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## Toward a Jurisprudence of Cost-Benefit Analysis

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# TOWARD A JURISPRUDENCE OF COST-BENEFIT ANALYSIS

*Michael Abramowicz\**

THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION. By *Cass R. Sunstein*. Chicago: American Bar Association. 2002. Pp. 199. Paper, \$69.95.

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\* Assistant Professor of Law, George Mason University School of Law. B.A. 1994, Amherst; J.D. 1998, Yale. All citations to the book under review are based on the final page proofs; as a result, some page references may be slightly off. — Ed. I would like to thank Terrence Chovat, Craig Lerner, Kimberly Moore, and Cass Sunstein for comments and suggestions. The costs of finding any remaining errors would have exceeded the benefits.

## INTRODUCTION

In 1989, Cass Sunstein<sup>1</sup> published an article entitled *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*.<sup>2</sup> Sunstein apparently meant the words “costs” and “benefits” in an informal sense, as the article considered the advantages and disadvantages of aggressive judicial review without pretense of explicit quantification. That article was several generations ago in Sunstein scholarship, almost 100 articles and over a dozen books. The central concerns of that article, however, are relevant to an assessment of Sunstein’s latest book, whose title, *The Cost-Benefit State*, uses the words “costs” and “benefits” as labels for quantitative assessments of the effects of governmental actions. Sunstein, though a democratic theorist rather than an economist, enthusiastically urges agencies to make decisions based on numerical assessments of regulatory consequences, factoring in variables ranging from effects on consumer prices to lives saved. The book is not so much a primer on cost-benefit analysis as a manifesto, concluding without apology that cost-benefit analysis “is for everyone” (pp. 19-20).

It may seem ironic, then, that *The Cost-Benefit State* is written in much the same easygoing, engaging style as the 1989 article. Though illustrating with examples how cost-benefit analysis might prevent regulations whose costs exceed benefits,<sup>3</sup> and perhaps more startlingly how it might spur regulations whose benefits exceed costs,<sup>4</sup> Sunstein makes no attempt to quantify the costs and benefits of cost-benefit analysis itself. At one point, Sunstein muses about whether a version of cost-benefit analysis survives cost-benefit analysis (p. 121) but his analysis has less quantification than even some of the agency analyses that he criticizes in the book.<sup>5</sup> “The answer is that we cannot be sure,” he concedes. “But the current situation is not nearly as good as it could be, and if the analysis is done well, there is every reason to expect that it will lead to improvements” (p. 121).

My intent, however, is not to criticize Sunstein for writing the book in a conventional form, without mapping his arguments into a series of calculations. After all, even a study assessing cost-benefit analysis quantitatively might not survive cost-benefit analysis (and so on to in-

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2. Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522.

3. See, e.g., p. 128 (urging the courts to remand the EPA’s rule on ozone).

4. P. 7 (describing the Office of Information and Regulatory Affairs’ use of cost-benefit analysis to encourage beneficial regulations).

5. For an example, see p. 108, which criticizes the “EPA’s own public justification [of a regulation as] extremely long and detailed but in important respects vague and conclusory.”

finite regress), even if cost-benefit analysis in general is justified. The reason is not so much on the costs side — a law professor's time is not the scarcest of resources — as on the benefits side. Any study inevitably could be attacked as suffering from methodological imperfections. There may be no obvious objective way to determine, for example, how much more expensive it is for an agency to engage in cost-benefit analysis than in old-fashioned reasoning, at least in the absence of a controlled experiment. In the absence of such a study, Sunstein's argument would not be much more persuasive if it included a back-of-the-envelope calculation of the benefits and costs of cost-benefit analysis.

That cost-benefit analysis would not make much difference to the quality of Sunstein's arguments does present a paradox, however. Why should we embrace cost-benefit analysis as a means for justifying action except when it comes to arguments about undertaking cost-benefit analysis itself? Based on the conception of cost-benefit analysis that emerges in the book, I suspect that Sunstein would answer that cost-benefit analysis is less useful the more abstract the problem. This is sound, but there is a complementary answer: Cost-benefit analysis can serve as a *lingua franca* of the administrative state that facilitates review of administrative decisions and helps to suppress idiosyncratic decisionmaking. Sunstein is not part of the administrative state and has little reason to couch most arguments in the form of cost-benefit analysis, but we may wish to require legal decisionmakers to do so.

In this Review, I will illustrate Sunstein's conception of cost-benefit analysis and critique this conception by suggesting that cost-benefit analysis could serve a more important role than Sunstein would allow. Sunstein views cost-benefit analysis as a tool, one that any rational agency decisionmaker would choose regularly to use for concrete problems, just as any rational carpenter would use a hammer for driving nails into a wall. Those who oppose cost-benefit analysis are thus like those who recommend against hammering for driving nails, foolish and unlikely to be successful in pursuing their goals. There may be skeptics who fit into this metaphor, but opposition to cost-benefit analysis can be rational too, for someone whose valuations of costs and benefits are different from others' and who thus worries about not being able to achieve policy goals when forced to calculate net benefits using the accepted scheme.<sup>6</sup> This is, in my view, an argument for cost-benefit analysis rather than an argument against it. If properly implemented, cost-benefit analysis can push decision-

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6. Cf. Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913, 929-30 (2000) (arguing that many methods used in cost-benefit analysis are biased). I do not intend to defend here any of the methodological commitments of cost-benefit analysts, but rather to defend cost-benefit analysis as a tool that would facilitate dialogue between courts and agencies about those commitments.

makers toward factoring in generally accepted valuations rather than their own idiosyncratic ones. This is a democratic benefit, producing results closer to what an informed body politic would decide.

Though Sunstein and I agree on more about cost-benefit analysis than we disagree, our different conceptions of cost-benefit analysis have significant implications, particularly for how courts should review agency decisions. My analysis thus brings us back to Sunstein's 1989 article<sup>7</sup> concerning the aggressiveness of judicial review of agency decisions. I argue for a more active judicial role in scrutinizing agency actions than Sunstein would recommend, though not necessarily a less deferential one. Where agencies can engage in cost-benefit analysis, judicial review can be more democratic and less likely to represent the arbitrary elevation of judicial preferences than if arguments are made without numbers.

This Review will proceed as follows. Part I will outline Sunstein's defense of the role of cost-benefit analysis and his recommendations for implementing it. Part II considers how Sunstein envisions implementation of cost-benefit analysis, including the ways in which Sunstein seeks to expand the practice and the ways in which he ultimately would limit it. In Part III, I offer a broader vision of cost-benefit analysis, recognizing the limitations of both unconstrained agency decisionmaking and unconstrained judicial decisionmaking. I argue that the development of cost-benefit principles through common law processes best avoids these opposing dangers. Finally, also in Part III, I argue that judicial review of cost-benefit analyses should take into account agency reputation and political proclivities as developed over a number of such analyses, as well as the political orientation of the courts in cases reviewing agency action.

## I. THREE CHEERS FOR COST-BENEFIT ANALYSIS

Sunstein's defense of cost-benefit analysis is sprinkled throughout the book, but several significant themes emerge. Cost-benefit analysis, Sunstein argues, is useful in forcing decisionmakers to consider all relevant factors, in improving the cognitive processes of decisionmakers, and in promoting democratic governance. Although I agree on all three counts, I believe these advantages are likely to be slight if cost-benefit analysis serves as a flexible mode of justification rather than as a rigid requirement.

### A. *Consideration of All Relevant Factors*

Perhaps the most controversial word in the phrase "cost-benefit analysis" is "cost," and Sunstein emphatically argues that costs are a

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7. Sunstein, *supra* note 2.

critical consideration in regulatory decisionmaking. Costs may seem most vulnerable to critique when benefits and costs seem incommensurate,<sup>8</sup> for example if lives are on one side of the balance and money is on the other. “[I]t might be possible to question,” Sunstein acknowledges, “whether a large amount of money (say, \$400 million) would really be too much to spend to save a small number of lives (say, two)” (p. 21). Sunstein’s response cites decisions that people make in their own lives. “Each of us has limited resources, and we do not spend all of our budget on statistically low risks. We spend a certain amount, and not more, to protect against the risks associated with poor diet, motor vehicle accidents, fires, floods, and much more” (p. 21). At some point, the cost of avoiding a risk is so high that individuals will take that risk, and so too, Sunstein believes, should the government.

Although I find it persuasive, this argument is insufficient to meet Sunstein’s goal. Sunstein insists that a “suitably devised system of [cost-benefit analysis or] CBA is for everyone,” including, for example, both “people who think that workers deserve much more protection and those who think that worker-protection programs have gone much too far.”<sup>9</sup> Sunstein characterizes his case for considering costs as “heavily pragmatic” (p. 21), without acknowledging that many are skeptical of pragmatic arguments, especially ones that seem to place greater focus on utility than on rights.<sup>10</sup> Even many proponents of cost-benefit analysis would concede that the government should not cap spending to save an identifiable life, for example someone trapped in the rubble of a collapsed building.<sup>11</sup> This concession, if made, prevents the cost-benefit proponent from refusing to consider deontological arguments, which might differ from utilitarian ones even when no identifiable lives are involved.

Perhaps implicitly recognizing this counterargument, Sunstein relies on a diluted defense of cost-benefit analysis, arguing that the existence of “health-health trade-offs” makes a money versus lives comparison too simplistic. For example, “fuel economy standards for new cars will lead manufacturers to produce smaller and more hazardous

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8. Sunstein himself has noted that incommensurability cannot excuse government from making decisions. See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 780 (1994) (remarking that identification of incommensurability is “emphatically not meant to deny the existence of grounds for evaluating private and public choices”).

