Michigan v. EPA: A Mandate for Agencies to Consider Costs

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> [M]y way is[] to divide half a sheet of paper by a line into two columns; writing over the one *pro*, and over the other *con*; then, during three or four days consideration, I put down under the different heads short hints of the different motives that at different times occur to me, *for* or *against* the measure. When I have thus got them all together in one view, I endeavor to estimate their respective weights. . . . [A]nd thus proceeding I find at length where the *balance* lies . . . . And though the weight of reasons cannot be taken with the precision of algebraic quantities; yet, when each is thus considered separately and comparatively, and the whole lies before me, I think I can judge better, and am less liable to make a rash step; and in fact I have found great advantage from this kind of equation, in what may be called *moral* or *prudential* algebra.
>
> —Benjamin Franklin[1]

The economic efficiency of subjecting fossil fuel–fired power plants to the Clean Air Act's most prescriptive and onerous regulatory program was probably about the last thing on then-EPA Administrator Carol Browner's mind when she signed the notice to trigger that regulation on December 14, 2000. Two days earlier, the Supreme Court had announced its decision in *Bush v. Gore*, clearing the path for George W. Bush to assume the presidency a little more than a month thereafter. More important for Browner and her colleagues was the defeat of Al Gore, whom many had expected to build on the Clinton Administration's environmental record by

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[1] Memoirs of the Life and Writings of Benjamin Franklin 12 (William Temple Franklin ed. 1818) (quoting letter from Benjamin Franklin to Joseph Priestly (Sept. 19, 1772)).

requiring even greater reductions in emissions of air pollution by American industry. The centerpiece of the first-term Gore agenda would have been imposing "maximum achievable control technology" (MACT) requirements on power plants under Section 112 of the Clean Air Act. But now there would be no Gore agenda. So Administrator Browner signed the cursory seven-page notice finding that Section 112 regulation was "appropriate and necessary"—irrespective of cost—thereby triggering regulation, with the expectation that even a Bush Administration EPA would have little choice but to issue implementing standards and little ability to blunt Section 112's stringency.

That action was fateful, but not only in the way that those cheering Browner's finding anticipated. Yes, the finding did ultimately lead to MACT standards for power plants known as the Mercury and Air Toxics Standards Rule (MATS Rule)—after a dozen years of false starts and litigation and the election of another Democratic president, Barack Obama. But the Clinton EPA's haste in 2000 boxed in its Obama Administration successors, who sought to backstop the finding against legal challenges even while being constrained to do no more than "affirm" its reasoning, lest they cast doubt on its sufficiency. And that, in turn, led to the Supreme Court's decision in *Michigan v. EPA* holding that the EPA acted "unreasonably when it deemed cost irrelevant to the decision to regulate power plants."[2] Whatever its ultimate impact on the EPA's Section 112 regulation, the Court's decision marks a modest turning point in the law governing the activities of the regulatory state.

Michigan establishes as a baseline principle of administrative law that agencies must give some consideration to costs when regulating under statutes that do not preclude them from doing so. This marks a turnabout from earlier decisions, which were wary of cost-benefit analysis, and even from more recent ones, which focused on agency discretion.

After *Michigan*, all agencies will have to pay some attention to the costs of their actions. On the whole, this will be no great change for executive agencies, which are already subject to executive orders mandating cost-benefit analysis and consideration of alternative approaches. But it could be a sea change for independent regulatory

[2] 135 S. Ct. 2699, 2712 (2015).

agencies—including the financial regulators—which have long resisted the application of cost-benefit principles to rulemaking. In addition, *Michigan* provides an opportunity to obtain judicial review of how agencies regard costs.

But greater judicial scrutiny of the substance of agencies' consideration of costs is in itself unlikely to prove much of a check on agency discretion and, more broadly, on the regulatory state. *Michigan* requires only that agencies take some consideration of cost—one that is reasonable in the circumstances—not necessarily that they attempt to monetize costs or measure them against monetized benefits in an attempt to maximize social welfare. In some instances, simply eyeballing the anticipated results of an action may be enough; in others, more formal analysis may be necessary. Agencies are likely to receive substantial deference on what places they choose on that continuum. But even were courts inclined to require more formal, quantitative analyses, it still would not make much of a difference due to increasing sophistication among the "protection-oriented" (i.e., pro-regulatory) community in using cost-benefit analysis to justify a more aggressive regulatory agenda and to block deregulatory measures. And where there are disputes over costs and benefits, the courts are more likely than anything to defer to agency determinations, citing the agencies' relative expertise and policymaking discretion.

That said, *Michigan* may have a real impact in leading courts to focus on the proper scope of agencies' consideration of costs and benefits. While both the majority justices and dissenters agree on the presumption that agencies must consider cost, the difference in their positions is whether cost consideration must be tied to the particular authorities and objectives that Congress legislated, with the majority requiring such a nexus. This and other features of the majority opinion suggest a wariness of agencies' use of co-benefits—that is, ancillary benefits unrelated to statutory objectives—to justify regulatory actions. That would be a major blow to the EPA, which has relied on contestable projections of co-benefits attributable to reductions in particulate-matter emissions to justify many of its recent air rules—including the MATS Rule and its greenhouse-gas regulations.

I. Agencies' Consideration of Costs: From Negative Presumption to Discretion to Obligation

Prior to *Michigan*, the Supreme Court's decisions dealing with agencies' consideration of costs were limited to passing on the requirements of particular statutory schemes—whether they required, forbade, or allowed costs to be taken into account. Such statutory questions are typically subject to review under the two-step framework associated with *Chevron v. Natural Resources Defense Council, Inc.* Under *Chevron*, a court first applies the traditional tools of statutory interpretation to determine whether Congress has spoken directly to the question.[3] If the statute is silent or ambiguous with respect to the question, then in step two a court defers to the agency's interpretation of the statute so long as it is reasonable.[4]

Michigan addresses a more fundamental question than the meaning of a single statute. It considers whether an agency's failure to take account of costs in exercising statutory authority that is silent on the issue is irrational and therefore violates *Chevron's* second step and the Administrative Procedure Act's (APA) bar on "arbitrary and capricious" agency action.[5] The Supreme Court set forth the applicable test in *Motor Vehicle Manufacturers Association v. State Farm*: "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, *entirely failed to consider an important aspect of the problem*, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[6]

Because it proceeds in this manner, *Michigan* breaks new ground, establishing that consideration of costs is a central aspect of reasoned

[3] 467 U.S. 837, 842–43 (1984).

