctrine's enforcement (a feature, not a bug). Justice Gorsuch, for example, argues that requiring greater specificity from Congress will “promote deliberation” and protect minority interests,<sup>95</sup> “promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules,”<sup>96</sup> and promote accountability.<sup>97</sup> For Justice Thomas, too, any cost in speed and flexibility of government action would be justified by the benefits of congressional restraint. Quoting Alexander Hamilton in *The Federalist* No. 73, he writes that any “injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.”<sup>98</sup> Of course, these conclusions rest on assumptions about the effects of requiring greater specificity from Congress.

So far, the Supreme Court has not granted certiorari on any nondelegation challenges that it has reviewed since *Gundy*.<sup>99</sup> And even if it rethinks the doctrine, it is not clear whether and how this would affect agency discretion to adopt a risk-management approach in the face of congressional silence.<sup>100</sup> But if the Supreme Court requires Congress to explicitly make the risk-management policy decision, what effect would this have? In the short term, of course, it might mean that much of CBA-justified rulemaking is invalid because many statutes do not specifically require CBA. But then it depends on the congressional response. Congress might adopt new statutes that require CBA, likely satisfying the Court's criteria for

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<sup>93</sup> See also Jeffrey A. Wertkin, *Note, Reintroducing Compromise to the Nondelegation Doctrine*, 90 GEO. L.J. 1055, 1074-75 (2002) (summarizing arguments for and against stricter enforcement of nondelegation).

<sup>94</sup> Justice Gorsuch sketched out a few of his ideas in his dissent in *Gundy*. See *Gundy*, 139 S. Ct. at 2139-42 (Gorsuch, J., dissenting) (“Congress must set forth standards ‘sufficiently definite and precise to enable Congress, the courts, and the public to ascertain’ whether Congress’s guidance has been followed . . . . Once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.”). Justice Thomas seems to have an even narrower view of acceptable agency rulemaking authority. See *DOT*, 575 U.S. at 86 (2015) (Thomas, J., concurring) (“We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power.”).

<sup>95</sup> *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

<sup>96</sup> *Id.* at 2138

<sup>97</sup> *Id.*

<sup>98</sup> *DOT*, 575 U.S. at 86–87, (Thomas, J., concurring).

<sup>99</sup> See, e.g., *American Institute for Int’l Steel Inc. v. United States* (cert. denied June 22, 2020); *Center for Biological Diversity v. Wolf* (cert. denied June 29, 2020).

<sup>100</sup> Cary Coglianese, *Dimensions of Delegation*, FACULTY SCHOLARSHIP AT PENN L. 2114 (2019), [https://scholarship.law.upenn.edu/faculty\\_scholarship/2114/](https://scholarship.law.upenn.edu/faculty_scholarship/2114/); Cody Ray Milner, *Into the Multiverse: Replacing the Intelligible Principle Standard With a Modern Multi-Theory of Nondelegation*, 28 GEO. MASON L. REV. \_\_ (2020) (working copy).

appropriate authorization. The result would not be much different from current practice. Or, Congress might make the risk-management decisions itself by statutorily setting stringency, which could be more or less stringent than CBA-justified. After the resignation of Anne Gorsuch Burford as administrator of a scandal-prone EPA, Congress responded by enacting several highly prescriptive statutes.<sup>101</sup> If something other than CBA fills the gap, the result might not reflect the restraint and stability that Justices Gorsuch and Thomas envision. The congressional response matters.

#### IV. CONGRESS AND CBA

CBA, though widespread, rests on unsteady ground. Presidential support for the constraint might wane. Courts might decide to take a much more deferential approach to agency factfinding going forward. Or, most drastically, courts might no longer be willing to uphold the broad authorizations that let CBA thrive. Without congressional action, any of these threats, if realized, would destroy the current CBA consensus. But while presidents, courts, and agencies have maintained or increased their support of CBA over the last forty years, congressional trends on CBA have remained unexamined. This Part takes up this task.

As an initial matter, there is no reason to think that congressional support for CBA would follow the same trajectory as executive and judicial support for CBA. Federal agencies are notoriously less politically accountable by design. Congress is the body most responsive to the people. Its decisions are more likely to be tied to the preferences and perceptions of constituents. Examining congressional decisions on CBA sheds light on how CBA is perceived over time. It can identify continuing challenges to the acceptance of CBA that the widespread agency use and judicial encouragement might obscure. Section A describes the theoretical benefits and costs of CBA from the perspective of Congress and discusses the kinds of legislation that Congress would pass in light of the baseline CBA consensus. Section B examines actual congressional action on CBA and discuss implications.

##### A. *Benefits and Costs*

Scholars have often modeled the Congress's relationship with agencies as a principal-agent problem: Congress wants the agencies to implement Congress's preferences and priorities.<sup>102</sup> In this model, Congress supports CBA if its imposition

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<sup>101</sup> See, e.g., HSWA (1984), SARA (1986), parts of CAAA (1990) (e.g. re air toxics, CAA 112).

<sup>102</sup> Scholars often focus on the President as the principal but the reasoning just as easily applies to Congress. E.g., Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1140 (1990); Bernard Steunenberg, *Congress, Bureaucracy, and Regulatory Policy-Making*, 8 J. L. ECON. & ORG. 673 (1992); Eric A. Posner, *Controlling Agencies with Cost-Benefit*

makes it more likely for Congress to impose its preferences on an agency action vis-à-vis the other branches. This Section summarizes these theoretical considerations and makes empirical predictions.

### 1. Oversight, Efficiency, and Ossification

Congress could benefit from CBA requirements for informational and substantive reasons. CBA reveals information about regulatory action that could be useful in oversight, and it forces agencies to apply evidence-based expertise before deciding on a course of action. To the extent that Congress cares about speed, however, a CBA requirement might prove costly. Congress’s willingness to enact legislation that promotes CBA will depend on the relative importance of these considerations.

Robust political oversight is necessary for agency accountability.<sup>103</sup> CBA facilitates such oversight by succinctly providing information about the likely costs and benefits of agency actions and often identifying distributional effects; this information helps both the President and Congress to oversee agencies.<sup>104</sup> Congress does not need to rely on information from interest groups, which might have motivated or one-sided information about regulatory effects.<sup>105</sup> Congress could use this information to pressure the agency to correct course through public oversight actions or the threat of legislation.<sup>106</sup> One well-known example that suggests Congress values CBA in its oversight is the Congressional Review Act (“CRA”).<sup>107</sup> The CRA requires the agency to submit CBA. [Add more] In the first few months of the Trump Administration, Congress used the Congressional Review Act (CRA) to get rid of sixteen recently issued rules from the Obama Administration. Because the rules were generally supported by CBA, Congress’s actions suggested that the value of CBA in those cases, if any, was in providing information on rules’ costs and benefits and not in persuading Congress to leave in place cost-benefit justified rules.<sup>108</sup>

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*Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001); Kagan, *supra* note 32, at 2277 (“[A]n era of presidential administration has arrived.”); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 33–34 (1994) at 5.

<sup>103</sup> Posner, *supra* note 102, at 1141; McCubbins, Noll & Weingast, *supra* note 85, at 246.

<sup>104</sup> Eric Posner describes this as converting a relationship of asymmetric information to one of full information. Posner, *supra* note 102, at 1143.

<sup>105</sup> See Posner, *supra* note 80, at 1189 (arguing that “[a]nother virtue of cost-benefit analysis is that it reduces the ability of interest groups to use their information advantages to influence political outcomes.”).