9. P. 20. Earlier in the book, Sunstein is more equivocal, acknowledging that “we lack full information” on whether cost-benefit analysis “actually produces what can be taken as policy improvements by people with diverse views about appropriate policy.” P. 8.

10. Sunstein does consider the issue of rights later in the book. See *infra* Section II.B.2 (discussing Sunstein’s approach to the issue).

11. See, e.g., Richard S. Markovits, *Duncan’s Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169, 1175 (1984) (“[W]e readily admit that reliance upon cost-benefit analysis is not always appropriate where preexisting moral and legal rights are involved.”).

vehicles, causing a number of deaths in the process” (p. 13). Similarly, “[f]lying is much safer than driving, and hence the FAA’s measures might increase the number of lives lost on balance” (pp. ix-x). Even without a direct causal connection between regulation and health, “evidence suggests that high expenditures — of perhaps \$15 million or more — will cause the loss of a statistical life, and hence that regulations with high costs and low benefits may cause more deaths than they prevent.”<sup>12</sup> Governmental expenditures ultimately must be paid by taxes, and the distortions inherent in taxation may decrease wealth and indirectly cost lives.

The identification of health-health trade-offs is a clever rhetorical tactic, with a substantive payoff in forcing someone whose maximand is health to consider some costs. It is not, however, sufficient to convince “everyone” of the virtues of cost-benefit analysis, for two reasons. First, a deontologist might argue that some effects of government regulations on lives are more important than others. If, for example, government must treat everyone with equal concern and respect, lives saved from improved conditions in the workplace may count more than lives lost because of decrease in wealth. Second, health-health trade-offs show only that *some* costs should be considered. Perhaps Sunstein would prefer a form of cost-benefit analysis in which lives are valued at \$15 million each to one in which costs are not considered at all, but absent new evidence on the appropriate valuation of life, this approach would produce decisions that he himself would reject.

My point is not that agencies should ignore costs, or that pragmatic arguments are unreliable. To the contrary, Sunstein’s arguments succeed at convincing me, but I am in the choir. The problem is that if Sunstein’s arguments persuade only those who share his pragmatic framework, then they will not encourage increased reliance on cost-benefit analysis among others. Contrary to Sunstein, consideration of costs is not for everyone. Sunstein promises to convince both “committed environmentalists and those who think of environmentalism as a form of hysteria” (p. 21). An environmentalist, however, might believe that treating the earth as a commodity to be placed in the balance is morally wrong, no matter what.<sup>13</sup> A rejection of cost-benefit analysis seems appropriate on these premises. Perhaps we should

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12. P. 29 n.4 (citing ROBERT W. HAHN ET AL., DO FEDERAL REGULATIONS REDUCE MORTALITY? (2000)). Other studies examining this issue are W. Kip Viscusi, *Risk-Risk Analysis*, in THE MORTALITY COSTS OF REGULATORY EXPENDITURES 5, 9-12 (W. Kip Viscusi ed., 1994); Ralph L. Keeney, *Mortality Risks Induced by Economic Expenditures*, 10 RISK ANALYSIS 147 (1990); Randall Lutter et al., *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations*, 37 ECON. INQ. 599 (1999); Aaron Wildavsky, *Richer Is Safer*, PUB. INT., Summer 1980, at 23.

13. See, e.g., AL GORE, JR., EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 192-93 (1992).

force such an individual, if placed in a policymaking role, to consider costs, but an argument for doing so cannot be made on terms appealing to all.

Ordinarily, it is no defect for a book to fail to persuade some of its readers. But Sunstein's arguments that costs should be considered are circular. Of course we should consider costs, Sunstein seems to say; that's why we call them costs. Sunstein accordingly misses an opportunity to make an institutional argument for cost-benefit analysis. Cost-benefit analysis can force those who do not care about certain consequences of governmental regulation to take them into account in making decisions. Such an argument would be no more appealing than Sunstein's to someone who does not wish to consider certain costs, but it does not purport to promise progress through force of logic alone. The stronger argument for considering costs is not that any rational person should agree to consider them, but that some people might *not* agree to consider certain costs even though the rest of us would like those costs to be considered. Cost-benefit analysis is useful not because consideration of costs is for everyone, but because it is not for everyone.

### B. *Cognitive Correction*

Another virtue of cost-benefit analysis that Sunstein identifies is its ability to overcome cognitive problems attributable to imperfections in how individuals think about risk. A variety of heuristics could affect regulation and produce systematic biases in regulation,<sup>14</sup> but Sunstein focuses especially on the "availability heuristic" (p. 26). Sunstein explains, "we tend to think that an event is more probable if an example is cognitively 'available,' in the sense that it comes easily to mind" (p. 26). For example, the publicity surrounding the Love Canal hazardous waste problem in the 1970s led to considerable public concern about hazardous waste dumps, which "can be a serious health hazard, but . . . cannot possibly be ranked among the most pressing environmental issues."<sup>15</sup> Similarly, the September 11, 2001, terrorist attacks, because so prominent in individuals' thoughts and experiences, led people to be "far more fearful than the facts warranted" (p. 26).

The rigor of cost-benefit analysis may expose the weaknesses in conclusions influenced by heuristics. Sunstein notes that "people tend to be 'intuitive toxicologists,' making a number of errors about toxic

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14. Mark Seidenfeld has recently offered a comprehensive analysis of how cognitive biases might affect judicial review of agency action. See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002).

15. P. 26. For a book arguing that the public did not overreact to Love Canal, see ADELIN GORDON LEVINE, *LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE* (1982).

substances, such as, for example, how likely it is that those exposed to a carcinogen will get cancer” (p. 9). Cost-benefit analysis, he argues, “helps to ensure that these errors are not translated into regulatory policy” (p. 9). Why base policies on intuitive toxicologists rather than on actual toxicologists whom an agency can hire? Similarly, the availability heuristic may lead individuals to focus on the worst case without considering this scenario’s small probability of occurrence. Cost-benefit analysis, according to Sunstein, “should help government resist demands for regulation that are rooted in a kind of hysteria” (p. 9). The problem, Sunstein recognizes, may operate in either direction. “When people understate the risks associated with poor diet and lack of exercise and overstate the risks associated with pesticides and air travel, it is often because the availability heuristic leads them astray” (p. 9). Cost-benefit analysis is a “natural corrective,” because it “gives people a more accurate sense of the level of risks” (p. 9).

Two possible arguments emerge from these examples. The premise to both is that individuals will sometimes support regulations (or fail to push for regulations) for reasons that do not make sense. The first argument is that cost-benefit analysis may help by making people less likely to demand bad regulatory outcomes. Perhaps publicity about cost-benefit analyses would provide a counterweight to the availability heuristic, so that, for example, television reports on hypothetical studies concluding that improved airport security would be extraordinarily expensive and provide little benefit would compete with reports on airplane accidents. This argument, however, seems weak, for cost-benefit analysis is unlikely to achieve the salience of an accident; indeed, the generally low salience of arguments and studies is the reason that the availability heuristic is of such concern.

Sunstein thus must be focusing on a second argument, that cost-benefit analysis will make government officials less likely to pay attention to the demand for regulation. Government officials themselves may be caught up in the availability cascades<sup>16</sup> that affect ordinary citizens, and cost-benefit analysis can serve to remind them of what they ought to be thinking about. Certainly, it is plausible that bureaucrats, like politicians and voters, would respond naturally to crises by seeking to provide solutions, and that by default they might focus more on that task than on careful evaluation of forward-looking policy arguments. The observation, however, can be taken only so far. The availability heuristic is less likely to affect a policy official at the FAA than an ordinary citizen, because studies and analyses will compete with anecdotal evidence for the official’s attention. On the margins, cost-

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16. For a description of such cascades, see Timur Kuran & Cass R. Sunstein, *Availability Cascades are Risk Regulation*, 51 STAN. L. REV. 683 (1999). Whether the availability heuristic leads to a cascade may depend in part on whether activists choose to call attention to the available phenomenon. *Id.* at 713.

benefit analysis might help direct bureaucrats to important considerations, thus reducing whatever contamination the availability heuristic otherwise would impose, and perhaps cost-benefit analysis might help address what cognitive psychologists call the self-serving bias,<sup>17</sup> by making bureaucrats less likely to assume that their proposals will be satisfactory solutions. But the very creation of administrative agencies and of any processes by which proposals are considered and debated will tend to address these problems, regardless of whether costs and benefits are quantified or merely assessed qualitatively.

A refined argument might focus not on the availability heuristic, which seeks to explain why people might focus on certain information, but on institutional norms concerning an agency's goals. Even if agency officials are, unlike the general public, aware of the full range of considerations in a particular substantive area, norms may affect the weight given to different considerations. For example, in the air safety context, FAA administrators are likely to be aware of information relevant to issues like the cost of compliance with various initiatives and the relative safety of air and auto travel. Nonetheless, administrators might feel that their institutional mission is not to maximize net benefits, but to maximize airplane safety. This may be because policymakers in the agency are likely to be experts in aviation safety, or because they feel that their success will be evaluated in terms of improvements in aviation safety. High compliance costs sometimes might even emerge as factors favoring a particular regulation, because such costs may lead the public to believe that the agency takes safety seriously.<sup>18</sup> If an institutional norm makes the goal of an agency something other than maximizing net benefits, administrators will focus primarily on information relevant only to the maximand. Such administrators will act much like individuals afflicted by the availability heuristic; the problem, though, is not cognitive, but one of incentives created from the institutional norm.

If this norms account of cost-benefit analysis has greater explanatory power than the availability heuristic account, then gently encouraging agencies to engage in cost-benefit analysis will not help. Perhaps, Sunstein might argue, the widespread practice of cost-benefit analysis might change how administrators think about the goals that they should be pursuing. We should not be too optimistic, however,

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17. See, e.g., David M. Messick & Keith P. Sentis, *Fairness and Preference*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 418 (1979) (documenting the self-serving bias). An example of self-serving bias occurs in civil litigation when parties' expectations of trial outcomes are systematically different, with plaintiffs predicting higher awards than defendants. See, e.g., George Lowenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993).