[4] *Id*. See also City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013).

[5] 5 U.S.C. § 706(2)(A). The Clean Air Act contains an analogous review provision. See, 42 U.S.C. § 7607(d)(9); W. States Petroleum Ass'n v. EPA, 87 F.3d 280, 283 (9th Cir. 1996) ("We review final administrative actions of the EPA pursuant to the Clean Air Act under the same standard as set forth in the Administrative Procedure Act."). On the relationship between *Chevron's* second step and arbitrary-and-capricious review, see United States v. Mead Corp., 533 U.S. 218, 227 (2001) ("any ensuing regulation is binding in the courts unless . . . arbitrary or capricious in substance.").

[6] 463 U.S. 29, 43 (1983) (emphasis added).

decisionmaking and therefore required under any statutory scheme but for those that preclude it.

A. Presumptions Every Which Way

Although the Court had never had the occasion to directly rule on the necessity of cost-benefit analysis in statutes that do not explicitly require or prohibit the practice, its decisions were not completely silent on the point, either. *Michigan's* predecessors generally called on the Court to address the permissibility of consideration of costs in specific statutory contexts. The case that set the mold was *American Textile Manufacturers Institute, Inc. v. Donovan*, a challenge to an agency's refusal to balance costs and benefits in setting a standard limiting exposure to cotton dust, a cause of "brown lung" disease, under the Occupational Safety and Health Act.[7] The act required the agency to "'set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity.'"[8] The agency interpreted that language "to require adoption of the most stringent standard to protect against material health impairment, bounded only by technological and economic feasibility" and, on that basis, rejected a more lenient standard proposed by the textile industry that took account of compliance costs.[9] Although the Court upheld that interpretation based principally on the statutory text—the "plain meaning" of "feasible," it said, was "capable of being done"—it also observed that "Congress uses specific language when intending that an agency engage in cost-benefit analysis" and drew a negative implication from the absence of such language in the act.[10] In this respect, *American Textile Manufacturers Institute* at least suggests a presumption against consideration of costs in the absence of such language.[11]

[7] 452 U.S. 490 (1981).

[8] *Id*. at 508 (emphasis in original) (quoting 29 U.S.C. § 655(b)(5)).

[9] 452 U.S. at 503–04.

[10] *Id*. at 508–11.

[11] See also Union Elec. Co. v. EPA, 427 U.S. 246, 257 n.5 (1976) ("Where Congress intended the [EPA] Administrator to be concerned about economic and technological infeasibility, it expressly so provided.").

The Court's 2001 decision in *Whitman v. American Trucking Associations* applied the same logic to National Ambient Air Quality Standards under the Clean Air Act.[12] The act requires the EPA to set standards for ambient concentrations of certain pollutants at levels "requisite to protect the public health" with "an adequate margin of safety."[13] That language, the Court concluded, made it "fairly clear" that the act "does not permit the EPA to consider costs in setting the standards."[14] But what about the point that "the economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains achieved in cleaning the air—for example, by closing down whole industries and thereby impoverishing the workers and consumers dependent upon those industries"?[15] A clever argument, but one the Court rejected based on the same negative implication as in *American Textile Manufacturers Institute*: given that "authorization to consider costs . . . has elsewhere, and so often, been expressly granted," the Court refused to find such authority "implicit in ambiguous sections of the [act]."[16] Thus, only "a textual commitment of authority to the EPA to consider costs" would suffice.[17]

At this point, following *American Trucking*, it may have seemed that the case law had all but established a default presumption against consideration of costs. But *Entergy Corp. v. Riverkeeper, Inc.*, in 2009, dispelled that notion.[18] At issue was the EPA's use of cost-benefit analysis to set standards for "impingement" (that is, squashing) and "entrainment" (capture) of aquatic organisms by power-plant cooling-water intake structures under a statute requiring that such structures "'reflect the best technology available for minimizing adverse environmental impact.'"[19] The Court rejected the view of the U.S. Court of Appeals for the Second Circuit—stated in an opinion by then-Judge Sonia Sotomayor—that this language precluded consideration of

[12] 531 U.S. 457.

[13] 42 U.S.C. § 7409(b)(1).

[14] 531 U.S. at 465.

[15] *Id.* at 466.

[16] *Id.* at 467.

[17] *Id.* at 468.

[18] 556 U.S. 208.

[19] *Id.* at 213 (quoting 33 U.S.C. § 1326(b)).

costs. Instead, deferring to the EPA's interpretation, it reasoned that "'best technology' may . . . describe the technology that *most efficiently* produces some good" and that "minimize" need not refer to the "greatest possible reduction."[20] Seemingly reversing the presumption against consideration of costs cited in previous decisions, the Court explained that, when Congress has "wished to mandate the greatest feasible reduction," irrespective of cost, it has employed absolute language, like "elimination" or "no discharge."[21] An agency "retains some discretion" to consider costs, it concluded, when Congress "does not unambiguously preclude cost-benefit analysis."[22]

The Court reaffirmed that holding, and then some, in *EPA v. EME Homer City Generation, L.P.*, a challenge to the EPA's Cross-State Air Pollution Rule.[23] The rule implemented the Clean Air Act's "Good Neighbor Provision," which requires states to prohibit in-state sources "'from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in . . . any other State with respect to'" ambient air quality standards.[24] To reduce compliance costs, the EPA required states to eliminate emissions that (1) contribute more than a *de minimis* amount to nonattainment in a downwind state and (2) could be eliminated most cost-effectively.[25] This latter means that, rather than address emissions from states in proportion to their contribution to downwind nonattainment, the rule instead required reductions by the least-cost avoider. According to the majority, this cost-centric approach was a reasonable interpretation of the word "amounts," given that multiple upwind states may contribute to nonattainment in a downwind state, that there must be some means of apportioning the offending emissions among the upwind states, and that the statute is silent on how exactly to do that.[26] Using costs, the majority concluded, "makes good sense" because it "is an efficient and equitable solution to the allocation problem the Good

[20] *Id.* at 218–19.

[21] *Id.* at 219 (citing statutory language).

[22] *Id.* at 219–20.

[23] 134 S. Ct. 1584 (2014).

[24] *Id.* at 1593 (alterations in original) (quoting 42 U.S.C. § 7410(a)(2)(D)(i)).

[25] *Id.* at 1597.

[26] *Id.* at 1603–04.