<sup>106</sup> Brian Feinstein has found congressional hearings to be effective. Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences & Congressional Monitoring of the Administrative State*, 8 J. L. Econ. & Pol’y. 23 (2011).

<sup>107</sup> 5 U.S.C. § 801 *et seq.* (1996).

<sup>108</sup> Some scholars had predicted that Congress would target regulations that were not justified by high-quality CBA. See Adam Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the “Substantially Similar” Hurdle in the Congressional Review Act: Can*

To promote CBA for congressional oversight purposes, Congress would want agencies to perform high-quality CBA of its actions and readily provide Congress access to the analyses—but Congress would not necessarily require the agency to rely on the analysis in any way. Useful legislation would include provisions requiring agencies to conduct CBA, providing support for this analysis, requiring agencies to submit CBA to Congress, and requiring courts to ensure compliance with this mandate and evaluate the quality of the analysis.

CBA also has a substantive component, identifying the regulatory approach or stringency that would maximize aggregate net benefits. There is often uncertainty in these estimates, and, of course, important categories of benefits or costs are not always quantifiable based on current available data. These uncertainties and data gaps often require some qualitative judgment of the relative value of different categories of benefits or costs. But even acknowledging a reasonable range of cost-benefit justified approaches and stringencies, CBA-based decision rule constrains agency action.<sup>109</sup>

There are at least two reasons why Congress might separately value this substantive constraint: (1) it forces the agency to apply its expertise, and (2) it constrains the application of presidential preferences. Although scholars have long questioned Congress’s interest in promoting efficient regulation,<sup>110</sup> the idea is not entirely implausible. It is unquestionable that a responsible balancing of tradeoffs requires the application of expertise. This is particularly true for risk-management decisions, which require considering and balancing relevant tradeoffs. A CBA requirement forces the agency to transparently acknowledge these tradeoffs and make evidence-based decisions to the extent possible. This option might be especially valuable to a Congress that recognizes these tradeoffs but is divided on how to balance them (or wishes to avoid direct accountability for the balancing). This is consistent with the reality that, for many high-profile issues, members of Congress are lobbied by groups on both sides of an issue, each highlighting the part of the tradeoff that affects them. Of course, it is possible to accomplish these aims with a more general delegation of expertise-based decisionmaking. But especially when Congress and the President are divided, a neutral decision rule that

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*OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 710 (2011). But the latest uses of CRA have cast doubt on this reasoning. Obama-era rules that were axed tended to be supported by CBA that justified the rules. This suggests that the CBA may have provided useful information about the effects of the rules, but its conclusion on whether the rules were cost-benefit-justified was not important to Congress.

<sup>109</sup> Posner, *supra* note 102, at 1197–98 (arguing that “it is not usually easy to manipulate cost-benefit data,” though acknowledging that some variables are hard to measure); Cecot, *supra* note 31; Masur, *supra* note 13.

<sup>110</sup> Posner, *supra* note 102, at 1141 (“The purpose of requiring agencies to perform cost-benefit analysis is not to ensure that regulations are efficient . . . [E]valuation of cost-benefit analysis should be based. . . not on its instantiation of ethical principles that elected officials may or may not share.”) (citing McCubbins, Noll & Weingast, *supra* note 78).

constrains presidential influence over agency outcomes might be desirable in its own right.<sup>111</sup>

If Congress supports substantive CBA, Congress would enact legislation that requires agencies not only to conduct CBA but also to rely on CBA when justifying their actions. Congress would also promote judicial review of agency reliance on CBA.

But admittedly, CBA is expensive and time-consuming to conduct. [Insert statistic on cost and average time.] Conducting high-quality CBA, especially for complex rulemakings, could present a formidable hurdle, particularly if speed is important. In general, hurdles to quick federal regulatory action—sometimes referred to as regulatory “ossification”<sup>112</sup>—could also be problematic when there are large costs to delaying federal actions. The costs of federal inaction could include unaddressed or worsening market failures or inconsistent state solutions. Congress, concerned about these issues, might loosen CBA constraints in particular situations where these costs of delay are most salient.

## 2. Context

There are thus practical reasons why Congress might encourage CBA in particular contexts. The next Section evaluates whether there is actually any empirical support for any of these reasons. The examination would shed light on which of these reasons have proven most influential. And it could support a plan for Congress to support CBA if any threats are realized.

Executive orders going back to at least the Reagan Administration, however, require agencies to conduct and even, when permissible, rely on CBA. These background requirements reduce Congress’s incentive to enact CBA-forcing legislation, regardless of whether Congress values CBA for informational or substantive reasons. In other words, an investigation into congressional practice might turn up nothing—and still not reveal much about congressional support for CBA as facilitating oversight or promoting efficiency.

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<sup>111</sup> Of course, a non-neutral decision rule might be most desirable by a Congress whose majority disagrees with presidential priorities and preferences—but such legislation would likely fail to get the necessary presidential approval in order to get enacted. CBA constrains political action, but in a politically neutral way that would be difficult for a presidential (especially one that supports CBA via Executive Order) to oppose.

<sup>112</sup> See, e.g., William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 128 (2001) (agreeing that detailed judicial scrutiny of agency rationales has contributed to “ossification” of the regulatory process); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 394–95 (2000); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 529–30 (1997); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1387 (1992) (noting that “it is difficult to disagree with the conclusion that it is much harder for an agency to promulgate a rule now than it was twenty years ago”).

Assuming that Congress knows about Executive Order 12,291 and its progeny,<sup>113</sup> it is not clear that Congress would expect these requirements to endure and continue to be enforced. When it was adopted, Executive Order 12,291 faced considerable resistance both within agencies and in academic circles.<sup>114</sup> In fact, many thought that President Clinton would rescind the Order when he got into office.<sup>115</sup> Instead, of course, President Clinton reinforced its main principles in Executive Order 12,866.<sup>116</sup> It would be a far-fetched, though, to think that Congress during the 1980s acted with any expectation that presidents would continue to require CBA. Similarly, because compliance with the executive orders is not judicially enforceable, there was little reason for Congress to expect compliance with CBA requirements.<sup>117</sup>

But even if Congress's incentives to enact some CBA-based legislation are reduced because of background executive support, this reduced incentive does not hold across the board. None of the executive orders cover independent agencies or agency actions that are not deemed "significant,"<sup>118</sup> and the availability and quality of CBA has not been consistent across agencies.<sup>119</sup> There is room, then, for Congress to pass CBA-forcing legislation in these contexts if it values CBA for informational or substantive purposes.<sup>120</sup> A Congress interested in high-quality CBA for oversight purposes might require agencies to produce a CBA to accompany its regulatory

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<sup>113</sup> The assumption of congressional knowledge over judicial rules, at least, has been questioned. See Abbe Gluck & Lisa Bressman, *Statutory Interpretation From the Inside – An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) (arguing that congress is often unaware of judicial rules).

<sup>114</sup> James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 851–60 (2001) (describing C. Boyden Gray's account of the agitation and confusion surrounding the unveiling of Executive Order 12,291); Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 5 REG. 33, 35–36, 38–40 (1981); see also Marc Granetz, *Deregulation Rodeo: Reagan's Rulebusters Get Ready to Ride*, NEW REPUBLIC 9–12 (Nov. 12, 1984); David Hoffman, *Election '84: The Reagan Record*, WASH. POST, Jan. 31, 1984, at A6.