18. Agency officials may also increase their own power and budgets by favoring regulation. See WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 36-42 (1971) (arguing that agencies generally seek to expand their budgets).

about government's ability to change institutional norms by adding procedural requirements.<sup>19</sup> Agency officials might retain the goals that they would have had in the absence of cost-benefit analysis and see such analysis as a hurdle. The availability heuristic makes this more likely, as agency officials seek to respond to what the public afflicted by this heuristic wants. Cost-benefit analysis may be a useful hurdle, but if it is merely one among many that agency officials encounter, it is unlikely to be a high one. Once again, Sunstein's arguments might provide strong reason to use cost-benefit analysis as a check on agencies, but in the absence of a binding constraint, we should not be confident that agency officials, once given the gift of cost-benefit analysis, will choose to conduct their tasks in a significantly different way than before.

### C. *Democracy-Advancing*

Sunstein's summary of the democratic virtues of cost-benefit analysis is directly related to his argument on cognition. Indeed, Sunstein argues that "the case for CBA is strengthened by the fact that interest groups are often able to use these cognitive problems strategically, thus fending off desirable regulation or pressing for regulation when the argument on its behalf is fragile" (p. 9). "Often purportedly public-interest measures," Sunstein argues, "are really a bow in the direction of self-interested agents" (pp. 27-28). As examples, Sunstein cites the Clean Air Act, which may have benefited eastern coal producers at the expense of western producers,<sup>20</sup> as well as "the farm lobby's support of ethanol" (p. 28). Cost-benefit analysis, Sunstein explains, "could be a big help, because it would draw attention to the right questions" (p. 28). This would be persuasive if we believe that interest groups succeed at achieving welfare-reducing regulation by distracting administrators from relevant information. Interest group theory, however, puts relatively little weight on interest groups' ability to filter information that decisionmakers receive.<sup>21</sup> Interest groups are powerful primarily because officials, for electoral and other reasons, want to cater to their interests. It would be naïve to count on cost-benefit analysis to persuade officials otherwise inclined to give interest

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19. For an experimental model assessing the extent to which the government might be able to change a social norm, see Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1228 (1997).

20. See BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981).

21. *But cf.* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 166 (1998) ("[T]he views of the *n*th business group may seem redundant, whereas the input from a single consumer group may provide useful new information.").

groups what they want, unless the results of cost-benefit analysis are binding on officials.

Sunstein's democratic defense of cost-benefit analysis is incomplete. Whether cost-benefit analysis accords with democratic values depends, of course, on how those values are defined. If democracy is equated with whatever the people want, then cost-benefit analysis is, if anything, counterproductive. If, on the other hand, results count as being democratic if they are what the people would want if they had full opportunity to consider individual questions, Sunstein's argument for increased use of cost-benefit analysis is more powerful, though still limited. Sunstein's emphasis on overcoming problems with the administrative state suggests that his ambition is to avoid the negative repercussions of democratic government, to move past "what has been called a system of simultaneous 'paranoia and neglect.'"<sup>22</sup> Democratic government, Sunstein recognizes, is prone to push too hard in some areas and not hard enough in others, and Sunstein hopes that the tool of cost-benefit analysis will improve rationality. Perhaps so, but it is hard to avoid seeing in Sunstein's optimism a reminder of the Progressives at the dawn of the administrative state, who were confident that insulated experts and careful procedures would combine to produce sound apolitical judgments.<sup>23</sup> Cost-benefit analysis, like agency independence and notice-and-comment processes, might improve administrative outputs, but it will not lead to the objective exercise of expertise.

Sunstein might have attempted a different sort of democratic defense of cost-benefit analysis, one based on equality principles. The defense would have emphasized that cost-benefit analysis typically considers people's willingness to pay for goods, including how much individuals would pay to avoid the risk of death. Sunstein suggests sympathy to the willingness-to-pay approach (pp. 77-80). If methodological difficulties can be overcome,<sup>24</sup> a cost-benefit analysis using this approach has the virtue of allowing aggregation of costs and benefits across individuals. While tolerating non-Pareto-improving regulation, cost-benefit analysis thus has the potential to serve at least as a requirement of Kaldor-Hicks efficiency,<sup>25</sup> approving of regulations

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22. Pp. 137, 138 n.13 (quoting John D. Graham, *Making Sense of Risk, in RISKS, COSTS, AND LIVES SAVED* 183, 183 (Robert W. Hahn ed., 1996)).

23. See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 75-76, 154-55 (1938).

24. For an examination of some of the issues, see Frank B. Cross, *Natural Resource Damage Valuation*, 42 *VAND. L. REV.* 269 (1989). See also Donald J. Boudreaux et al., *Talk Is Cheap: The Existence Value Fallacy*, 29 *ENVTL. L.* 765 (1999) (questioning the conceptual foundation of the contingent valuation approach).

25. A policy is Kaldor-Hicks efficient if in theory the gainers could have compensated the losers so that no one's welfare would decrease. For criticism of the use of this criterion, see Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 *FLA. ST. U. L. REV.* 241, 252-53 (2000).

whenever those who benefit would be willing, in theory, to make side payments to those who suffer from regulatory outcomes. If a regime of cost-benefit analysis along these lines were enforced, with agencies required to sum up costs incurred and benefits in the form of willingness to pay, cost-benefit analysis would help prevent the types of regulatory failures that concern Sunstein, making both availability cascades and policies designed to benefit interest groups at the expense of the polity less likely.

Sunstein, however, does not embrace this sort of defense, and indeed he suggests that cost-benefit analysis should not be narrowly restricted to willingness to pay. "Rather than private willingness to pay," Sunstein explains, "perhaps regulatory agencies should seek public judgments, as these are expressed in public arenas. Society should not be taken as some maximizing machine, in which aggregate output is all that matters" (p. 8; footnote omitted). Indeed, it seems plausible to argue that paternalistic regulations sometimes may be justified,<sup>26</sup> that society sometimes should value individuals' lives more than willingness to pay,<sup>27</sup> or that agencies should take into account that some people's preferences are distorted.<sup>28</sup> Such an argument could even be made on the basis of equality, focusing on the uncomfortable implication of the willingness-to-pay approach that the lives of the wealthy should be valued more than those of the poor.<sup>29</sup> What Sunstein does not acknowledge, though, is that the more we are willing to allow agency officials' judgments of social welfare to count in cost-benefit analysis, the less of a claim cost-benefit analysis has to improving democracy. At the least, as the methodology of cost-benefit analysis becomes less constrained, arguments for institutional limits become more persuasive.

In the end, Sunstein and I may simply disagree about the potential for truly deliberative democracy. In recent years, Sunstein has worked on the phenomenon of group polarization, which refers to the ten-

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26. See, e.g., Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229 (1998) (providing an economic defense of paternalistic regulation).

27. See, e.g., Lisa Heinzerling, *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV. 189, 194-95 (2000) (noting that proponents of cost-benefit analysis often recommend using average aversion to risk as bases for valuing statistical lives to avoid discriminating against individuals who "value" their lives less than average).

28. See Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted*, 29 J. LEGAL STUD. 1105 (2000) (considering how agencies should respond to a variety of different forms of distorted preferences). "A person's preferences are distorted when his or her satisfaction does not enhance that person's well-being." *Id.* at 1105. For example, preferences may be based on a lack of information. *Id.*

29. Sunstein expressly recognizes this problem. "Poor people often have little ability and hence little willingness to pay. Fortunately, agencies typically use a uniform number per life saved." Pp. 8-9.

dency of groups to move toward extremes.<sup>30</sup> For example, Sunstein has shown how mock juries will tend to move in deliberation to more condemnatory judgments.<sup>31</sup> Yet Sunstein has retained faith in group deliberation, pointing to experiments indicating that deliberation among people of opposing views can lead to moderate judgments.<sup>32</sup> Administrative agencies may be examples of the group polarization phenomenon, especially when they are comprised of a group of like-minded decisionmakers, who may share a goal different from maximization of net benefits. Perhaps Sunstein sees cost-benefit analysis as a tool that helps achieve consensus by forcing decisionmakers into a conversation with objective data. I am, however, skeptical of cost-benefit analysis's ability to perform this democratic function if cost-benefit analysis is a flexible tool that decisionmakers may employ without constraint.

## II. SUNSTEIN'S RECOMMENDATIONS FOR COST-BENEFIT ANALYSIS

So far, I have detailed and endorsed Sunstein's case for cost-benefit analysis, but I have not yet described just how Sunstein imagines that agencies would employ cost-benefit analysis. In this Part, I fill in these details, showing how Sunstein's analysis for the most part leaves cost-benefit analysis far less of a constraint on agency action than it might be. In Section II.A, I explain ways in which Sunstein would expand cost-benefit analysis beyond its current state, although not as far as it might be expanded. In Section II.B, I identify ways in which Sunstein would allow agencies to employ cost-benefit analysis in a flexible way. Both sections further the critique that cost-benefit analysis would provide only a minimal constraint on agency decision-making.

### A. *Expanding Cost-Benefit Analysis*

#### 1. *Statutory Interpretation*

Sunstein recognizes that statutory guidelines for administrative agencies, as interpreted by the courts, run the gamut for the permissibility of cost-benefit analysis. The most restrictive statutes "appear to forbid any consideration of cost" (p. 12) or even the magnitude of benefits. Examples of these types of statutes include the Delaney Clause's longtime prohibition on food additives that "induce cancer in

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30. See, e.g., Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000).