Neighbor Provision requires the Agency to address."[27] Writing in dissent, Justice Antonin Scalia (also the author of *American Trucking* and *Entergy*) argued, with some persuasive force, that the only relevant factor under the statutory text was the "amounts" of air pollution that "contribute" to downwind states' nonattainment.[28] And, he added, there was no distinguishing *American Trucking*, and so its presumption against costs consideration in the absence of authorizing language ought therefore to control.[29]

But as this discussion suggests, that negative presumption was never definitive, bolstering conclusions principally supported by traditional statutory interpretation. And whatever force the presumption may have had—*American Textile Manufacturers Institute* and *American Trucking* have certainly been read to support a principle broader than statute-by-statute analysis—has surely waned, as cases like *Entergy* and *EME Homer* appear to adopt a presumption in favor of agency discretion to consider costs. At the least, "it is difficult not to get the impression that the Court has become more receptive to the use of [cost-benefit analysis] in the thirteen years since *American Trucking* was decided."[30]

B. Michigan *Identifies Consideration of Costs as Fundamental to Reasoned Decisionmaking*

Michigan continues that trend, moving well beyond mere deference to an agency's choices. At issue is the application of the Clean Air Act's hazardous air pollutants program, contained in Section 112 of the act, to power plants. The Section 112 program targets stationary-source emissions of a number of listed hazardous air pollutants.[31] The program's focus is on categories of sources (for example, petroleum refineries and industrial process cooling towers) that emit those pollutants. The EPA is required to "list" all categories of sources that emit hazardous air pollutants and then issue

[27] *Id.* at 1607.

[28] *Id.* at 1611 (Scalia, J., dissenting).

[29] *Id.* at 1616 (Scalia, J., dissenting).

[30] Caroline Cecot & W. Kip Viscusi, Judicial Review of Agency Benefit-Cost Analysis, 22 Geo. Mason L. Rev. 575, 586–87 (2015).

[31] 42 U.S.C. § 7412.

emissions standards for each listed category.[32] Unlike other pollution-control programs, Section 112 provides little discretion in setting minimum standards for "major sources"—those emitting or with the potential to emit more than 10 tons of a single pollutant or more than 25 tons of a combination of pollutants per year.[33] In general, under the "maximum achievable control technology" standard, major sources are subject to a "floor" based on "the average emission limitation achieved by the best-performing 12 percent of the existing sources."[34] The EPA then may in some circumstances go "beyond the floor"—that is, make them even more stringent—based on cost considerations and other factors.[35] But the general idea of Section 112 and MACT is that every major source—no matter its age or unique characteristics—is required to minimize emissions of hazardous air pollutants to the same extent as the very best-performing sources in the same category.[36]

When Congress created the current Section 112 program in the 1990 Clean Air Act Amendments, it required the EPA to identify, list, and regulate nearly all categories of sources emitting hazardous air pollutants but made an exception for fossil fuel–fired power plants. Recognizing that other provisions of the amendments would directly lead to significant reductions in power plants' emissions of hazardous air pollutants through market-based measures and could therefore render Section 112 regulation unnecessary, it directed the EPA to study the plants' emissions and review "alternative control strategies."[37] It then directed the EPA to regulate power plants under Section 112 only if it "finds such regulation is *appropriate and necessary* after considering the results of the study."[38]

That was the regulatory finding that EPA Administrator Browner signed in the final days of the Clinton Administration. While the

[32] *Id.* § 7412(c)(1)–(2).

[33] *Id.* § 7412(a)(1).

[34] *Id.* § 7412(d)(3)(A).

[35] Michigan, 135 S. Ct. at 2705.

[36] See generally Nat'l Lime Ass'n v. EPA, 233 F.3d 625, 633–34 (D.C. Cir. 2000); S. Rep. No. 101-228, at 131–33 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3516–18.

[37] 42 U.S.C. § 7412(n)(1)(A). See also 136 Cong. Rec. 3493 (Mar. 6, 1990) (statement of Sen. Symms); 136 Cong. Rec. H12911, 12934 (daily ed. Oct. 26, 1990) (statement of Rep. Oxley).

[38] 42 U.S.C. § 7412(n)(1)(A) (emphasis added).

notice encompasses seven pages, the core of the finding amounts to just a few sentences:

> It is *appropriate* to regulate HAP [hazardous air pollutant] emissions from coal- and oil-fired electric utility steam generating units under section 112 of the CAA because, as documented in the utility RTC [report to Congress] and stated above, electric utility steam generating units are the largest domestic source of mercury emissions, and mercury in the environment presents significant hazards to public health and the environment. . . . Further, it is *appropriate* to regulate HAP emissions from such units because EPA has identified a number of control options which EPA anticipates will effectively reduce HAP emissions from such units. It is *necessary* to regulate HAP emissions from coal- and oil-fired electric utility steam generating units under section 112 of the CAA because the implementation of other requirements under the CAA will not adequately address the serious public health and environmental hazards arising from such emissions identified in the utility RTC and confirmed by [another] study, and which section 112 is intended to address.[39]

Although the notice contains no explanation of the agency's interpretation of the statutory "appropriate and necessary" trigger, its view can be inferred from the finding itself. Regulation is *appropriate*, in the agency's view, if power plants emit a listed hazardous air pollutant that poses risks to public health or the environment and if controls are available to reduce those emissions. Regulation is *necessary* if other Clean Air Act programs do not eliminate those risks. The costs of regulation—in this instance, the application of the Clean Air Act's most stringent program to the nation's largest category of industrial sources—are not part of the equation.

And there things stood—for purposes of this article[40]—until the Obama Administration, which picked up where the Clinton EPA left off. Pursuant to a consent decree, the EPA proposed MACT standards for power plants in May 2011 and published a final rule in Feb-

[39] 65 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000) (emphases added).