<sup>115</sup> Sunstein, *supra* note 36.

<sup>116</sup> Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

<sup>117</sup> If an agency does not need to rely on CBA to support its decisionmaking—and explicitly chooses not to—then the production and quality of the CBA is largely irrelevant and would not ordinarily be evaluated by courts.

<sup>118</sup> All executive order exclude independent agencies from the CBA requirements, and all had a threshold rule for when the requirements apply to executive-agency action. See Exec. Order No. 12291, 45 Fed. Reg. 13193 (Feb. 17, 1981) (limited to "major" executive-agency rules); Executive Order No. 12866, 58 Fed. Reg. 51735 (Sep. 30, 1993) (limited to "significant" executive-agency rules).

<sup>119</sup> See note 13.

<sup>120</sup> Others have examined more contexts in which agencies might avoid OIRA review and CBA requirements that would be ripe for congressional attention even during this period of expanded agency practice of CBA. See Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J. L. & PUB. POL'Y. 447 (2014); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1757–58 (2013).

action—and require courts to ensure that agencies adhere to this requirement—but it would not necessarily require an agency to rely on the substantive conclusions of a CBA to justify its action. Meanwhile, a Congress interested in constraining agencies substantively would require that agencies issue regulations when the benefits justify the costs, and it might require judicial review of compliance with this decision rule. And, in light of the background agency practice, Congress should have incentives to suspend CBA if it does not value the information it produces, disagrees with its substantive component, or is concerned about its costs in a particular situation. The next section tries to evaluate the underlying support for CBA over time and under different circumstances by examining explicit delegations, paying particular attention to the context in which these delegations arise.

### *B. Congressional CBA Directives*

This Article examines thirty-five enacted laws that contain explicit provisions related to CBA since 1981.<sup>121</sup> These laws are summarized in Table 1. The list includes provisions requiring an agency to prepare a CBA (“Prepare,” 2), requiring an agency to consider the results of a CBA (“Consider,” 17), requiring an agency to issue cost-benefit justified regulations (“Require,” 6), requiring an agency to review the costs and benefits of prior regulations (“Review,” 2), waiving agency CBA requirements (“Waive,” 5), and requiring an agency to report CBA of regulation to Congress (“Report to Congress,” 6).<sup>122</sup> Notably, the list reveals that Congress has not generally required agencies to limit regulations to those with benefits greater than costs—but it has often agencies to consider both costs and benefits before issuing regulation. Below I discuss some of the features of these provisions, examining both the enacted language and the associated legislative history.<sup>123</sup>

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<sup>121</sup> In particular, the Article examines all the relevant statutory provisions identified by the following two searches in Westlaw: (1) “adv: (“cost-benefit” “benefit-cost”) (cost! /s benefit! /30 (regulation! rule! action requirement level stringency)), limited to “federal” jurisdiction and “statutes”; and (2) “adv: (cost! /p benefit! /p (regulation! rule! action requirement level stringency)), limited to “federal” jurisdiction and “statutes.” These searches identified 701 and 628 provisions, respectively (with substantial overlap). Because the analysis is limited to explicit congressional language related to agency rulemaking after Executive Order 12,291, I excluded: 1) applicable provisions enacted before February 1981 (5); 2) provisions where the cost-benefit language appeared only in “Relevant Additional Resources” or “Relevant Notes of Decisions” (the majority of search results); 3) provisions requiring cost-benefit justified local or private projects for federal approval, grants, or funding (49); 4) provisions requesting studies including CBA of legislation or enacted pilot programs (21); 5) provisions requiring CBA for another purpose besides aiding in rulemaking (e.g., field reorganizations; agency name changes); and 6) irrelevant provisions picked up by the search (e.g., cost-sharing in health benefit plans). The final list included 35 enacted laws with relevant provisions, as summarized in Table 1.

<sup>122</sup> Some bills included multiple relevant types of provisions, as indicated in the table.

<sup>123</sup> While I acknowledge that Congress is made up of many different individuals over time, representing diverse and evolving opinions, I nonetheless examine legislative history to provide clues about congressional concerns at the time the laws were enacted.

Table 1. Summary of Congressional CBA Directives for Regulation (35)

<b>Bill</b>	<b>Year</b>	<b>Statutory provisions</b>	<b>CBA (Require/ Consider/ Report/ Prepare/ Waive)</b>	<b>Congressional majority, D/R/Split (Pres.)</b>	<b>Agency</b>
Omnibus Budget Reconciliation Act of 1981, PL 97-35 (HR 3982), Aug. 13, 1981, 95 Stat 710	1981	15 U.S.C.A. §§ 1262, 2058	Require	Split (R)	CPSC
PL 97-410 (S 2355), Jan. 3, 1983, 96 Stat 2043	1983	47 U.S.C.A. § 610	Consider	Split (R)	FCC
PL 98-554 (S 2217), Oct. 30, 1984, 98 Stat 2829	1984	49 U.S.C.A. § 31502	Consider	Split (R)	DOT
Omnibus Foreign Trade and Competitiveness Act of 1988, PL 100-418 (HR 4848), Aug. 23, 1988, 102 Stat 1107	1988	19 U.S.C.A. §§ 2251, 2253	Require	D (R)	President
Clean Air Act, Amendments, PL 101-549, Nov. 15, 1990, 104 Stat 2399	1990	42 U.S.C.A. §§ 7511b, 7612	Consider/ Review	D (R)	EPA
Consumer Product Safety Improvement Act of 1990, PL 101-608, Nov. 16, 1990, 104 Stat 3110	1990	15 U.S.C.A. § 1274	Waive	D (R)	CPSC
Cable Television Consumer Protection and Competition Act of 1992, PL 102-385, Oct. 5, 1992, 106 Stat 1460	1992	47 U.S.C.A. § 544a	Consider	D (R)	FCC
Mammography Quality Standards Act of 1992, PL 102-539, Oct. 27, 1992, 106 Stat 3547	1992	42 U.S.C.A. § 263b	Report to Congress	D (R)	DHHS
Revision of Title 49 U.S.C.A., "Transportation", PL 103-272, July 5, 1994, 108 Stat 745	1994	49 U.S.C.A. § 31136(c)(2)	Consider	D (D)	DOT
Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, PL 103-354, Oct. 13, 1994, 108 Stat 3178	1994	7 U.S.C.A. § 2204e	Prepare/ CBA Office	D (D)	USDA