31. See David Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000).

32. See Sunstein, *supra* note 30, at 116-18. See generally JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE* 161-81 (1997) (describing deliberative polling).

man or animal”<sup>33</sup> and the Clean Air Act, long interpreted to be based on “public health” alone and thus not permitting agencies to consider compliance costs.<sup>34</sup> Some statutes, such as the Occupational Safety and Health Act, provide for regulation of “significant” or “unacceptable” risks, thus appearing to focus on the magnitude of the risk but not on the cost of decreasing the risk.<sup>35</sup> Other statutes, such as the Toxic Substances Control Act, require agencies to consider substitute risks, what Sunstein labels as “health-health trade-offs,”<sup>36</sup> but do not require consideration of costs other than negative health effects. Still other statutes require regulation “to the extent feasible” or “achievable,” thus apparently considering costs only if they are such that an industry is technically or economically unable to implement a regulation without significant business failures (p. 14). Sunstein also describes balancing test statutes that require agencies to “take into consideration” various factors, though perhaps at different stages of the analysis,<sup>37</sup> and finally statutes that explicitly require consideration of costs and benefits, though perhaps not cost-benefit analysis itself.<sup>38</sup>

While taking seriously the congressional instructions embedded in these standards, Sunstein recognizes that such standards are vague and that the process of judicial interpretation may make them more rational. For example, Sunstein describes and defends court decisions exempting trivial risks from regulation despite apparently inconsistent standards. In *Monsanto Co. v. Kennedy*,<sup>39</sup> the D.C. Circuit indicated that an agency could allow a food additive if there is so little migration into the food “as to present no public health or safety concerns.”<sup>40</sup> “When the benefits of regulation are trivial,” Sunstein writes, “no one is likely to have anything to complain about” in the absence of regulation (p. 58). Similarly, Sunstein notes the plurality opinion in the *Benzene Case*<sup>41</sup> concluded that even though the key statutory language seemed to require that “no employee . . . suffer” from benzene, common sense indicated that Congress did not intend to require costly regulation of relatively trivial risks.<sup>42</sup>

These are sensible conclusions even from a statutory interpretation perspective because none of the relevant statutes provides clear indi-

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33. 21 U.S.C. § 348(c)(3)(A) (1994).

34. P. 12 (discussing 42 U.S.C. § 7409(b) (1994)).

35. P. 13 (discussing *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607 (1980)).

36. P. 13; *see also* text accompanying note 12 *supra*.

37. P. 14 (discussing, *inter alia*, OSHA, 42 U.S.C. § 7429(a)(2) (1994)).

38. Pp. 14-15 (discussing, *inter alia*, 15 U.S.C. § 2605(a) (1994)).

39. 613 F.2d 947 (D.C. Cir. 1979).

40. *Id.* at 955.

41. *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (plurality opinion).

42. Pp. 34-35 (quoting 29 U.S.C. § 655(b)(5) (1994)).

cations to the contrary. No statute, for example, provides explicitly that agencies should not consider costs, no matter how high. Even if a statute provides for regulation of “significant” or “unacceptable” risks, without mentioning costs, an interpretation of “significant” and “unacceptable” as implicitly including consideration of costs seems reasonable. For example, the word “induce” in the Delaney Clause could be conceptualized as including a magnitude component. The terms “feasible” and “achievable” could be interpreted as including all costs, and not just extreme costs like agency failure.

Sunstein, however, is not as forceful in his advocacy of statutory interpretations favoring cost-benefit analysis as he might be. According to Sunstein, courts should presume an agency interpretation unreasonable “if it interprets the statute to fail to make de minimis exemptions, to disallow health-health trade-offs, not to consider costs or feasibility, to regulate insignificant risks, or to ban cost-benefit balancing” (p. 65). But if the various statutory standards are generally sufficiently vague to allow the courts to impose such presumptions, there is a strong argument that they are also sufficiently vague to support a stronger presumption that statutes require regulation only where benefits exceed costs. Such a presumption need not amount to a requirement that agencies conduct a cost-benefit analysis, a procedural requirement that is probably beyond the courts’ authority to demand,<sup>43</sup> but it would reflect at least the common sense notion that agencies should compare the advantages and disadvantages of their regulatory approaches. Sunstein is surely right to admit that the cost-benefit principles he is advocating are not yet recognized canons of construction (p. 64), but as long as he is in advocacy mode, why not urge a presumption that all consequences of agency actions be considered rather than a series of lesser presumptions?

Sunstein’s reluctance to urge more aggressive interpretation is perhaps most apparent in his discussion of *American Trucking*,<sup>44</sup> in which he appears to agree with the Court’s conclusion that the statute’s “adequate margin . . . requisite to protect the public health” standard was unambiguous in preventing the agency from considering costs.<sup>45</sup> He could have critiqued the Court more forcefully for its statement that “we find it implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards.”<sup>46</sup> An opposing argument would find it implausible that

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43. See *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (holding that the courts cannot add to the requirements of the Administrative Procedure Act).

44. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001).

45. P. 49 (quoting 42 U.S.C. § 7409(b) (1994)).

46. *Am. Trucking*, 531 U.S. at 468.

Congress would use these elliptical phrasings to mean that agencies should *not* consider costs. Indeed, that is at the heart of Sunstein's case for clear statement rules;<sup>47</sup> if statutes are ambiguous, those ambiguities might as well be resolved by the presumption that Congress has meant to act sensibly. Sunstein's embrace of cost-benefit analysis suggests that comparison of benefits and costs would be sensible, yet he does not urge a clear statement rule nearly as broadly as he might.

Perhaps Sunstein simply does not see as much ambiguity in the statute as I do, and it is difficult to argue coherently about how ambiguous an ambiguous statutory phrase is, but something else may be at work. In particular, for Sunstein, a regime in which agencies are permitted to consider costs and benefits is almost as good as or maybe even better than one in which they are required to do so. Sunstein embraces Justice Breyer's statement in concurrence in *American Trucking* that courts generally should permit consideration of costs,<sup>48</sup> without addressing whether that is likely to have a substantial impact on policy. Meanwhile, in discussing one case that could be read as requiring cost-benefit balancing, the Fifth Circuit's decision in *Corrosion Proof Fittings v. EPA*,<sup>49</sup> Sunstein does not explicitly disagree, but does call the opinion "especially aggressive" (p. 48) and, later, "exceptionally aggressive" (p. 49). Certainly, the opinion is more aggressive than those that Sunstein embraces, but it is presumably too aggressive, as Sunstein implies, only if the costs of more aggressive review are greater than the benefits. Perhaps Sunstein believes that the benefits of aggressive review are not that great.

## 2. Judicial Review

In detailing his Clean Air Act example, Sunstein considers a range of approaches that courts might take to individual EPA decisions. Much of his analysis is quite general, suggesting that he would take a similar approach in other regulatory contexts. The loosest form of judicial review that Sunstein discusses is a "soft look," a phrase that is an obvious contrast with the "hard look" review that courts often apply to agency decisions.<sup>50</sup> Discussing ozone regulation, Sunstein concludes, "perhaps a court should say that there is much scientific uncertainty here, and that the EPA should be allowed to resolve the doubts as it

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47. See generally William N. Eskridge, Jr. & Phillip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (discussing various clear statement rules used by the Supreme Court).

48. P. 49 (citing *Am. Trucking*, 531 U.S. at 488 (Breyer, J., concurring)).

49. 947 F.2d 1201 (5th Cir. 1991).

50. Perhaps the most prominent case applying the hard look doctrine is *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

sees fit” (p. 125). Such a soft look is soft indeed, apparently permitting judicial rejection of an agency decision only if the agency decision is wrong to a scientific certainty. While not explicitly endorsing the approach, Sunstein offers no criticisms of it, and indeed comments that it has “several advantages,” particularly avoiding the delay that judicial review can create.<sup>51</sup>

Sunstein’s enthusiasm for the least rigorous form of judicial review that he considers is balanced by similar enthusiasm for the most rigorous form that he considers, a requirement that agencies explain why they have adopted particular regulations rather than stricter or more lenient ones. As Sunstein notes, although *American Trucking* precluded such a doctrine as a matter of constitutional law, it did not do so as a matter of administrative law (p. 127). Indeed, he notes that such judicial review might come in two flavors. First, the court might claim that it cannot in the absence of further explanation know whether the standard set by the statute is met (p. 127). Second, “the court might . . . say that it cannot tell whether the agency’s action is arbitrary or capricious, within the meaning of the Administrative Procedure Act, unless the EPA has given a more detailed explanation of its choice.”<sup>52</sup> Sunstein thus pulls an old administrative law trick, voiding a regulation on the basis that the courts cannot perform judicial review in the absence of further explanation.<sup>53</sup>

This trick, Sunstein properly insists, would be “a genuine innovation” (p. 127), pushing agencies toward quantitative rather than qualitative analysis of regulation. There would, however, be an irony to courts requiring additional explanation so that they can provide judicial review if, once they are given the information, the judicial review that they will perform consists of little more than a “soft look.” The approach would ensure that the agency itself was sure that it wanted to enact the regulation, but not assess whether the regulation was in fact worth enacting. This strategy will not push agencies to weigh costs and benefits in the same way as other agencies or as informed practitioners of cost-benefit analysis would choose to weigh them, but it would produce the same delay that Sunstein decries. Often, when an agency vigorously defends a regulation in court, it will respond to a remand with a result similar to the initial one, especially if its only task

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51. P. 125. (“A serious problem with intense judicial review of agency action is that it creates delay — and hence ensures a bias in favor of the status quo.” (citing JERRY L. MASHAW & DAVID L. HARSFT, *THE STRUGGLE FOR AUTO SAFETY* (1990))).