[40] For an account of what did happen in the interim, see 76 Fed. Reg. 24,976, 24,984–86 (May 3, 2011) (discussing the Bush Administration's revocation of the 2000 finding and promulgation of standards under Clean Air Act Section 111 and the D.C. Circuit's invalidation of those actions in New Jersey v. EPA, 517 F.3d 574 (2008)).

ruary 2012.[41] Attempting to backfill the deficiencies of the 2000 finding, the final rule's preamble features a dense 54-page discussion of the basis for regulation, ultimately "affirm[ing]" that application of Section 112 to power plants remained "appropriate and necessary."[42] Although greatly expanded, the 2012 analysis relies on the same interpretation of the statutory trigger as the 2000 finding—most likely out of concern that it would be required to defend its action solely by reference to the 2000 finding and therefore did not wish to undercut that finding in advance of litigation.[43]

The agency did, however, respond to comments that it was required to consider costs in assessing the "appropriate[ness]" of regulation. According to the EPA, it was reasonable to make the decision listing power plants without consideration of the costs of regulation because it is forbidden from considering costs when making listing decisions under Section 112 for other source categories.[44] It also claimed discretion to adopt an interpretation of "appropriate" turning only on the ability of Section 112 regulation to address power plants' emissions of hazardous air pollutants. "Cost," it concluded, "does not *have to be read* into the definition of 'appropriate.'"[45] In this, the agency appeared to argue that it had discretion to consider costs but was not obligated to do so. And so it decided not to, on the view that Section 112 was geared to reducing hazards to human health and the environment.[46]

Although the EPA did not take into account costs when determining whether to regulate, it did produce a "Regulatory Impact Analysis" tabulating the expected costs and benefits of the standards. The regulation would force power plants to bear costs of $9.6 *billion* per year[47]—making the rule one of the most expensive in the history of

[41] *Id*. For an account of the events leading up to entry of the consent decree, see Andrew M. Grossman, Regulation Through Sham Litigation: The Sue and Settle Phenomenon 5–7 (2014), available at http://www.heritage.org/research/reports/2014/02/regulation-through-sham-litigation-the-sue-and-settle-phenomenon.

[42] 77 Fed. Reg. 9,304, 9,310–64 (Feb. 16, 2012).

[43] See *id*. at 9,311.

[44] *Id*. at 9,327.

[45] *Id*. (emphasis added).

[46] See *id*.

[47] *Id*. at 9,305–06.

the federal government.[48] It projected monetized direct benefits—that is, benefits flowing directly from reduced emissions of hazardous air pollutants, particularly mercury, that could be quantified—of $4–6 *million* per year, chiefly from "avoided IQ loss" resulting from reduced mercury exposure.[49] It also projected ancillary benefits attributable to reductions in emissions of particulate matter (and to a much lesser extent, carbon dioxide) amounting to $37–90 billion per year, while acknowledging that these particulate matter "co-benefits" are subject to "uncertainty" based on limitations in its research linking particulate-matter levels with health outcomes.[50]

The rule was challenged on numerous grounds but ultimately upheld by the D.C. Circuit, over the dissent of Judge Kavanaugh, who argued that it was "entirely unreasonable for EPA to exclude consideration of costs in determining whether it is 'appropriate' to regulate electric utilities under the MACT program."[51] In Judge Kavanaugh's view, the result was the same "whether one calls it an impermissible interpretation of the term 'appropriate' at *Chevron* step one, or an unreasonable interpretation or application of the term 'appropriate' at *Chevron* step two, or an unreasonable exercise of agency discretion under *State Farm*."[52] The Supreme Court granted three petitions raising that point and directed the parties to address a single question that it had formulated: "Whether the Environmental Protection Agency unreasonably refused to consider cost in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities."[53] Notably, the question did not distinguish between the EPA's statutory authority—analogous to the issues

[48] White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1263 (D.C. Cir. 2014), (Kavanaugh, J., concurring in part and dissenting in part) (citing James E. McCarthy, Congressional Research Service, R42144, EPA's Utility MACT: Will the Lights Go Out? 1 (2012)).

[49] See 77 Fed. Reg. at 9,306, Table 2, 9,427–28. For a description of the EPA's convoluted approach to estimating and monetizing these benefits, see Brief for the Cato Institute as Amicus Curiae, Michigan v. EPA, 135 S. Ct. 2699 (2015) (No. 14-46) [hereinafter "Cato Michigan Brief"].

[50] 77 Fed. Reg. at 9,306 & Table 2.

[51] White Stallion, 748 F.3d at 1261 (Kavanaugh, J., concurring in part and dissenting in part).

[52] *Id*.

[53] 135 S. Ct. 702 (2014).

addressed in the Court's prior cases on consideration of costs—and the reasonableness of its exercise of discretion.

The Court's opinion in *Michigan*, authored by Justice Scalia, takes the latter issue as its starting point, forcefully declaring, "'Not only must an agency's decreed result be within the scope of its lawful authority'"—that is, within its statutory authority—"'but the process by which it reaches that result must be logical and rational.'"[54] And that process, it continues, must rest "'on a consideration of the relevant factors'"—a direct quotation from *State Farm's* explication of the arbitrary and capricious standard.[55]

The opinion reasons that there is a presumption that agencies will consider the costs of their actions. "Agencies," it says, "have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."[56] And it is not "even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[57] Accordingly, to overcome the presumption that costs will be taken into account, the EPA's burden was to identify "an invitation to ignore cost."[58]

The "appropriate and necessary" language, the Court concluded, is not anything of the sort. While recognizing that the word "appropriate" is "capacious[]," which would ordinarily provide an agency a wide scope of interpretative discretion, the majority explains that a reasonable statutory interpretation may not, like any agency action, "'entirely fai[l] to consider an important aspect of the problem'"—which "naturally" includes costs.[59] After all, "[n]o regulation is 'appropriate' if it does significantly more harm than good."[60] For example, an agency could not reasonably deem something like emissions

[54] 135 S. Ct. at 2706 (quoting Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998)).

[55] *Id.* (quoting State Farm, 463 U.S. at 43).

[56] *Id.* at 2707.

[57] *Id.*

[58] *Id.* at 2708.

[59] *Id.* at 2707 (quoting State Farm, 463 U.S. at 43) (alteration in original).

[60] *Id.*

limitations "appropriate" if "the technologies needed to eliminate these emissions do even more damage to human health."[61]

Moreover, the Court buried whatever vestige of the presumption against consideration of costs might have survived *Entergy* and *EME Homer*. The opinion rejects as "unreasonable" the government's argument that, "by expressly making cost relevant to other decisions, the Act implicitly makes cost irrelevant to the appropriateness of regulating power plants."[62] And it commensurately narrows the holding of *American Trucking*, stating that it stands for nothing more than "the modest principle that where the Clean Air Act expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the Agency to consider cost anyway."[63] That principle, of course, "has no application here."[64]

For two reasons, *Michigan* should be taken as establishing a baseline principle of administrative law that agencies generally must consider costs to avoid having their actions condemned as unreasonable or arbitrary and capricious. First is the deliberate sequence of the Court's reasoning, which begins with that principle and then places the burden on the EPA to identify some statutory basis to disregard costs. In that respect, *Michigan* is very different from its predecessors, which began and ended with statutory analysis and never addressed agencies' general obligation of reasoned decisionmaking within the bounds of those statutes. Second, even if *Michigan* could be viewed as a statutory case, its *Chevron* step-two reasonableness analysis parallels arbitrary-and-capricious review, drawing the kernel of its reasoning from *State Farm* and denying that the decision to ignore costs, absent some statutory bar to consideration of costs, is "rational."[65] This is in accord with recent decisions recognizing that *Chevron's* second step requires a court to "ask whether an agency

[61] *Id.*

[62] *Id.* at 2709.