PRELIMINARY DRAFT

<b>Bill</b>	<b>Year</b>	<b>Statutory provisions</b>	<b>CBA (Require/ Consider/ Report/ Prepare/ Waive)</b>	<b>Congressional majority, D/R/Split (Pres.)</b>	<b>Agency</b>
Railroads, PL 103–440, Nov. 2, 1994, 108 Stat 4615	1994	49 U.S.C.A. § 20148	Consider	D (D)	DOT
Unfunded Mandate Reform Act of 1995, PL 104–4, Mar. 22, 1995, 109 Stat 48	1995	2 U.S.C.A. § 1532	Prepare	R (D)	all agencies
ICC Termination Act of 1995, PL 104–88, Dec. 29, 1995, 109 Stat 803	1995	49 U.S.C.A. § 14104	Consider	R (D)	DOT
Safe Drinking Water Act Amendments of 1996, PL 104–182, Aug. 6, 1996, 110 Stat 1613	1996	42 U.S.C.A. § 300g-1	Consider/ Waive	R (D)	EPA  Commission on 21st Century Production Agriculture
Federal Agriculture Improvement and Reform Act of 1996, PL 104–127, Apr. 4, 1996, 110 Stat 888	1996	7 U.S.C.A. § 7313	Report to Congress	R (D)	
Contract with America Advancement Act of 1996 ("Congressional Review Act"), PL 104–121, Mar. 29, 1996, 110 Stat 847	1996	5 U.S.C.A. § 801	Report to Congress	R (D)	all agencies
Federal Aviation Reauthorization Act of 1996, PL 104–264, Oct. 9, 1996, 110 Stat 3213	1996	49 U.S.C.A. § 106	Review	R (D)	DOT (FAA)
Accountable Pipeline Safety and Partnership Act Of 1996, PL 104–304, Oct. 12, 1996, 110 Stat 3793	1996	49 U.S.C.A. § 60102	Require	R (D)	DOT
Department of the Interior and Related Agencies Appropriations Act, 1998, PL 105–83, Nov. 14, 1997, 111 Stat 1543	1997	16 U.S.C.A. § 620f	Require	R (D)	USDA/DOI DHHS (Agency for Healthcare Research and Quality)
Healthcare Research and Quality Act of 1999, PL 106–129, Dec. 6, 1999, 113 Stat 1653	1999	42 U.S.C.A. § 299b-5	Consider	R (D)	

PRELIMINARY DRAFT

<b>Bill</b>	<b>Year</b>	<b>Statutory provisions</b>	<b>CBA (Require/ Consider/ Report/ Prepare/ Waive)</b>	<b>Congressional majority, D/R/Split (Pres.)</b>	<b>Agency</b>
Consolidated Appropriations—FY 2001, PL 106–554, Dec. 21, 2000, 114 Stat 2763	2000	7 U.S.C.A. § 19	Consider	R (D)	CFTC
Aviation and Transportation Security Act, PL 107–71, Nov. 19, 2001, 115 Stat 597	2001	49 U.S.C.A. § 114	Waive	Split (R)	TSA/ DHS
Fair and Accurate Credit Transactions Act of 2003, PL 108–159, Dec. 4, 2003, 117 Stat 1952	2003	15 U.S.C.A. § 1681s-2	Consider	R (R)	"Federal banking agencies"/ FTC
Cape Town Treaty Implementation Act of 2004, PL 108–297, Aug. 9, 2004, 118 Stat 1095	2004	49 U.S.C. § 44101 note	Waive	R (R)	DOT (FAA)
Security and Accountability for Every Port Act Of 2006 (Safe Port Act), PL 109–347, Oct. 13, 2006, 120 Stat 1884	2006	6 U.S.C.A. § 943	Consider	R (R)	DHS (CBP)
Implementing Recommendations of the 9/11 Commission Act of 2007, PL 110–53, Aug. 3, 2007, 121 Stat 266	2007	6 U.S.C.A. § 1204	Consider	D (R)	TSA/ DHS
Consumer Product Safety Improvement Act of 2008, PL 110–314, Aug. 14, 2008, 122 Stat 3016	2008	15 U.S.C.A. § 1472	Waive	D (R)	CPSC
Dodd–Frank Wall Street Reform and Consumer Protection Act, PL 111-203, July 21, 2010, 124 Stat 1376	2010	12 U.S.C.A. §§ 5496b, 5512, 5551; 31 U.S.C.A. § 313	Consider/ Report to Congress (CG)	D (D)	CFPB
Twenty–First Century Communications and Video Accessibility Act of 2010, PL 111-260, Oct. 8, 2010, 124 Stat 2751	2010	47 U.S.C.A. § 613	Require	D (D)	FCC

<b>Bill</b>	<b>Year</b>	<b>Statutory provisions</b>	<b>CBA (Require/ Consider/ Report/ Prepare/ Waive)</b>	<b>Congressional majority, D/R/Split (Pres.)</b>	<b>Agency</b>
FDA Food Safety Modernization Act, PL 111-353, Jan. 4, 2011, 124 Stat 3885	2011	21 U.S.C.A. § 2223	Require	Split (D)	DHHS
Drug Quality and Security Act, PL 113-54, Nov. 27, 2013, 127 Stat 587	2013	21 U.S.C.A. § 360eee-1	Consider	Split (D)	DHHS
Every Student Succeeds Act, PL 114-95, Dec. 10, 2015, 129 Stat 1802	2015	20 U.S.C.A. § 6571	Report to Congress	R (D)	Dept. of Educ.
Frank R. Lautenberg Chemical Safety for the 21st Century Act, PL 114-182, June 22, 2016, 130 Stat 448	2016	15 U.S.C.A. § 2605	Consider/ Waive	R (D)	EPA
Strengthening Career and Technical Education for the 21st Century Act, PL 115-224, July 31, 2018, 132 Stat 1563	2018	20 U.S.C.A. § 2306a	Report to Congress	R (R)	Dept. of Educ.
FAA Reauthorization Act of 2018, PL 115-254, Oct. 5, 2018, 132 Stat 3186	2018	49 U.S.C.A. § 44805	Consider	R (R)	DOT (FAA)

Seventy percent of the laws with explicit CBA provisions (25 out of 35) were enacted during times when the President and the congressional majority were members of different political parties. Overall, seventeen laws were enacted by a Republican-controlled Congress, twelve by a Democratic-controlled Congress, and six by a split Congress. The Republican-controlled 104<sup>th</sup> Congress (January 1995 through January 1997) during the Clinton Administration was particularly active in passing such laws (7 out of 35).<sup>124</sup> But laws with explicit CBA provisions still

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<sup>124</sup> After the midterm 1994 election, Republicans took control of the House of Representatives for the first time since 1954. During the election, Senator Newt Gingrich championed a “Contract with America,” specifying policies that Republicans would focus their efforts on reforming. None of the proposed policy reforms, however, were directly related to cost-benefit analysis or even agency action. *See* <https://web.archive.org/web/19990427174200/http://www.house.gov/house/Contract/CONTRACT.html>.

made up a tiny minority of all enacted legislation.<sup>125</sup> In fact, between 1981 and 2019, such laws made up less than 1 percent of legislation enacted by each Congress, with the exception of the 104<sup>th</sup> Congress (2 percent of its laws contained explicit CBA provisions).<sup>126</sup> Because most legislation is not legislation where risk-management decisionmaking is at all relevant, I examine how much risk-management legislation, broadly defined, Congress passes during each session to provide a more informative baseline. In each congressional session, Congress passes [X] major risk-management legislation.<sup>127</sup>

By design, the sample is limited to the period where executive agencies were already subject to presidential CBA requirements. Nonetheless, the majority of laws (nineteen laws) imposed some CBA requirement on executive agencies. The majority of these were enacted in times of divided government, particularly when Congress was Republican and the President was Democratic (given the strong representation of the 104<sup>th</sup> Congress). This suggests congressional interest in exerting additional control over these agencies at those times and possibly an interest in slowing down regulation.<sup>128</sup>

Four laws waived CBA requirements for executive agencies. But the waivers were all responsive to specific concerns about speed and flexibility, diminishing their generalizability. One waiver, in the wake of the September 11 attacks, gave the Under Secretary of the Transportation Security Administration emergency authority to issue regulations in order to protect transportation security, without adhering to CBA requirements, without going through notice-and-comment requirements, or even without prior approval from the Secretary.<sup>129</sup> The other three were very specific and limited waivers. Two of them, in fact, waived CBA requirements in order to ensure that previously settled agreements could be swiftly implemented.<sup>130</sup>

One of these, the waiver under the Safe Drinking Water Act Amendments, is particularly worth highlighting. In the spring of 1993, Milwaukee suffered a devastating outbreak of cryptosporidium.<sup>131</sup> Several individuals became ill. A later study revealed that the outbreak was caused by one of the treatment plants failing

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<sup>125</sup> I note again, however, that these laws were all enacted against the backdrop of executive CBA requirements. Congressional silence suggests some approval of or, at least, acquiescence to agency practice.