52. P. 127 (citing 5 U.S.C. § 706(2)(A) (1994)).

53. See, e.g., *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (holding that in informal adjudication, agency administrators cannot be required to explain the basis of their decisions, but that if they do not do so, the court must order discovery to determine what the basis was).

it to provide a more detailed explanation.<sup>54</sup> Imposing such a modest requirement of explanation might improve the rationality of agency decisionmaking sufficiently to justify such delays, but such a limited approach gives up any hope of forcing determined agencies to avoid costly regulatory mistakes.

## B. *Allowing Flexibility in Cost-Benefit Analysis*

### 1. *Qualitative Considerations Trumping Analysis*

One of the most surprising concessions that Sunstein makes is his conclusion that even when agencies are required to engage in cost-benefit analysis, they sometimes should decide to enact regulations that fail the cost-benefit test. "Cost-benefit analysis ought not to place agencies in an arithmetic straightjacket," he explains. "[R]egulators might reasonably decide that the numbers are not decisive if, for example, children are mostly at risk, or if the relevant hazard is faced mostly by poor people, or if the hazard at issue is involuntarily incurred or extremely difficult to control" (p. 22). It is significant that Sunstein expects an explanation when cost-benefit numbers are ignored, but it is peculiar that he does not require a quantification of the explanation. The factors that he identifies as justification for failing to follow the results of a cost-benefit analysis may be significant, but Sunstein does not explain why he does not believe that cost-benefit analysis is sufficiently robust to handle them.<sup>55</sup>

Sunstein's argument might make sense if he conceived of cost-benefit analysis as a rigid summation of willingness to pay, for then the categories of "costs" and "benefits" would not exhaust the universe of considerations. We have seen, however, that Sunstein is willing to allow public judgments to figure in cost-benefit analysis,<sup>56</sup> and the considerations that he mentioned could be factored into such an analysis. If children are more likely than adults to be among the lives lost, the cost-benefit analysis could be adjusted, as Sunstein recognizes, to consider "life-years" lost, rather than lives lost.<sup>57</sup> Perhaps a pure life-years analysis, though, does not do a perfect job of accommodating our in-

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54. For a preliminary empirical analysis of whether agencies change their original position after remand, see Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1048-49 & tbl.18.

55. One plausible argument against the net benefits criterion is that the proper approach is to consider marginal costs and benefits. See, e.g., Steve P. Calandrillo, *Responsible Regulation: A Sensible Cost-Benefit, Risk Versus Risk Approach to Federal Health and Safety Regulation*, 81 B.U. L. REV. 957, 990-96 (2001). A careful cost-benefit analysis of all plausible alternatives, however, should lead to the selection of the alternative for which marginal benefits equal marginal costs.

56. See *supra* notes 26-29 and accompanying text.

57. P. 119 (discussing quality adjusted life-years).

tutions. Maybe, as Richard Revesz has implied and as Sunstein considers, children's lives should be valued more because the risks that they face are involuntary.<sup>58</sup> Or, perhaps we value a year of childhood at more than a year at older ages.<sup>59</sup> Further refinements of cost-benefit analysis, though, could take these considerations into account. Agencies may not be able to calculate perfectly how much each life-year should be worth, in part because there is no right answer, but they could do their best and respect the numeric results.

Similarly, consider arguments that agencies should take into account the distributional effects of their actions. "Sometimes a regulation producing \$5 million in benefits but \$6 million in costs will be worthwhile," Sunstein argues, "if those who bear the costs (perhaps representing dollar losses alone?) are wealthy and can do so easily, and if those who receive the benefits (perhaps representing lives and illnesses averted?) are especially needy" (p. 8). This statement confounds the distributional issue with the issue of whether it is appropriate to value life.<sup>60</sup> Moreover, it should be possible to produce a calculation determining whether the distribution would be appropriate. One benchmark would be the deadweight cost associated with redistribution programs.<sup>61</sup> If the government theoretically could accomplish a redistribution from the rich to the poor to compensate for a distributional effect of a regulation in the other direction for less money than the regulation's net benefits, for example by enacting a new entitlement program, the distributional claim is weak.<sup>62</sup>

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58. See pp. 80-81; Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 968-71 (1999).

59. See Richard Zeckhauser & Donald Shepard, *Where Now for Saving Lives?*, 40 LAW & CONTEMP. PROBS. 5, 12-13 (1976) (noting that a year of good health may be more valuable than a year of bad health).

60. Sunstein's implication in the parentheticals is perplexing, as perhaps he acknowledges with the insertion of question marks. The parentheticals suggest that even once valuations are placed on lives or illnesses, we might still consider a \$1 million financial loss to be preferable to a \$1 million loss that reflects illness or risk of death. The point of valuing lives and illnesses, however, is to make them comparable to pure dollar losses, so if lives and illnesses are valued appropriately (placing the distributional issue aside), society should be truly indifferent between these alternatives. See also p. 59 (offering similarly flawed logic).

61. There are two categories of cost. The first is the deadweight cost associated with increases in taxation, from tax enforcement costs and tax avoidance, and possibly decreased incentives to work (depending on the relative magnitude of income and substitution effects). See, e.g., Charles L. Ballard et al., *General Equilibrium Computations of the Marginal Welfare Costs of Taxes in the United States*, 75 AM. ECON. REV. 128 (1985) (discussing calculation of deadweight costs of marginal increases in taxation). The second is the administrative costs and other inefficiencies associated with programs designed to give money to the poor. See, e.g., Ann L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995) (comparing the costs of administering the earned income tax credit with those of administering other welfare programs).

62. This may often be true. See, e.g., SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 39 (1992) ("Economic regulatory programs are simply not effective ways to achieve equity goals.").

An agency also could attempt to put a price on distributional effects. There is no theoretical reason that a dollar benefit to a rich person must count in the social calculus as no less than a dollar or that a dollar cost to a poor person must count in the social calculus as no greater than a dollar. An agency could develop a table translating nominal increases or decreases in the bank accounts of individuals of different incomes into costs and benefits from a social point of view.<sup>63</sup> Such judgments might be controversial, especially if, for example, an agency followed Sunstein in considering placing special weight on losses suffered by African Americans (p. 81). But at least it would force agencies to candidly acknowledge trade-offs and value judgments. Moreover, it would alert the public to the identities of any groups receiving special attention and possibly spark a debate on whether the choice is appropriate.

These are, admittedly, just two of many complications that a cost-benefit analysis might encounter. Perhaps, Sunstein might argue, there are some adjustments that would be far more difficult to quantify with any reasonable methodology. A minimal requirement that one might impose then would be to require an agency to explain not only why it is disregarding the results of a cost-benefit analysis, but also why a consideration that it believes is sufficiently relevant to change the result cannot be adequately quantified. There is a strong argument, however, that even if an agency cannot come up with any methodology to measure some factor that it deems relevant, it should be required nonetheless to plug in some number that it claims is its best estimate. The cost of doing so is close to zero. The benefits, however, could be significant. It would make it more difficult for an agency to offer a bogus reason for ignoring a cost-benefit analysis, assuming agency officials would be concerned about the reputational consequences of making absurd assessments of purportedly unquantifiable variables. More significantly, it would assure cost-benefit analysis a more prominent place in the regulatory process, preventing it from becoming lost as just one consideration.

Whether a flexible cost-benefit analysis that takes into account all factors is ultimately superior to a rigid cost-benefit analysis that ignores some important dimensions to regulatory policy is a difficult question. Sunstein notes, "Of course, it is possible to think that we lack the tools to engage in a good incidence analysis, or that an assessment of distributional issues will be subject to interest-group manipulation, and hence that the 'bottom line' numbers should be used

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63. It might be appropriate for such a table to take into account not only differences in income, but also the phenomenon of loss aversion. Even to a single person, and even accounting for the declining marginal utility from wealth, a one-dollar loss may have a greater effect on utility than a one-dollar gain. See, e.g., Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 279 (1979).

for pragmatic reasons” (p. 82). Perhaps once we admit distributional concerns into the cost-benefit process, rather than just the political process, we open the way for abuse, and the same argument can be made regarding any variable for which measurement is difficult. Yet once we resolve this question in favor of considering distributional concerns, as Sunstein does, no sound reason recommends taking them into account qualitatively rather than quantitatively. Forcing quantification (as well as, perhaps, qualitative explanation) seems more likely to prevent abuse than qualitative identification of factors alone.<sup>64</sup>

## 2. *Rights and Irreversibility*

Sunstein also seeks flexibility in cost-benefit analysis by suggesting that it might be trumped by considerations of rights and problems of irreversibility. Sunstein argues, “For example, the costs undoubtedly associated with politically controversial speech are not a legitimate basis for regulating such speech. Those costs are entitled to no weight at all; it is not as if they count but are insufficiently high” (p. 68). Sunstein’s point, however, is not merely that the Constitution sometimes may constrain agencies. An agency ought not waste time on unconstitutional regulations, and the doctrine of constitutional doubt counsels even against regulations that are arguably unconstitutional.<sup>65</sup> But this is an antecedent question for the agency to resolve before it even arrives at cost-benefit analysis. Sunstein’s point, rather, seems to be that even where regulation or its absence clearly would be constitutionally permissible, rights-like thinking sometimes should preclude balancing.