[63] *Id.*

[64] *Id.*

[65] See *id.* at 2707.

interpretation is 'arbitrary or capricious in substance.'"[66] Viewed either way, the result is the same.

Justice Elena Kagan's dissent—which will be discussed further below—confirms as much. She "agree[s] with the majority—let there be no doubt about this—that the EPA's power plant regulation would be unreasonable if '[t]he Agency gave cost no thought *at all*.'"[67] She continues:

> Cost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing "a standard-setting process that ignore[s] economic considerations." *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U.S. 607, 670 (1980) (Powell, J., concurring in part and concurring in judgment). At a minimum, that is because such a process would "threaten[] to impose massive costs far in excess of any benefit." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 234 (2009) (Breyer, J., concurring in part and dissenting in part). And accounting for costs is particularly important "in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Id.*, at 233. . . . [A]bsent contrary indication from Congress[,] an agency must take costs into account in some manner before imposing significant regulatory burdens.[68]

Notably, Justice Kagan's point of disagreement with the majority is the EPA's obligation to consider costs when making its "appropriate and necessary" determination, rather than later in the standard-setting process. Accordingly, in the view of Justice Kagan (joined by Justices Ruth Bader Ginsberg, Stephen Breyer, and Sotomayor), the agency's obligation does not arise from the statutory language at issue—which she does not read to address consideration of costs—but from background principles of administrative law. Between the majority and the dissenters, the Court is unanimous on this point,

[66] See, e.g., Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011) (quoting Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 711 (2011)).

[67] 135 S. Ct. at 2714 (Kagan, J., dissenting) (quoting majority opinion).

[68] *Id.* at 2716–17 (Kagan, J., dissenting).

even if they may disagree as to how this obligation applies in particular cases.

In just 14 years, the Court went from requiring "a textual commitment of authority" for agencies to consider costs to requiring a statutory "invitation to ignore cost" for agencies to disregard them. In fairness, the whiplash is not quite so great—*American Trucking*, if not necessarily *American Textile Manufacturers Institute*, would almost certainly be decided the same today—particularly in light of increased use of and comfort with cost-benefit analysis in the administrative state.

II. Where *Michigan* Matters

Michigan reflects the ascendancy of cost-benefit analysis in administrative practice, and for that reason, it is not exactly a watershed opinion. On the margins, however, it will have practical effects, in terms of both agencies' consideration of costs and judicial review of agency action.

In order to understand the impact of *Michigan* on agency practice, one must first recognize the near-pervasive use of cost-benefit analysis in administrative proceedings. As the epigram commencing this article suggests, systematically weighing the expected benefits of some proposed course of action against its costs is nothing new and just common sense. Little surprise, then, that its use in government has grown in tandem with the rise and regularization of the administrative state. As best anyone can tell, the first formal use of cost-benefit analysis by a federal agency involves the Army Corps of Engineers, which employed the technique as far back as 1902 to identify the most promising and urgent flood-control projects.[69] (Or, for the more cynical, the Corps' actual aim may have been to facilitate logrolling among members of Congress hoping to see projects constructed in their states and districts.[70]) In any case, Congress in 1936 enacted a statutory requirement that the Corps undertake only those projects whose "benefits. . . . are in excess of the estimated costs."[71]

[69] John C. Coates IV, Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications, 124 Yale L.J. 882, 899–901 (2015) (discussing Theodore M. Porter, Trust in Numbers: The Pursuit of Objectivity in Science and Public Life 148–90 (1995)).

[70] *Id*. at 899–900.

[71] 33 U.S.C. § 701a.

While various other statutes require consideration of costs, current use of cost-benefit analysis by agencies can be traced to President Reagan's Executive Order 12,291 in 1981, which required agencies not to act "unless the potential benefits to society for the regulation outweigh the potential costs to society," to select regulatory objectives so as "to maximize the net benefits to society," and, when choosing among alternative approaches to achieve an objective, to select "the alternative involving the least net cost to society."[72] To carry out these requirements, agencies were directed to perform a "regulatory impact analysis" for all major rules, defined as those with an annual effect on the economy of $100 million or more.[73] "The executive order also increased agency accountability to the White House by formalizing a system of review of agency action headed by the Office of Information and Regulatory Affairs ('OIRA') within [the Office of Management and Budget] that continues in substantial part to the present."[74]

The general approach of Executive Order 12,291 was affirmed by President Clinton in Executive Order 12,866 and has been retained through subsequent administrations.[75] Thus, each year executive agencies conduct cost-benefit analyses for most major rules (also referred to as "significant regulatory actions"), and those analyses are in turn reviewed by OIRA, which can recommend that the agency perform additional analysis, change the details of its rule, or scrap its approach altogether. And these agencies are expected in all instances—whether or not a major rule is involved—to assess costs as possible, consider alternatives, and act "in the most cost-effective manner to achieve the regulatory objective."[76] (That said, consideration of costs is not carried out in all instances, as the EPA's decision

[72] Exec. Order No. 12,291, § 2, 46 Fed. Reg. 13,193 (Feb. 17, 1981). President Reagan's initiative, in turn, built on less prescriptive initiatives by Presidents Nixon, Ford, and Carter. For example, an executive order by President Carter required agencies to prepare regulatory impact analyses and consider alternative approaches. Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978).

[73] Exec. Order No. 12,291, §§ 1(b), 3(a).

[74] Cecot & Viscusi, *supra* note 30, at 581.

[75] See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (superseding, but in substance only amending, Executive Order 12,291); Exec. Order No. 13,258, 67 Fed. Reg. 9,385 (Feb. 26, 2002) (amending Executive Order 12,866); Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011) (supplementing Executive Order 12,866).