<sup>126</sup> Between 1981 and 2019, each Congress enacted about 465 laws. This includes the 97<sup>th</sup> Congress through the 115<sup>th</sup> Congress.

<sup>127</sup> [Pending author calculations.]

<sup>128</sup> This impression is supported by accounts of the motivations of the 104<sup>th</sup> Congress.

<sup>129</sup> Aviation And Transportation Security Act, PL 107–71, Nov. 19, 2001, 115 Stat 597.

<sup>130</sup> Cape Town Treaty Implementation Act Of 2004, PL 108–297, Aug. 9, 2004, 118 Stat 1095; Safe Drinking Water Act Amendments Of 1996, PL 104–182, Aug. 6, 1996, 110 Stat 1613.

<sup>131</sup> Michael Decourcy Hinds, *Milwaukee's Water Suspected as Cause Of Intestinal Illness*, N.Y. TIMES, Apr. 9, 1993, at A1.

to adequately remove cryptosporidium oocysts.<sup>132</sup> In the original SDWA, Congress specifically required EPA to regulate a long list of 83 contaminants, many of which were not even thought to be high risk. EPA did not prioritize regulating any types of contaminants on the list and developed a huge backlog. Critics at the time argued that EPA's failure to regulate contaminants that posed immediate health risks contributed to the outbreak in Milwaukee.<sup>133</sup> CBA, perhaps surprisingly, emerged as the ideal solution to this problem. The Senate report's opening statement made clear that the 1996 Amendments were inspired by the 1993 contamination.<sup>134</sup> The health effects of water contamination were salient due to the recent outbreak—but so were the costs of imposing burdensome requirements that would be borne by poor rural households.<sup>135</sup> The Senate report discussed the value of CBA in policymaking, especially in making effective environmental laws that require making difficult tradeoffs.<sup>136</sup> CBA was a widely applauded, bipartisan addition to the statute. The exception for cryptosporidium and disinfection byproducts, supported by Robert Perciasepe, the EPA assistant administrator, was enacted because significant progress had already been made since the outbreak to issue a responsive regulation, and the EPA worried that the CBA requirement would only be a holdup at that point.<sup>137</sup> This provision was extremely nuanced, enacted by a Congress fully aware

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<sup>132</sup> Joseph N. S. Eisenberg et al., *An Analysis of the Milwaukee Cryptosporidiosis Outbreak Based on a Dynamic Model of the Infection Process*, 9 *Epidemiology* 255 (1998).

<sup>133</sup> H.R. Rep. 104-632(1), at 10 (1995).

<sup>134</sup> S. Rep. No. 104-169, at 1 (1996).

<sup>135</sup> H.R. Rep. 104-632(1), at 130 (1995) (statement of Representative Tom Coburn (R-Oklahoma)) (“At the same time, we know that fully implementing this rule will be extremely costly for public water systems, especially those small systems serving rural areas. For instance, each household in northeastern Oklahoma would have to pay nearly \$200 more a year if we fail to use common sense and move forward with the proposed rule.”); *id.* at 15 (statement of American Medical Association, sharing his concerns).

<sup>136</sup> S. Rep. No. 104-169, at 99.

<sup>137</sup> H.R. Rep. 104-632(1), at 17. Perciasepe's letter describes the process of negotiation and fact finding that led to the current rules governing disinfectants, noting that as part of the long negotiations “Costs and benefits were extensively analyzed and addressed in a manner satisfactory to all signatories of the agreement.” *Id.* at 17-18 (“[I]t is important to understand that the negotiators and EPA have agreed to governing principles (for developing the D/DBP-microbial rules) which ensure greater certainty that protection against waterborne disease will be maintained or improved, at an affordable cost, than would a cost-benefit framework. Potential weakening of such protection is not categorically ruled out within the cost-benefit framework advocated by Dr. Seward. . . . Any provision disturbing the negotiated agreement could lead to delay in additional, much-needed public health protections.”). Congress suggested that it thought the proposed rulemaking was largely consistent with CBA requirements. *See* H. Rep. 104-741, 76-77 (“The Conferees recognize, however, that the development of this regulatory package has required the negotiators to consider complex issues of risk, costs, affordability, feasible technology, and health benefits. It is the Conferees' view that the proposed rule that has been produced is consistent with the ‘risk-risk’ provision set out in new section 1412(b)(5). Therefore, Section 104(b) makes clear that the Administrator may use the authority of section 1412(b)(5) to promulgate Stage I and Stage II rules. However, it is also the

of tradeoffs—but also fully committed to having the administrator strike the right balance. In fact, Congress specified that “[a] court may set aside a rule for which no cogent analysis of the costs and benefits is offered in support of the determinations required by [the relevant provision]. . . [b]ut a court is not to examine the values that the Administrator brings to bear on these decisions. . . . [which] are delegated by the Congress solely to the Administrator.”<sup>138</sup>

The last CBA waiver was the removal of the CBA requirement in determining whether to regulate a chemical under TSCA.<sup>139</sup> This waiver was a response to reports that the CBA requirement contributed to stalling regulation under the section. Congress faced pressure from both environmental and industry groups to loosen the requirements that trigger federal regulation—environmental groups wanted to get rid of the CBA requirement altogether and industry groups wanted *some* federal regulation to preempt inconsistent state regulation. But importantly, Congress decided to keep the key requirement to consider CBA when establishing the stringency of regulation, the ultimate risk-management decision.

Meanwhile, ten laws imposed CBA requirements on independent agencies, and two laws waived requirements previously imposed on such agencies. Both CBA waivers related to the Consumer Product Safety Commission (CPSC), which was originally subject to a strict CBA requirement in 1981. The original provision was largely motivated by President Reagan’s goal of reducing the regulatory burdens on the economy, particularly to small businesses, and it specifically sought to codify the cost-benefit test articulated by the 5th Circuit in *Southland Mower Co. v. CPSC*.<sup>140</sup> In 1990, the Democratically controlled Congress waived the requirement, prompted by concerns about the length and inefficiency of CPSC rulemaking, the ineffectiveness of a “mechanical” CBA requirement, and inappropriateness of CBA to the topic of reviewing whether a consumer product has a defect.<sup>141</sup> But Congress stopped short of prohibiting CBA, making clear that the Commission was permitted to conduct CBA in those situations where it believed the analysis to be appropriate. Significantly, Congress never passed any law that would extent any requirement to consider (or even conduct) CBA to all independent agencies, although such laws was frequently proposed.<sup>142</sup>

The only two laws that applied to all agencies—the Unfunded Mandate Reform Act and the Congressional Review Act—imposed minimal procedural CBA requirements: a requirement to prepare a CBA (but not necessarily consider or rely

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Conferees' intent that no provision of Section 1412(b)(5) be interpreted to force an alteration of the negotiated agreement.”).

<sup>138</sup> S. Rep. 104-169, at 37.