As an example, Sunstein considers the Endangered Species Act,<sup>66</sup> and postulates that “perhaps the statute is best taken to be rooted in a theory of rights, one that rebuts the presumption in favor of cost-benefit balancing” (p. 68). The foundations of the statute, Sunstein argues, “lie in a judgment that human beings should not knowingly bring about the extinction of other species, at least in the absence of truly extraordinary circumstances” (p. 69; footnote omitted). In addition,

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64. This point is responsive to the following critique of cost-benefit analysis by Henry Richardson: “[I]f [cost-benefit analysis] ignores distributional issues it is unjust, while if it attempts to incorporate distributional concerns by some scheme of weighting it is doomed to do so crudely and controversially.” Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, 29 J. LEGAL STUD. 971, 972-73 (2000). This argument fails to make a comparison between the last two of the following three possibilities: rigid cost-benefit analysis ignoring issues such as distribution, flexible cost-benefit analysis in which analysts do their best to quantify such issues, and no cost-benefit analysis at all. While flexible cost-benefit analysis may be crude, decisionmaking in the absence of any quantification is more so.

65. When an agency’s interpretation of a statute would present the possibility of constitutional problems, courts will not defer to the agency’s interpretation, even if it is otherwise a reasonable construction of the statute. *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

66. 16 U.S.C. §§ 1531-1544 (1994 & Supp. V 1999).

Sunstein notes that the Act “is concerned with preventing genuinely irreversible losses” (p. 68), *Jurassic Park* scenarios notwithstanding. Generalizing from the example, Sunstein concludes, “Where regulatory policy is designed to ensure against irreversible damage, or otherwise to prevent the violation of rights, the cost-benefit default principles might well be displaced” (p. 69). Coupled with Sunstein’s expansive conception of rights, this opens the door to a potentially significant exception to cost-benefit balancing.

Further, an exception where rights are at stake is inappropriate, for it assumes, wrongly, that rights have no place in cost-benefit analysis. Properly conceived, cost-benefit analysis is rooted not in utilitarianism,<sup>67</sup> but in a theory of politics. A deontologist might well conclude that the snail darter is worth thousands of jobs, but she should not object to enunciating her objection with numbers. She might even indicate that the snail darter has infinite value, though that would subject her to critiques from people like Sunstein who would allow extinction at least in “truly extraordinary circumstances.” The benefit of saving a species might be rated as very high even if there is no real possibility that the species would ever serve human needs in a particular way. Cost-benefit analysis need not preclude consideration of the pain of animals, the existence value of species, the beauty of the environment, or the rights of individuals. It would, however, force those who would advocate results on the basis of these considerations to identify the point, if any, at which these considerations should give way. This can only advance democratic dialogue in a world composed of deontologists, utilitarians, and people who believe that both rights and utility matter.<sup>68</sup>

Nor should irreversibility be allowed to trump cost-benefit analysis. There are many harms that are irreversible, the death of a person most prominent among them, and yet Sunstein would allow government to avoid regulation on the ground that private activity will cost only a small number of lives.<sup>69</sup> Sometimes, it might make sense for cost-benefit analyses to take irreversibility into account when the government’s information is likely to improve. For example, suppose there is some scientific uncertainty about whether a certain plot of land is vital to an ecosystem, but there is reason to think that a sounder scientific understanding might be available in the future.

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67. See, e.g., p. 137 (“The best defense of cost-benefit analysis relies not on controversial claims from neoclassical economics, but on a simple appreciation of how we all make mistakes in thinking about risks . . .”).

68. Amartya Sen has argued that cost-benefit analysis allows for “[b]roadly consequential evaluation,” which considers “not only such things as happiness or the fulfillment of desire on which utilitarians tend to concentrate, but also whether certain actions have been performed or particular rights have been violated.” Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931, 936 (2000).

69. See, e.g., p. 21 (indicating that \$400 million is too much to save two lives).

Even if the best current guess is that the benefits of paving the plot for a Wal-Mart exceed the costs to the ecosystem, that is not the relevant question. The question is what are the costs and benefits of delay. The benefits would include the possibility that subsequent scientific information would reveal that the cost-benefit analysis on the ultimate question of paving should go the other way. While Sunstein is right to point out that the phenomenon of irreversibility may be relevant to policy decisions, he is wrong to ignore the possibility that cost-benefit analysis itself could be used to determine whether delaying a decision might produce greater net benefits than immediate resolution in either direction.

### III. COST-BENEFIT BALANCING IN JUDICIAL REVIEW

Although we have seen that Sunstein is cautious in evaluating the judicial role in cost-benefit analysis, his analysis is nonetheless useful in identifying legal strategies that courts might use to encourage quantification more rigorously than he would demand. Although *Chevron*<sup>70</sup> deference requires courts to defer to reasonable constructions of agency statutes, Sunstein points out that courts remain free to scrutinize policy decisions by agencies in implementing statutes, either by requiring more information to facilitate judicial review or by performing a “hard look” review.<sup>71</sup>

The timing for the second strategy is particularly appropriate, as the courts increasingly focus on *Chevron*'s Step 2, which inquires whether an agency's construction of a statute is reasonable.<sup>72</sup> Until recently, most attention focused on Step 1, which inquires whether a statute is clear, in which case an agency must follow the statute.<sup>73</sup> The Supreme Court's execution of *Chevron* analysis has focused almost entirely on Step 1,<sup>74</sup> with the dual effect of making Step 2 seem unimpor-

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70. *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

71. P. 127. Without explicitly citing the hard look doctrine or *Chevron* Step 2, Sunstein notes that “these conclusions would be relatively conventional, and neither would mark a huge departure from current law.” P. 127

72. *Chevron*, 467 U.S. at 843 (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”).

73. Step 1 analysis can be quite complicated, particularly because of *Chevron*'s admonition that a statute may become clear after consideration of the canons of statutory construction. *Id.* at 843 n.9. For a discussion of the role of canons in *Chevron* analysis, see Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 675-79 (2000).

74. The only cases in which the Supreme Court arguably has invalidated a regulation on the basis of Step 2 are *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001). Even these cases could be classified as Step 1 cases, given the ambiguous borderline between Step 1 and Step 2. See Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1142 n.186 (2001).

tant and providing an opening for courts and commentators to offer suggestions. One suggestion,<sup>75</sup> which has the virtue of explaining the lack of attention to Step 2 in case law, was that Step 2 encapsulated the “hard look” doctrine, by which courts ensure that agencies consider and answer all relevant arguments against the courses of action that they choose.<sup>76</sup> The D.C. Circuit has seemed to adopt this suggestion, increasing its significance. All this might be much ado about nothing — not a lot rests on whether hard look review is part of *Chevron* analysis or independent from it — but it provide a reminder that courts play a role in ensuring the rationality of agency decisions, even when Congress delegates power.

Courts thus could, and I will argue should, use hard look review both to encourage cost-benefit analysis and to discipline the analyses that agencies offer. In making these suggestions, however, I do not contest Sunstein’s position that the courts’ posture should be one of deference. The question that I address is not how much deference the courts should give, but the type of reasoning that courts should employ in determining whether an agency’s decision should receive deference. Exploring how much deference courts should give is largely an empty exercise, for whatever verbal formulation guides the courts, ultimately the outcomes of cases will depend on the judgment of those on the bench.<sup>77</sup> But the factors that judges consider in reviewing agency decisions are critical, because agencies will pay more attention to factors that judges consider more important.

Thus, I do not recommend that courts strike down regulations merely because an agency has declined to use cost-benefit analysis. Rather, courts should be more favorable to agencies that make decisions quantitatively than qualitatively, because quantitative assessments provide more convincing demonstrations that agencies have sufficiently considered alternative approaches. Similarly, I do not believe that a court should strike down a regulation merely because it comes to a different conclusion about a particular variable in a cost-benefit analysis, even if the court’s best estimate of that variable would shift the cost-benefit analysis in the other direction. Rather, a

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75. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHL-KENT L. REV. 1253 (1997) (arguing that the courts should recognize Step 2 to be equivalent to “arbitrary and capricious” review); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEXAS L. REV. 83 (1994) (offering a similar proposal).

76. The statutory basis for hard look review is 5 U.S.C. § 706(2)(A) (1994), providing for judicial review of “arbitrary” and “capricious” administrative action.

77. Justice Frankfurter recognized this in refusing to offer a formula explaining how courts should apply the “substantial evidence” standard: “Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951).

court should strike a regulation only if it can show that the agency acted unreasonably in making the conclusion that it did. That assessment should depend in part on a comparison of the agency's justification for its decision with evaluations of similar cost-benefit issues made by the courts in earlier cases. More controversially, I will argue that the assessment should depend also on a candid evaluation of the agency's reputation across a range of regulatory issues, and perhaps also the ideology of the judges who have considered the relevant issues. Invalidation of a regulation should occur only when an agency consistently, within and across regulations, has shown a bias that deviates from sound cost-benefit principles, as recognized and enunciated by judges across the political spectrum.

#### A. *The Advantages and Disadvantages of Aggressive Judicial Review*

An assessment of the virtues of judicial review of agency decisions must depend on an evaluation of relative institutional competence. Sunstein's work clearly reflects this, as despite his recognition of imperfections in the administrative state, he recommends against aggressive judicial action. Sunstein does not, however, offer a full analysis. Moreover, his emphasis on the danger that aggressive judicial review will allow lawyers to object to almost any rulemaking elides two critical issues. First, it assumes that litigation itself is the evil to be avoided, rather than judicial decisions vacating agency decisions. While litigation costs are relevant, they may not be sensitive to the form of judicial review. Second, it ignores that even if the overall intrusiveness of judicial review is held constant, the approach to judicial review that courts take may be important. In this section, I provide at least a preliminary comparison of the dangers of unconstrained agency decisionmaking and unconstrained judicial decisionmaking.