[76] Exec. Order No. 12,866 § 1(b)(5).

to ignore costs when deciding to regulate power plants under Section 112 demonstrates.) Congress has supplemented the presidential regulatory review process with statutes requiring cost-benefit analysis—although not necessarily consideration of costs in formulating policy—in such statutes as the Unfunded Mandates Reform Act (requiring "a qualitative and quantitative assessment of the anticipated costs and benefits" of rules that impose substantial unfunded mandates on state, local, and tribal governments),[77] the Paperwork Reduction Act,[78] and the Regulatory Flexibility Act (requiring agencies to assess costs of proposed rules on small entities).[79]

Almost none of this, however, applies to independent regulatory agencies,[80] which since 2011 have been merely "encouraged to give consideration" to the principles of Executive Order 12,866 and its successors.[81] They are in some instances required to perform cost-benefit analyses—although not in all instances to actually consider costs—under the Paperwork Reduction Act and Regulatory Flexibility Act. In other instances, independent agencies' authorizing statutes require that they take costs into account in certain respects. For example, the Securities and Exchange Commission is required to consider whether its regulatory actions under the Investment Company Act "will promote efficiency, competition, and capital formation"[82]—a mandate that the courts have construed as requiring consideration of costs.[83] But again, the scope of this requirement is limited, to rules promulgated under particular statutory authority.

Accordingly, *Michigan's* most visible impact may be to more effectively "encourage"—under the real threat of invalidation of regulatory actions—independent regulatory agencies to consider costs

[77] 2 U.S.C. § 1532(a)(2).

[78] 44 U.S.C. §§ 3501 et seq.

[79] 5 U.S.C. §§ 601 et seq.

[80] See 44 U.S.C. § 3502(5).

[81] Memorandum from Cass R. Sunstein, Administrator of OIRA, "Executive Order 13563, 'Improving Regulation and Regulatory Review,'" Feb. 2, 2011, available at http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf. See also Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 1, 2011) (encouraging independent regulatory agencies to follow the principles of Exec. Order No. 13,563 without actually requiring them to do anything).

[82] 15 U.S.C. § 80a-2(c).

[83] See Chamber of Commerce v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005).

when issuing regulations. This is no small thing. Nearly all of the major financial regulators are independent regulatory agencies, as are the Federal Communications Commission, the Federal Energy Regulatory Commission, and the National Labor Relations Board.[84] And these agencies' consideration of costs to date has been, at best, inconsistent. For example, from October 2012 through September 2013, the independent regulatory agencies issued 18 major rules.[85] According to the Office of Management and Budget (OMB), 13 of those "provided *some* information on the benefits and costs of the regulation."[86] Only two provided analyses that monetized portions of the costs; none included monetized estimates of benefits.[87] This is roughly consistent with the independent regulatory agencies' performance over the past decade.[88] As OMB concluded, "[t]he absence of such information is a continued obstacle to transparency, and it might also have adverse effects on public policy."[89]

To be sure, *Michigan* does not necessarily require an agency to conduct exhaustive, quantitative cost-benefit analyses—a point considered further below—but it should at least prompt agencies to identify costs in all circumstances and to monetize them when necessary to support reasoned judgment. It could even push hitherto reluctant agencies to finally give in to conducting rigorous cost-benefit accounting.

Michigan will also affect judicial review. Agency compliance with Executive Order 12,866 and its brethren is not subject to judicial review.[90] Limited judicial review is available under the Regulatory Flexibility Act[91]—the typical result in a successful challenge is for the agency to redo its analysis without altering its substantive

[84] 44 U.S.C. § 3502(5).

[85] Office of Management and Budget, 2014 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 34, June 2015, available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/2014-cost-benefit-report.pdf.

[86] *Id*. (emphasis added).

[87] *Id*.

[88] See *id.* at 106–07.

[89] *Id*. at 34.

[90] Helicopter Ass'n Int'l, Inc. v. FAA, 722 F.3d 430, 439 (D.C. Cir. 2013).

[91] 5 U.S.C. § 611(a)(4).

regulation[92]—and under the Unfunded Mandates Reform Act, which allows suits only to compel the agency to produce analyses, not to challenge their substance or conclusions.[93]

By contrast, agency regulatory actions are generally subject to potential vacatur under the APA's judicial review provisions and analogous statutory provisions.[94] And as *Michigan* teaches, proper consideration of costs is a component of "logical and rational" agency decisionmaking.[95] An agency's refusal to consider costs therefore renders its action arbitrary and capricious because it has "'entirely fail[ed] to consider an important aspect of the problem.'"[96] Accordingly, *Michigan* opens the door to judicial review of agencies' use of costs in regulating, even outside of areas where consideration of costs is specifically required by statute.

In sum, *Michigan* should prod agencies to take account of costs in more instances and should provide at least the potential for relief through litigation for affected parties when they do not.

III. Cost Consideration as a Check on the Regulatory State?

Even so, those hoping that *Michigan*—and greater use of cost-benefit analysis generally—will provide a potent check on regulatory agencies are likely to be disappointed. In the main, *Michigan's* impact is likely to be marginal. Indeed, recent experience suggests that it could even be used to justify greater regulation or to block deregulatory measures.

To begin with, *Michigan* does not say what exactly, short of not entirely ignoring costs, an agency is required to do. The majority opinion denies that, in making what it assumed would necessarily be a "preliminary estimate" of the costs and benefits of Section 112 regulation for power plants, the EPA was required "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value."[97] Instead, in the first instance, "[i]t

[92] See, e.g., U.S. Telecom Ass'n v. FCC, 400 F.3d 29, 42–43 (D.C. Cir. 2005).

[93] 2 U.S.C. § 1571(a)(2)(A).

[94] See 5 U.S.C. §§ 702, 706. See also 42 U.S.C. § 7607(b)(1), (d)(9) (analogous provisions applicable to certain actions under the Clean Air Act).

[95] 135 S. Ct. at 2706.

[96] *Id*. at 2707 (quoting State Farm, 463 U.S. at 43).