<sup>139</sup> Frank R. Lautenberg Chemical Safety for the 21st Century Act, PL 114-182, June 22, 2016, 130 Stat 448.

<sup>140</sup> 619 F.2d 499 (5th Cir. 1980); *see* H. Rep 97-208/2, 876 (Conf. Rep.).

<sup>141</sup> Consumer Product Safety Commission Authorization Act of 1989, consideration by the Committee on Commerce, Science, and Transportation. Senate; 13923 S.Rep. 37, 9-10.

<sup>142</sup> *E.g.*, [insert].

on the CBA) for specific types of regulation and a requirement to send any CBA to Congress for all significant regulation.<sup>143</sup> Substantive CBA requirements (whether to consider CBA or, more strongly, require regulations to be CBA-justified), though common overall in the sample (23 out of 35) were limited to specific agencies and provisions.

Earlier I discussed the nuanced CBA provisions in the SDWA amendments inspired by the outbreak in Milwaukee. These were not the only CBA-related provisions enacted in the wake of a public health crisis. For example, after a series of salmonella and E. Coli food outbreaks during the recession, Congress passed the Food Safety Modernization Act.<sup>144</sup> The CBA justification was almost treated like a no-brainer “improvement” to the legislation.<sup>145</sup> There was extensive discussion of various costs and general benefit to public health throughout the legislative history, but little specific debate over the CBA justification. Similarly, the Drug Quality and Security Act<sup>146</sup> was passed after a fungal meningitis outbreak in Massachusetts caused by a failure of proper care in the drug supply chain.<sup>147</sup> The failure allowed counterfeit drugs to be sold on the market, leading to the death of at least 64 people.<sup>148</sup> Congress was focused on finding a solution to the problem of drug counterfeiting.<sup>149</sup> While there was no specific discussion of the CBA provision, the hearing records debate the potential costs of various technology solutions to big pharmaceutical companies, to small pharmacies, and to the American consumer, concerned with who has the most to lose from receiving a counterfeit prescription drug.<sup>150</sup> Significant statements included in the legislative record were all focused on striking the right balance between costs and benefits to these stakeholders.<sup>151</sup>

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<sup>143</sup> See Unfunded Mandate Reform Act of 1995, PL 104–4, Mar. 22, 1995, 109 Stat 48.

<sup>144</sup> FDA Food Safety Modernization Act, PL 111-353, Jan. 4, 2011, 124 Stat 3885. A series of salmonella food outbreaks during the recession prompted development of the bill (including the peanut butter salmonella outbreak and recalls of 2008, which cost industry \$65million in recalls; E. Coli outbreak in bagged spinach which cost over \$350 million, and the “cookie dough” salmonella outbreak, and avoidance of tomatoes after an incorrectly reported salmonella outbreak in Florida). Hearing to Review Current Issues in Food Safety, Committee on Agriculture, H.R. 111-25, Jul 16, 2009 at 40.

<sup>145</sup> See Hearing to Review Current Issues in Food Safety at 55 (Statement of Kent Pepler on Behalf of Nat’l Farmer Union) (“This section was also improved by requiring a cost/benefit analysis, public hearings, a pilot project and information gathering effort prior to publishing regulations.”).

<sup>146</sup> Pub. L. 113-54, 2013, 127 Stat. 605, 21 U.S.C. § 360eee-1.

<sup>147</sup> 159 Congressional Record, 113th Congress, 1st Session, House consideration and passage of H.R. 3204, 5960 (Sept. 28, 2013).

<sup>148</sup> *Id.*

<sup>149</sup> See *Securing Our Nation’s Prescription Drug Supply Chain: Hearing Before the House Subcommittee on Health of the Committee on Energy and Commerce*, 113th Cong. (2013).

<sup>150</sup> *Id.* at 10. See also

<sup>151</sup> *Reforming the Drug Compounding Regulatory Framework: Hearing Before the House Subcommittee on Health of the Committee on Energy and Commerce*, 113th Cong. 20 (2013)

These high-profile public disasters put pressure on Congress to respond effectively—which sometimes means, to overreact. But these examples cut against assumptions that Congress tends to overreact to low-probability disasters or events. Instead, although these events prompted congressional action, they appear to have attracted enough competing stakeholders to prevent Congress from implementing a one-sided solution. They drew lobbying, pressure, and information from all stakeholders and interested parties. Statements in the record show that Congress was aware of and grappling with the tradeoffs and wanted the agency to weigh in with its expertise. Instead of making the (costly and difficult) policy decision, however, Congress delegated it to the agency, but with the requirement that the agency to consider CBA. In other words, in situations where Congress is forced to acknowledge competing tradeoffs and recognize the usefulness and importance of technical expertise, it delegates the decision to agencies, enshrining a neutral CBA principle for balancing competing interests.<sup>152</sup>

Overall, the examination reveals the following takeaways: (1) Congress most often requires agencies to *consider* CBA; (2) salient rejections of CBA (CBA waivers) have been overstated; (3) Congress appears to value statutory CBA requirements for executive agencies especially in times of divided government; (4) Congress imposes CBA requirements, at least initially, on independent agencies; and (5) after public crises, Congress requires agencies to regulate after considering CBA. But Congress has been reluctant to impose cross-cutting substantive CBA requirements that would apply to all agencies. The discussion surrounding CBA waivers suggest that this is because CBA consideration is not costless. There is concern that it could interfere with agreements/settlements and delay federal action, allowing inefficient and inconsistent state action.

In addition, Congress often requires agencies to prioritize projects seeking federal money on substantive CBA grounds. The examination revealed at least 39 provisions requiring agencies to limit federal funding to cost-benefit justified projects or acquisitions.<sup>153</sup> The list also includes CBA conditions on reciprocity with

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("[W]e have to make sure we strike the appropriate balance between the need to establish a secure system that protects the public health and the costs and feasibility of such a system and we need to make sure we put something in place, I think, that evolves over time to a common goal that we all have is a system that prevents criminals from taking advantage of our patients, prevents people from diverting drugs and marking them up, prevents us not being able to identify recall drugs and actually people being harmed while we are doing investigations and trying to figure out where these drugs ended up."); (Statement of Janet Woodcock, M.D.) ("While the health care system has grown to rely on obtaining these products from outsourcers, if they are produced under substandard sterile conditions, the risks to patients can outweigh any perceived benefits.").

<sup>152</sup> In some ways, the Lautenberg Act is an exception to this pattern, where the crisis was deemed to be caused by CBA.

<sup>153</sup> These provisions were picked up by the same search, as described in note. This list of X omits permit approvals conditional on CBA requirements. These provisions are listed in Appendix Table 1.

foreign governments. All of these require the agency to at least consider or, in most cases, rely on the CBA when selecting or approving projects, acquisitions, or joint ventures. These provisions relate to the use of federal funds, while most regulations impose burdens on nongovernment entities. This examination suggests another takeaway: (6) Congress embraces CBA as a prioritization method in situations with scarce funding.