##### 1. *The Problem with Unconstrained Agency Decisionmaking*

The danger of unconstrained agency decisionmaking is that it might lead to the elevation of the preferences of the agency officials over the preferences of the population at large. One aspect of this phenomenon is that agencies might stretch the meaning of statutes. Even though *Chevron* Step 1 requires agencies to abide by clear statutory meaning, statutes are often ambiguous, and the more deferential judicial review, the more likely agencies will be to take advantage of such ambiguity to push regulation in their preferred direction. The danger, however, is also present even where Congress has expressly delegated authority to the agency, for example to the EPA to set ambient air quality standards. Agency officials, perhaps because of their own views on environmental law or perhaps influenced by the President or by interest groups, might choose standards that would be quite

different from those that the population at large, if fully engaged and informed in the debate, would choose. That there is no process that would lead to objective revelation of popular informed preferences does not make the danger of idiosyncratic agency decisionmaking any less acute.

Sunstein does not confront this problem directly, and indeed he offers a brief indication that he does not believe it to be a problem at all. In pressing the virtues of judicial deference, he states, "A special virtue of this approach is that the Bush Administration would be permitted to come to a different conclusion from the Clinton Administration, and vice versa, because different judgments of value could lead to different conclusions about how to proceed in the face of ambiguous science" (p. 125). This seems to suggest approval of agency officials resolving scientific ambiguity not by their best guess of scientific unknowns, but by virtue of their ideological preferences. This is not quite the same as agency officials acting like the "intuitive toxicologists" that Sunstein seeks to have the administrative state overcome (p. 9), but it is close. Sunstein's reasoning implies that when administrative questions are difficult (and aren't all the interesting ones?), agency officials should feel free to act like intuitive Republicans or intuitive Democrats.

It is strange to me that Sunstein sees this as an unmitigated virtue. Perhaps he is reaching for an argument about relative institutional competence, recognizing the claim that administrative agencies may be more politically accountable than legislatures or courts. Jerry Mashaw has made such an argument,<sup>78</sup> and it provides a plausible defense of judicial deference. It would be bizarre, however, to consider agency flexibility to base decisions on political views as an absolute plus, rather than as the lesser of two evils. Surely it would be better if agencies sought to reflect moderate political preferences rather than the preferences of any particular presidential administration. We would not be better off with liberal outcomes in Clinton administration decisions and conservative outcomes in Bush administration decisions, if it were possible to have moderate outcomes in both.

An objection to this argument is that by producing conservative results in Republican administrations and liberal results in Democratic ones (a simplification, of course), we end up with moderate results on average. The problem with this objection is that the average does not matter. For example, having excessively lenient standards for one pollutant regulated during a Republican administration and excessively harsh standards for another pollutant regulated during a Democratic administration isn't as good as having standards that are just right. Moreover, this is true even from the perspective of someone

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78. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

who thinks that either the lenient or harsh approach would be just right for both chemicals. If given the chance to negotiate, advocates of the Republican and Democratic approaches probably would choose to have two moderate standards rather than one harsh and one lenient standard. This will be true as long as marginal costs from misaligned standards increase as standards become more misaligned. Designing an administrative law doctrine that tends to advance more moderate decisionmaking performs, in effect, the same function as this hypothetical negotiation.

## 2. *The Problem with Unconstrained Judicial Decisionmaking*

I suspect that Sunstein is wary of judicial review not really because he believes that it is affirmatively good for the President to pursue without resistance regulation based on his own personal philosophy, but because Sunstein appropriately recognizes that there is a trade-off between unconstrained agencies and unconstrained courts. "A serious problem with intense judicial review of agency action," Sunstein warns us, "is that it creates delay — and hence ensures a bias in favor of the status quo" (p. 125). Delay occurs when a court vacates an agency decision, and the threat of delay may well lead to an agency decision to weaken the initial thrust of the regulation. Sunstein is right that this may be a problem, but only when the regulation does more good than harm, or when the administrative cost of fixing it is greater than the benefit. A judicial decision to vacate a regulation may increase social welfare if the regulation would have decreased social welfare. And of course, cost-benefit analysis is a way of determining whether the regulation increases or decreases social welfare.

Sunstein, though, is right to be concerned about judicial review, because courts may have no superior claim over agencies to being able to produce accurate cost-benefit analysis. Even if we assume that both the agency and the court will perform cost-benefit analysis in good faith, if a regulation independently must pass both the agency's and the court's test, the system will have the bias toward the status quo that worries Sunstein. If all that is needed to vacate a regulation is for courts to find a single defect in the agency's cost-benefit analysis, or a single point on which the court disagrees with the agency, then the status quo bias will be even more severe. The problem is exacerbated by the concern that judges may have political preferences too, and even further by the reality that different judges may have different political preferences. A substantial body of literature has shown that the political party affiliation of judges on the D.C. Circuit is a significant variable in explaining the decisions of those judges in administra-

tive law cases.<sup>79</sup> Thus, even if a goal of the administrative process is to produce moderate decisionmaking, there is a risk that judicial review could hurt rather than help, leaving the fate of regulations in the lottery of the judicial selection wheel.

These considerations are sufficient to caution against a regime in which courts conduct *de novo* review of agency actions on a case-by-case basis, with each successive panel assessing the myriad issues of cost-benefit analysis anew and overturning the agency decision if costs exceed benefits. At the same time, they counsel against even a regime in which courts resolve issues and set precedents with *stare decisis* effect. In such a regime, one panel might decide that the appropriate value of a life is less than \$7 million or that 5% is an acceptable discount rate for lives expected to be lost in future generations, and other panels would be obliged to follow. This is troubling for the same reason that we should not be happy with the Bush administration issuing conservative regulations and the Clinton administration issuing liberal ones. Having some variables resolved in a pro-regulation direction and others resolved in an anti-regulation direction seems unlikely to produce coherence. Perhaps *en banc* review could improve things, as a broader range of judges could consider the most important issues, but it is unlikely by itself to be a complete corrective.<sup>80</sup>

### B. Common Law Cost-Benefit Principles

This does not, however, mean that we should give up altogether on the possibility of a common law of cost-benefit analysis that emerges in the courts. The development of such a common law would be helpful, with the caveat that neither panels nor agencies should be obliged to follow the decisions of past courts. This would be in the true spirit of the common law, in which precedents warranted epistemological deference if persuasively reasoned but did not provide legal principles that courts were obliged to follow in the absence of the intervention of

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79. See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2173 (1998) (observing that politically aligned judicial panels on the D.C. Circuit are more likely than politically mixed panels to reach results consistent with the panels' apparent political orientation); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 303-07 (assessing the effect of D.C. Circuit judges' ideology on the performance of judicial review); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1738-47 (1997) (demonstrating the influence of ideology on the D.C. Circuit in environmental cases). *But see* Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 240 (1999) (disagreeing that the D.C. Circuit is political, but acknowledging that "the same life experiences that channel a judge's choice of political parties [may] also guide her judicial decisionmaking").

80. For an argument that even *en banc* courts may not be sufficiently politically representative, see Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600 (2000).

a legislature or a higher judicial authority.<sup>81</sup> In such a regime, courts would consider a full range of regulatory questions about cost-benefit analysis. They might consider, for example, whether people's concern for "relative position" should affect the valuation of life,<sup>82</sup> whether a regulation's effect on the size of the population should be considered independently of its effect on lives in being,<sup>83</sup> or the methodological issues involved in selecting an appropriate discount rate for administrative action.<sup>84</sup>

The looseness of such a common law might seem to provide support for Sunstein's suggestion that a common law of cost-benefit analysis could emerge in agencies rather than in courts (p. 120). Indeed, Sunstein is right to demand that agencies show consistency across regulations in performing cost-benefit analysis (pp. 120-21), for when an agency plugs in two different numbers for the same variable in two different regulatory contexts without explanation, a suspicion arises that the agency may be fudging numbers to provide ex post rationalizations of desired policy outcomes. But this is a very limited common law, limited to a particular agency. Even a broader one requiring agencies to explain inconsistencies with other agencies' approaches might not be sufficiently broad. Within any given presidential administration, a variety of agencies might choose a set of numerical values reflecting the President's ideological values.

Moreover, individual agencies are unlikely to engage in debates on theoretical considerations in cost-benefit analysis. Courts are institutionally well-suited to consider such abstract issues, even if they are not well-suited to declare values for particular variables to be used in cost-benefit analyses. There is an institutional point related to cognition here. Sometimes institutions are useful because they lead particular actors to use modes of thinking that otherwise might be ignored. One justification for judicial review that avoids the countermajoritarian difficulty is that judges are more likely to think about constitutional issues than legislatures, for whom constitutional

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81. See generally Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 28-45 (2001) (discussing the role of precedent and the rise of the principle of stare decisis in the nineteenth century).

82. See Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323 (2001) (arguing that because relative income is an important factor in individual well-being, higher statistical values of life should be used when a regulation might benefit a group of workers).

83. See, e.g., John Broome, *Cost-Benefit Analysis and Population*, 29 J. LEGAL STUD. 953 (2000) (assessing the intuition that changes in population are ethically neutral and therefore should not be considered in cost-benefit analysis).

84. Pp. 83-86. Compare John J. Donohue III, *Why We Should Discount the Views of Those Who Discount Discounting*, 108 YALE L.J. 1901 (1999) (arguing for the use of discounting in assessing the effects of a regulation on lives in the future), with Lisa Heinzerling, *Discounting Life*, 108 YALE L.J. 1911 (1999) (disputing Donohue's analysis).

issues may become lost in a shuffle of short-term policy concerns.<sup>85</sup> Similarly, the judicial station may make judges more likely than agencies to consider abstract questions concerning cost-benefit analysis, because judges consider regulations in a posture different from agency consideration. To the extent that agencies do examine abstract questions, even if only in reaction to courts' pronouncements, those evaluations deserve the same attention as judicial ones, but a rich common law is unlikely to emerge from agencies. That cost-benefit analysts have ignored many fundamental questions, perhaps even in a way that makes the methodology of cost-benefit analysis as a whole biased,<sup>86</sup> furnishes an argument for a more active judicial role.