[97] *Id*. at 2711.

will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost."[98]

One may expect that, as with other applications of arbitrary-and-capricious review, courts will be particularly deferential to agency views regarding the assessment and consideration of costs. An agency's approach need only be "rational" to survive, and "a court is not to substitute its judgment for that of the agency."[99] Judicial deference is typically even greater regarding technical matters and matters within an agency's area of expertise.[100] And, "[i]n practice, a [cost-benefit analysis] is the kind of analysis that often requires an agency to make many predictions based on available scientific and technical evidence—such as, for example, predictions about the emission-reduction benefits associated with a particular air-pollution-control technology or predictions about the cost of implementing a particular workplace-safety regulation."[101] In the main, courts are unlikely to reverse such decisions due to flaws in consideration of costs "simply because there are uncertainties, analytic imperfections, or even mistakes" in an agency's analysis, but "only when there is such an absence of overall rational support as to warrant the description 'arbitrary or capricious.'"[102]

The result is that agencies will continue to have substantial flexibility in terms of how they consider costs and their ultimate conclusions. As a practical matter, the term "cost-benefit analysis" "can refer to a wide and divergent array of procedures and practices. At one end of the spectrum is the 'prudential algebra' Ben Franklin described. . . . At the other end of the spectrum is a highly technical and theorized branch of welfare economics that attempts to quantify and monetize all social costs and benefits for a whole range of alternatives using formal techniques—including discounting future costs and benefits to present net value—and then attempts to pinpoint the course of action for which marginal benefits are just equal

[98] *Id*.

[99] State Farm, 463 U.S. at 42–43.

[100] See, e.g., Troy Corp. v. Browner, 120 F.3d 277, 283 (D.C. Cir. 1997) (agency determinations are due "considerable deference, especially where the agency's decision rests on an evaluation of complex scientific data within the agency's technical expertise.").

[101] Cecot & Viscusi, *supra* note 30, at 590.

[102] Ctr. for Auto Safety v. Peck, 751 F.2d 1336, 1370 (D.C. Cir. 1985).

to marginal costs."[103] *Michigan*, and *Entergy* before it, suggest that what agencies are required to do lies somewhere in between these two extremes, quantifying costs when possible while also making qualitative judgments—for example, determining that particular items are *de minimis* and need not be considered or, Ben Franklin-style, analyzing based on magnitudes of expected cost and benefit items.[104] In short, there's no reason to believe that many rules will be vacated due to courts' disagreement with the rigor or substance of agency cost-benefit analyses.

And that may be for the best. As Michael Livermore and Richard Revesz have observed, the Obama Administration in particular "has shown that cost-benefit analysis can be used to support a regulatory agenda that substantially increases environmental and public-health protections."[105] They describe how "protection-oriented groups" have become increasingly sophisticated in their use of the tools of cost-benefit analysis to promote regulation and beat back deregulatory initiatives.[106] As much as free-market advocates have come to view consideration of cost as a defense against excessive regulation, their opponents on the other side of the issue increasingly view cost-benefit analysis as a powerful weapon in their own arsenal.[107] To the extent that there is some force to both sides' arguments in this debate, judicial review that defers substantially to agencies' view of things just is not going to make much difference on the whole.

In sum, no one should expect that courts will use *Michigan* to carefully scrutinize the particulars of agency cost accounting and thereby rein in regulatory overreach. But it will matter at the margins,

[103] Amy Sinden, Formality and Informality in Cost-Benefit Analysis, 2015 Utah L. Rev. 93, 99 (footnote omitted).

[104] Michigan, 135 S. Ct. at 2711; Entergy, 556 U.S. at 225–26 (authorizing "some form of cost-benefit analysis").

[105] Michael Livermore & Richard Revesz, Retaking Rationality Two Years Later, 48 Hous. L. Rev. 1, 28 (2011).

[106] *Id*. at 29–33. See also Coates, *supra* note 69, at 916 ("[Cost-benefit analysis] law can slow or stop *de*regulation as easily as it can slow or stop new regulation, particularly if consumer or investor advocates develop and fund their own [cost-benefit analysis] litigation agendas.") (emphasis in original).

[107] But see Bruce Kraus & Connor Raso, Rational Boundaries for SEC Cost-Benefit Analysis, 30 Yale J. on Reg. 289, 291 (2013) (describing OIRA oversight and increased use of cost-benefit analysis as "a Trojan horse for more *Business Roundtable*-style anti-regulatory litigation").

spreading cost consideration to areas where it has been absent until now—presumably because regulatory activities in those areas could not be easily justified in cost-benefit terms—and encouraging agencies to act rationally in using costs as an input to formulating rules. So confined, *Michigan* may have a modest anti-regulatory effect, as agencies that would prefer to ignore excessive costs are forced to account for them.

IV. Judicial Review of Scope, Not Substance, as a Constraint on Agency Decisionmaking

While courts may be reluctant to police the *substance* of agency cost-benefit analyses—due to lack of expertise and the norm of deference—they are on firmer ground in reviewing the *scope* of cost and benefit considerations. Put in APA terms, courts are perfectly competent and well-placed to review whether an agency "relied on factors which Congress has not intended it to consider" or "failed to consider an important aspect of the problem."[108] *Michigan* provides additional support for this approach, recognizing that costs and benefits are just additional factors that Congress intended would be considered in agency reasoning, absent statutory indication to the contrary. In that respect, *Michigan* may be an effective constraint on agency discretion, one that is more amenable to judicial implementation than second-guessing the details of cost-benefit analyses.

This aspect of the decision is reflected in the duel of metaphors between the majority and the dissent. To the majority, consideration of cost is not to be undertaken in gross, but with respect to the specific determinations and actions to which it is relevant. That's why the majority rejects the EPA's argument that "it need not consider cost when first deciding *whether* to regulate power plants because it can consider cost later when deciding *how much* to regulate them."[109] This logic is like someone deciding "to buy a Ferrari without thinking about cost, because he plans to think about cost later when deciding whether to upgrade the sound system."[110]

In the dissenting justices' view, the majority's metaphor "run[s] off the road" because the "EPA knows from past experience and

[108] State Farm, 463 U.S. at 43.

[109] 135 S. Ct. at 2709 (emphasis in original).

[110] *Id.*

expertise alike that it will have the opportunity to purchase that good in a cost-effective way."[111] The dissent proposes its own analogy, "to a car owner who decides without first checking prices that it is 'appropriate and necessary' to replace her worn-out brake-pads, aware from prior experience that she has ample time to comparison-shop and bring that purchase within her budget."[112]

But the dissent's analogy falls short in two illuminating respects. For one, what if, upon checking prices, the car owner learns that there are none within her budget? In that instance, she can change course and buy a bus pass. An agency, however, lacks such an easy option, having already exercised its discretion in a way with legal effect—more so than an idle or tentative decision by an individual consumer. Second, it is completely artificial to separate a decision to act from consideration of the costs and benefits of that act. When the dissent's car owner "decides" to replace her brake pads, she assumes that she will be able to afford new ones. And when she learns that brake pads have become excessively expensive, she can factor that into her thinking and then *change her decision*—in other words, she is still engaged in the decisionmaking process. There is, as the majority recognizes, a close nexus between an action and consideration of the factors relevant to undertaking that action. This is just common sense: one properly considers the pluses and minuses of taking a particular action before doing so. Unless, that is, one has already prejudged the matter without reasonable consideration of the circumstances, which may itself be arbitrary and capricious.[113]

Under the majority's approach, then, a court must scrutinize the scope of an agency's analysis of costs and benefits, ensuring that all aspects of an action are supported by adequate analysis and that the agency's analysis is appropriately aligned with the statutory authority at issue. This is essentially the approach taken by the D.C. Circuit in a series of cases vacating rules by the Securities and Exchange Commission due to shortcomings in that agency's evaluation and consideration of costs with respect to the statutory objectives of promoting

[111] *Id.* at 2725 (Kagan, J., dissenting).