## V. FUTURE OF COST-BENEFIT ANALYSIS

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

There is no guarantee that future presidential administrations will continue to support CBA. The Trump Administration has revealed the constraining power of CBA. It has unsuccessfully tried to erode CBA norms to loosen CBA constraints. A future administration might try a direct approach by simply eliminating these self-imposed constraints, especially as explicit political control over agencies becomes more acceptable. Similarly, the CBA-based losses in courts have highlighted outstanding questions about the legitimacy of such scrutiny. While studies suggest that courts generally play a positive role in evaluating agency CBA, often simply ensuring that choices are well-explained and data is reasonably available, there is some concern that this nitpicking scrutiny could be wielded by judges in politically motivated ways. And finally, the Supreme Court may decide that Congress must explicitly state the risk-management framework—or even set stringency itself—in order to satisfy constitutional requirements. Justices who support rethinking the contours of the nondelegation doctrine envision a world with less regulations, lower burdens on private parties, and net welfare improvements to society, “ensuring the people would be subject to a relatively stable and predictable set of rules.”<sup>154</sup> The actual likely effects of such a sea change in delegation practice, however, are unclear. In fact, if any of these threats manifest and upset the current CBA consensus, the resulting situation might lead to a situation that all would consider to be worse. CBA has protected many CBA-justified regulations from being weakened or dismantled during this administration. And it generally constrains agencies from making unreasonable moves, whether in a deregulatory or proregulatory direction, and promotes transparency, a requirement for accountability.<sup>155</sup>

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<sup>154</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

<sup>155</sup> Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593 (2019) (arguing that extensive use of CBA promotes efficiency, regulatory stability, and political accountability).

Congress, however, can strengthen the foundations for CBA, but conventional wisdom suggests that Congress is, at best, indifferent to CBA. And its failure to pass cross-cutting substantive CBA requirements or extend current requirements to independent agencies and its rejection of CBA in several high-profile cases has created an impression that Congress's support for CBA has lagged behind the support in agencies and the courts. This Article analyzes the congressional record on CBA. The results have at least two implications for the future of CBA.

First, the salient rejections of CBA have been overstated. In all cases, they have been limited to specific issues [insert]. Some of them, on net, actually suggest support for CBA. Similarly, the failure to enact cross-cutting statutes such as the Regulatory Accountability Act (RAA) can be explained by congressional practice. Congress most often requires agencies to consider CBA. But the RAA goes much farther, even with respect to CBA.<sup>156</sup> It requires the agency to issue only regulations that are CBA-justified. A new, more modest RAA effort, focused on considering CBA or simply codifying executive-order requirements might have more chance of success. The overall congressional record suggests that there could be strong support for this, especially when adequate release valves are in place when there exist preexisting agreements/settlements or when there is good cause for suspending the requirements.

Second, the examination reveals evidence that, in the risk-management context, the application of agency expertise is key to authorizing agencies to issue regulations. Congress imposed CBA requirements after public health crises, when faced with competing tradeoffs and when expertise is most useful. Scholars such as Richard Epstein call for a rejection of “hard look” review, arguing that agencies are no different from lower courts and that courts should similarly defer to agency factfinding unless clearly erroneous and review *de novo* their decisions on law. But agencies are not like lower courts. Agencies implement Congress's statutory objectives. Congress accepted less political oversight and control in exchange for having agencies apply technical expertise. As long as the delegation is constitutional, courts should enforce the bargain that Congress struck. Courts should continue to ensure that CBA are consistent, evaluate important categories of costs and benefits, and disclose important data or assumptions. Courts should not defer to agencies if they shirk their expert role—and they should resist calls to do so.

Congress is the body most reflective of and most responsive to our diverse citizenry; its members' decisions are more likely to be tied to the preferences and perceptions of constituents. There is reason, however, to be optimistic about the

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<sup>156</sup> See, e.g., Cass R. Sunstein, *A Regulatory Reform Bill That Everyone Should Like*, BLOOMBERG (June 22, 2017, 8:30 AM), <https://www.bloomberg.com/opinion/articles/2017-06-22/a-regulatory-reform-bill-that-everyone-should-like> [<https://perma.cc/K3AD-APK3>] (discussing the consensus around the CBA provisions of Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017)).

PRELIMINARY DRAFT

future of CBA. Although efficiency has no constituency, concepts of expertise, transparency, and oversight still have some political traction.

Appendix

[I am considering cutting this table altogether, or significantly shortening it, because it takes up a lot of space.]

Appendix Table 1. Summary of CBA Conditions on Federal Funding (39)

<b>Statutory provision</b>	<b>Provision</b>
10 U.S.C.A. § 1788a	“(2) conduct a cost-benefit analysis of each family support service proposed to be included in a program . . . .”
10 U.S.C.A. § 2926	“(2) authorize the use of energy security, cost of backup power, and energy resilience as factors in the cost-benefit analysis for procurement of operational equipment;”
15 U.S.C.A. § 2207	“The Administrator is authorized to assist the Nation's fire services, directly or through contracts, grants, or other forms of assistance, to measure and evaluate, on a cost-benefit basis, the effectiveness of the programs and activities of each fire service and the predictable consequences on the applicable local fire . . . .”
16 U.S.C.A. § 1005	“At such time as the Secretary and the interested local organization have agreed on a plan for works of improvement, and the Secretary has determined that the benefits exceed the costs, and the local organization has met the requirements for participation in carrying out the works of improvement as set forth in section 1004 of this title . . . .”
16 U.S.C.A. § 1602	“(3) a discussion of priorities for accomplishment of inventoried Program opportunities, with specified costs, outputs, results, and benefits;”
16 U.S.C.A. § 3744	“(3) will yield benefits pertinent to the identified need at a level commensurate with project costs;”
16 U.S.C.A. § 3839aa-3	“In evaluating applications under this subpart, the Secretary shall prioritize applications--(1) based on their overall level of cost-effectiveness to ensure that the conservation practices and approaches proposed are the most efficient means of achieving the anticipated conservation benefits of the project . . . .”
16 U.S.C.A. § 757a	“the Secretary of the Interior is authorized to enter into cooperative agreements with one or more States, acting jointly or severally, that are concerned with the development, conservation, and enhancement of such fish, and, whenever he deems it appropriate, with other non-Federal interests. Such agreements shall describe (1) the actions to be taken by the Secretary and the cooperating parties, (2) the benefits that are expected to be derived by the States and other non-Federal interests, (3) the estimated cost of these actions, (4) the share of such costs to be borne by the Federal Government and by the States and other non-Federal interests”
16 U.S.C.A. § 79c	“No acquisition other than by donation shall be effectuated and no contract or cooperative agreement shall be executed by the Secretary pursuant to the provisions of this subsection until after he has notified the President of the Senate and the Speaker of the House of Representatives of his intended action and of the costs and benefits to the United States involved therein.”