Such a common law might prove useful even when agencies are not required to engage in cost-benefit analysis. Though it will be of little use in contexts in which the courts have interpreted Congress to have prohibited agencies from considering costs, it might be useful when an agency considers costs but does not go through the procedural steps of quantifying and comparing all costs and benefits. Questions about the significance of costs and benefits, like the appropriate value for a discount rate, are relevant even where the agency has not considered them quantitatively. If, as Sunstein believes, cost-benefit analysis is a useful and disciplined form of reasoning, courts should proceed quantitatively even if agencies have offered only qualitative reasoning. While the courts' assessments might not be in the form of a complete cost-benefit analysis, judges could provide at least approximate metrics by which to gauge the rationality of agency decisions.

This leaves the question of what a court should do when, in reviewing regulations and considering abstract questions of the theory of cost-benefit analysis, it finds that the agency performed the analysis differently from how the court would have performed it. My answer is that the ultimate standard should be no different from what it has long been. As long as an agency has offered sufficient explanation of its decisions, and as long as these explanations are not implausible, the court should allow the agency decision to stand.<sup>87</sup> This assessment, however, should be made against the backdrop of the courts' developing common law principles. Where an agency proceeds in a manner different from what courts have recommended, and without providing sufficient explanation, the decision should be vacated. If, however, an agency considers the courts' prior analyses, as well as any that other

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85. Christopher Eisgruber offers a related pragmatic argument, suggesting that judges may be best equipped to represent the people in resolving dilemmas of democratic governance. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 49-52 (2001).

86. See Frank, *supra* note 6.

87. See, e.g., *Indus. Union Dep't v. Hodgson*, 499 F.2d 467, 475 (D.C. Cir. 1974) ("What we are entitled to at all events is a careful identification by the Secretary . . . of the reasons why he chooses to follow one course rather than another.").

agencies have offered on similar questions, then its decision should be upheld as long as it is reasonable.

A virtue of the common law of cost-benefit analysis I describe is that it requires only a change in orientation, not a change in doctrine. It might seem that I have jettisoned the principle of *stare decisis*, but that is not so. Rather, the reason that courts ought not consider their predecessors' views on particular issues dispositive is that the exploration of cost-benefit principles is always made in the context of determining whether a particular regulation is reasonable. If one judicial panel finds that an agency could have used a superior approach in performing contingent valuation, for example, the court still might not find the agency unreasonable. And even if it did, a later panel might still uphold an agency using the same methodology labeled unsatisfactory by the first. This might be because the agency offered cogent reasons not considered by the first court to use the methodology. Or, it might be because even considering the decisionmaking defect, the agency's ultimate decision, all things considered, was within the realm of reasonableness. Such a finding would be particularly likely when the second agency made its decision before the initial court ruling, thus making judicial pronouncements prospective only.

Despite its generally deferential posture, judicial review under my proposal offers the hope of substantially improving agency decision-making. Sunstein's central insight is that the rigor of cost-benefit analysis might affect the decisions that agency officials reach by focusing them on relatively important considerations. My claim is that this can have full effect only if agency officials have a reason to take cost-benefit analysis seriously. Judicial review, as I have described it, would force officials to do so because they would realize that courts were taking it seriously in turn. There is a substantial difference between a regime in which an agency can choose from a wide range of plausible valuations of variables to one in which it must explain its choices because courts are attuned to the issues underlying those choices. If agency decisions were the same as in the absence of this form of judicial review, more regulations would likely be vacated, because review would call attention to deficiencies in agency reasoning that otherwise might go unnoticed. Agencies, though, would respond to such review with more careful analyses of their own, thus leaving the overall rate of judicial invalidation of regulations perhaps not too different from before.

### C. *Agency Reputation in Judicial Review*

My suggestion has been to allow quantitative considerations and underlying theories of cost-benefit analysis to influence judicial review without necessarily changing the overall level of deference. One advantage of such an approach to judicial review is that it might facilitate

the courts' consideration of a wider range of factors relevant to a decision whether to invalidate a regulation. For example, quantitative analysis would make it easier to determine whether the agency was consistently choosing values for variables in a conservative or aggressive way. While one disagreement with an agency's methodology ordinarily should not be sufficient to overturn a cost-benefit analysis, if the court identifies a persistent pattern across a range of issues, invalidation may be appropriate. Such a pattern supports a judgment that the agency, in making its ultimate decision to approve a regulation, acted unreasonably.<sup>88</sup> It is far more difficult to identify such a pattern with more traditional qualitative arguments. With such arguments, the agency is expected to explain why arguments against the regulation are insufficient to stop the agency from going forward, and the agency's response that each of the arguments is inadequate does not indicate bad faith.

Implicit in analysis seeking to identify patterns in an agency's reasoning processes is the recognition of the importance of reputation. When an agency seems to have acted fairly and moderately in making a decision on one variable, that strengthens the case that the agency intended to do so in considering another variable. The reputation of agencies, however, could be considered across cases as well. Perhaps courts already consider agency reputation implicitly, seeking to curtail agencies with a reputation for stretching their authority or achieving ideological objectives. But a quantitatively oriented judicial review might facilitate more explicit cross-case comparisons. A court should be more inclined to overturn a regulation when courts' independent assessments continually suggest the agency is enacting regulations whose costs exceed benefits than when it is only in the immediate case that the court's views on the net benefits of a regulation differ from the agency's. If courts were to consider explicitly past assessments of an agency's decisions, the agency would take into account not only its immediate objectives but also that aggressiveness might cost it reputational capital over the long term.

I realize that the suggestion that courts explicitly consider agency reputation may be controversial. It might, however, increase the significance of "prompt letters" that the Office of Information and Regulatory Affairs ("OIRA") uses to urge regulation with positive net benefits, which Sunstein identifies as a way that cost-benefit analysis can encourage good regulation rather than discourage bad regulation (p. 7). If OIRA has issued numerous prompt letters to an agency, and instead of responding to these letters the agency has proceeded on regulations whose costs seem to greatly exceed benefits, there is a strong reason to conclude that the agency's priorities are amiss. This

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88. *See supra* Section II.B.2.

may be because of interest group influence or simply because of lack of attention to regulatory priorities. A court should be more skeptical of regulations from such an agency than from one that has received few prompt letters. On the other hand, such letters may indicate a lack of sufficient agency resources, especially if the regulations that the agency does enact all seem to have benefits in excess of costs. In such a case, a court ought to demand less from an agency by way of explanation, because the procedural demands of administrative law may be preventing the agency from achieving its mission. In addition, courts might consider the extent to which an agency seems to be responding to prompt letters, thus improving OIRA's ability to encourage agencies to address significant problems.

It might seem that my analysis has been one-sided, focusing on agency reputation but not on judicial reputation. After all, I have argued that just as we should seek to avoid agency decisionmaking that is primarily ideological, so too should we recognize that judges may be influenced by their own ideology, and that random selection of judges means that whether a regulation is assessed by a conservative or a liberal may be a matter of luck.<sup>89</sup> An analysis of agency reputation as revealed through a range of cases, however, indirectly results in consideration of judicial reputation. If judges consistently find that an agency seeks to enact regulations whose costs apparently exceed benefits, or that an agency consistently ignores sound principles of cost-benefit analysis, the consistency of these conclusions suggests that they are not merely attributable to the political preferences of any individual judge. A practice of considering agency decisions over a range of cases thus might make case resolutions less susceptible to any single judge's or single panel's political orientation. In effect, a judge can bond herself not to allow ideology to play a significant role by placing emphasis not only on whether her perspective differs from the agency's in a particular case but also on whether previous judges in cases involving the agency have had similar concerns.

Nonetheless, judicial review might be better still if judges explicitly considered the politics of one another. This may be my most controversial conclusion, for it may seem inconsistent with courts' efforts to appear above the political fray.<sup>90</sup> But an observation by a relatively liberal panel to cite a previous panel's chastisement of an agency seems more relevant if that previous panel was conservative rather than liberal, and vice versa. In everyday interactions, after all, we are ordinarily more inclined to accept positions when individuals on both sides of the political spectrum endorse them. Someone told of *The*

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89. See *supra* Section III.A.2.

90. Judges sometimes bristle at academics who observe an ideological component to their decisionmaking. See, e.g., Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998); Wald, *supra* note 79.

*Cost-Benefit State's* enthusiasm for cost-benefit analysis might be more inclined to accept its arguments because its author is the relatively liberal Cass Sunstein than if the author were a known conservative. And that, along with the quality and innovation of the underlying arguments, helps explain why *The Cost-Benefit State* is an important book indeed.

#### CONCLUSION

I have advocated that courts develop a common law considering the most difficult questions of cost-benefit analysis. In the end, this recommendation finds inspiration in Sunstein's own writing. In his 1989 article, Sunstein wrote:

Sympathetic engagement with regulatory purposes, together with a solid understanding of regulatory pathologies, ultimately might lead to a set of principles by which courts could indeed bring about "net benefits" through judicial review. No one should argue that the judiciary should play the central role in ensuring legality, rationality, or justice in the administrative process. But it would be difficult to deny that a judiciary suitably sensitive to the functions and failures of the regulatory state might well make things better rather than worse.<sup>91</sup>

In *The Cost-Benefit State*, Sunstein himself reveals both "engagement with regulatory purposes" and "understanding of regulatory pathologies," and he shows how cost-benefit analysis may help agency officials fulfill purposes while avoiding pathologies. It is puzzling, then, that this work does not seem to recognize that cost-benefit analysis may itself provide "a set of principles by which courts could indeed bring about 'net benefits' through judicial review." Though courts should recognize the limits and dangers of their role, judicial attention to the principles of cost-benefit analysis can only improve the quality of administrative decisionmaking.

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91. Sunstein, *supra* note 2, at 537.