PRELIMINARY DRAFT

- 19 U.S.C.A. § 2901 “The principal negotiating objective of the United States regarding transparency is to obtain broader application of the principle of transparency and clarification of the costs and benefits of trade policy actions through the observance of open and equitable procedures in trade matters by Contracting Parties to the GATT.”
- 19 U.S.C.A. § 3802 “The principal negotiating objectives of the United States regarding the use of government regulation or other practices by foreign governments to provide a competitive advantage to their domestic producers, service providers, or investors and thereby reduce market access for United States goods, services, and investments are--(A) to achieve increased transparency and opportunity for the participation of affected parties in the development of regulations; (B) to require that proposed regulations be based on sound science, cost-benefit analysis, risk assessment, or other objective evidence . . . .”
- 19 U.S.C.A. § 4201 “The principal negotiating objectives of the United States regarding the use of government regulation or other practices to reduce market access for United States goods, services, and investments are--(A) to achieve increased transparency and opportunity for the participation of affected parties in the development of regulations; (B) to require that proposed regulations be based on sound science, cost benefit analysis, risk assessment, or other objective evidence . . . .”
- 22 U.S.C.A. § 2381a “The Congress believes that United States foreign aid funds could be utilized more effectively by the application of advanced management decisionmaking, information and analysis techniques such as systems analysis, automatic data processing, benefit-cost studies, and information retrieval.”
- 22 U.S.C.A. § 262m-5 “The Secretary of the Treasury shall instruct the United States Executive Director of each multilateral development bank to vigorously and continuously urge that each bank identify and develop methods and procedures to insure that in addition to economic and technical considerations, unquantified environmental values be given appropriate consideration in decisionmaking, and include in the documents circulated to the Board of Executive Directors concerning each assistance proposal a detailed statement, to include assessment of the benefits and costs of environmental impacts and possible mitigating measures, on the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided if the proposal is implemented, and alternatives to the proposed action.”
- 22 U.S.C.A. § 7709 “Any notification relating to the intent to negotiate or sign a Compact shall include a report describing the projected economic justification for the Compact, including, as applicable--(A) the expected economic rate of return of the Compact; (B) a cost-benefit analysis of the Compact;”
- 33 U.S.C.A. § 1268 “In selecting projects to carry out under this paragraph, the Administrator shall give priority to a project that--(i) constitutes remedial action for contaminated sediment; (ii)(I) has been identified in a Remedial Action Plan submitted under paragraph (3); and (II) is ready to be implemented; (iii) will use an innovative approach, technology, or technique that may provide greater environmental benefits, or equivalent environmental benefits at a reduced cost;”

PRELIMINARY DRAFT

- 33 U.S.C.A. § 2282 “...other non-Federal interests, and Federal agencies have been consulted in the development of the recommended plan. A feasibility report shall include a preliminary analysis of the Federal interest and the costs, benefits, and environmental impacts of the project.”
- 33 U.S.C.A. § 2326 “Subject to subsection (c), projects carried out under subsection (a) may be carried out in any case in which the Secretary finds that--(1) the environmental, economic, and social benefits of the project, both monetary and nonmonetary, justify the cost of the project; and (2) the project will not result in environmental degradation.”
- 33 U.S.C.A. § 579a “(x) the benefit-cost ratio of the project or separable element, calculated using the discount rate specified by the Office of Management and Budget for purposes of preparing the President's budget pursuant to chapter 11 of Title 31; (xi) the benefit-cost ratio of the project or separable element, calculated using the discount rate utilized by the Corps of Engineers for water resources development project planning pursuant to section 1962d-17 of Title 42 . . . .”
- 33 U.S.C.A. § 579f “aligns the assessment of the potential benefit-cost ratio for budgeting water resources development projects with that used by the Corps of Engineers during project plan formulation and evaluation pursuant to section 1962d-17 of Title 42”
- 38 U.S.C.A. § 8163 “(G) A summary of a cost-benefit analysis of the proposed lease.”
- 38 U.S.C.A. § 8164 “(c) Not less than 45 days before a disposition of property is made under this section, the Secretary shall notify the congressional veterans' affairs committees of the Secretary's intent to dispose of the property and shall publish notice of the proposed disposition in the Federal Register. The notice shall describe the background of, rationale for, and economic factors in support of, the proposed disposition (including a cost-benefit analysis summary) and the method, terms, and conditions of the proposed disposition.”
- 42 U.S.C.A. § 16134 “(4) the actual and estimated air quality and diesel fuel conservation benefits, cost-effectiveness, and cost-benefits of the grant, rebate, and loan programs under this part . . . .”
- 42 U.S.C.A. § 6348 “(2) Awarding of grants: The Secretary shall request project proposals and provide annual grants on a competitive basis. In evaluating grant proposals under this subsection, the Secretary shall consider--(A) potential energy savings; (B) potential environmental benefits; . . . (F) estimated project cost-effectiveness;”
- 42 U.S.C.A. § 6602 “(2) Explicit criteria, including cost-benefit principles where practicable, should be developed to identify the kinds of applied research and technology programs that are appropriate for Federal funding support and to determine the extent of such support.”
- 43 U.S.C.A. § 373f “that the project can be expedited by a joint powers authority as a non-Federal project or if the project fails to meet applicable Federal cost-benefit requirements or standards . . . .”

PRELIMINARY DRAFT

- 46 U.S.C.A. § 50302 “In selecting projects described in paragraph (3) for funding under this subsection, the Secretary shall give substantial weight to--(i) the utilization of non-Federal contributions; and (ii) the net benefits of the funds awarded under this subsection, considering the cost-benefit analysis of the project, as applicable.”
- 48 U.S.C.A. § 1492 “(iv) The project is not likely to cost more than the value of the reduction in direct damage and other negative impacts that the project is designed to prevent or mitigate. The cost benefit analysis required by this criterion shall be computed on a net present value basis.”
- 49 U.S.C.A. § 22101 “The Secretary shall establish a methodology for calculating the ratio of benefits to costs of projects proposed under this chapter. In establishing the methodology, the Secretary shall consider the need for equitable treatment of different regions of the United States and different commodities transported by rail. The establishment of the methodology is committed to the discretion of the Secretary.”
- 49 U.S.C.A. § 22907 “(B) after factoring in preference to projects under subparagraph (A), select projects that will maximize the net benefits of the funds appropriated for use under this section, considering the cost-benefit analysis of the proposed project, including anticipated private and public benefits relative to the costs of the proposed project and factoring in the other considerations described in paragraph (2).”
- 49 U.S.C.A. § 24320 “(II) the potential effect on Amtrak's ability to meet regulatory requirements if the project or program is not funded; and (III) the benefits and costs;”
- 49 U.S.C.A. § 24904 “(ii) the ability of infrastructure owners and operators to meet regulatory requirements if the project or program is not funded; and (iii) the benefits and costs;”
- 49 U.S.C.A. § 24911 “(2) take into account--(A) the cost-benefit analysis of the proposed project, including anticipated private and public benefits relative to the costs of the proposed project, including . . . .”
- 49 U.S.C.A. § 47124 “(D) Costs exceeding benefits.--If the costs of operating an air traffic tower under the Cost-share Program exceed the benefits, the airport sponsor or State or local government having jurisdiction over the airport shall pay the portion of the costs that exceed such benefit, with the maximum allowable local cost share capped at 20 percent.”
- 49 U.S.C.A. § 5309 “In making a determination for a small start project under paragraph (3)(B), the Secretary shall analyze, evaluate, and consider the following evaluation criteria for the project (as compared to a no-action alternative): mobility improvements, environmental benefits, congestion relief, economic development effects associated with the project, policies and land use patterns that support public transportation and cost-effectiveness as measured by cost per rider.”
- 49 U.S.C.A. § 6103 “(2) a reasonable relationship between the benefits of one-call notification and the cost of implementing and complying with the requirements of the State one-call notification program;”

PRELIMINARY DRAFT

- 6 U.S.C.A. § 563a “(4) an analysis of alternative security solutions, including policy or procedure solutions, to determine if the proposed security-related technology acquisition is the most effective and cost-efficient solution based on cost-benefit considerations”
- 6 U.S.C.A. § 945 “The Secretary, acting through the Commissioner, may designate foreign seaports to participate in the Container Security Initiative after the Secretary has assessed the costs, benefits, and other factors associated with such designation, including—”
- 7 U.S.C.A. § 3157 “(v) the economic costs, benefits, and viability of producers adopting conservation practices and technologies designed to improve water quality”