[112] *Id.*

[113] See, e.g., Consumers Union of U.S., Inc. v. Consumer Prod. Safety Comm'n, 491 F.2d 810, 812 (2d Cir. 1974).

"efficiency, competition, and capital formation."[114] The first, *Chamber of Commerce v. SEC*, involved a rule requiring mutual funds to have boards with at least 75 percent independent directors and to have an independent chairman.[115] The court identified three flaws in the agency's reasoning: (1) it made no attempt to estimate the costs associated with electing independent directors; (2) it made no attempt to estimate the costs to funds of the possibility that independent chairman would hire additional staff; and (3) it failed to consider, as an alternative to the independent-chairman condition, a less burdensome disclosure requirement. While "uncertainty may limit what the Commission can do" the court explained, "it does not excuse the Commission from its statutory obligation to do what it can to apprise itself . . . of the economic consequences"—which the court defined by reference to statutory objectives—"of a proposed regulation before it decides whether to adopt the measure."[116] Likewise, *American Equity Investment Life Insurance Co. v. SEC* vacated a rule subjecting certain annuity contracts to federal regulation due to the Commission's failure to evaluate the rule's potential economic effects consistent with the same statutory objectives.[117] And *Business Roundtable v. SEC* vacated a "proxy access" rule requiring public companies to provide shareholders with information about and the ability to vote for shareholder-nominated board candidates.[118] The agency, the court found, "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."[119] Again, the court measured the agency's shortcomings by reference to the statutory objectives.[120]

What these cases have in common (with the possible exception of portions of *Business Roundtable* that more carefully scrutinize the SEC's accounting), and what they share with *Michigan*, is that they methodically

[114] 15 U.S.C. § 80a-2(c).

[115] 412 F.3d 133, 135 (D.C. Cir. 2005).

[116] *Id.* at 144.

[117] 613 F.3d 166, 176–79 (D.C. Cir. 2009).

[118] 647 F.3d 1144 (D.C. Cir. 2011).

[119] *Id*. at 1148–49.

[120] See, e.g., *id.* at 1148, 1155.

check that the agency did its homework, ensuring that all relevant costs and benefits have been considered with respect to each aspect of agency action, without second-guessing the agency's determinations and weighing of the evidence.[121] In this way, the D.C. Circuit has navigated an administrable middle course between abdication of any reviewing role and substitution of the court's views for the agency's own.

This approach is likely to have currency in litigation over the use of ancillary benefits, or "co-benefits," in cost-benefit analysis, including with respect to the EPA's Section 112 regulations on remand. In recent years, the EPA has relied extensively on particulate-matter co-benefits to justify regulations targeting power plants and other industrial sources, particularly under statutory authority other than that concerned with particulate-matter emissions.[122] For example, although the EPA projects that its MATS Rule will have little in the way of benefits from reducing power plants' emissions of hazardous air pollutants (the ostensible target of Section 112), the agency projects benefits of $36 to $89 billion per year from reductions in particulate-matter emissions due to plant shutdowns and the controls that must be installed to address emissions of hazardous air pollutants.[123] This is consistent with the EPA's approach in other recent air rulemakings.[124] For example, in its proposed carbon-dioxide regulations for

[121] See, e.g., Chamber of Commerce, 412 F.3d at 144 (tying cost issues to impacts on statutory factors of "efficiency and competition"); Business Roundtable, 647 F.3d at 1148 (same). For another good example of judicial review in this vein, see Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1215–17 (5th Cir. 1991) (same approach, under different statutory regime).

[122] In general, consideration of co-benefits is consistent with OMB guidance, although the guidance warns against "double-counting of benefits," as the EPA has been accused of doing with respect to projected particulate-matter reductions. See Office of Management and Budget, Circular A–4, at 26–27 (2003). Particulate matter is subject to an EPA-set National Ambient Air Quality Standard that is, in turn, enforced through several of the Clean Air Act's cooperative federalism programs. See generally 42 U.S.C. §§ 7408–7410, 7470–7479, 7501 et seq.

[123] 77 Fed. Reg. at 9,306, Table 2.

[124] See, e.g., 75 Fed. Reg. 35,520, 35,588/3 (June 22, 2010) (claiming $2.2 million in direct benefits from revised sulfur-dioxide standard and $15 billion to $37 billion in co-benefits due to reductions in particulate matter); 75 Fed. Reg. 9,648, 9,669/3 (Mar. 3, 2010) (promulgating Section 112 standards for stationary compression ignition engines used in power plants and other facilities and projecting monetized benefits only for particulate-matter co-reductions); RIA, Existing Stationary Spark Engine Hazardous Air Pollutant Rule at 1-3, Table 1-1 (Jan. 2013) (projecting monetized benefits only for incidental co-reductions of particulate matter and its precursors); RIA, Industrial,

existing power plants under Clean Air Act Section 111(d) (which the agency calls the "Clean Power Plan"), the EPA projects annual net monetized benefits from the proposed rule of between $46 billion and $84 billion.[125] Projected reductions in emissions of particulate matter and its precursors account for almost all of that amount.[126]

The *Michigan* dissenters accept the EPA's lopsided co-benefits estimate uncritically, citing it as reason enough to justify the EPA's decision to regulate.[127] Their credulity is easy to understand: courts aren't really in the business of second-guessing agency scientific determinations. Then again, a more inquisitive jurist might wonder why, if particulate-matter emissions are responsible for as much premature mortality and morbidity as the EPA claims, the agency doesn't crack down on them more through the Clean Air Act programs that actually target particulate matter but that do not allow the EPA to directly target particular disfavored source categories.[128] Such a judge would discover that the EPA's benefit estimates are based on aggressive extrapolation from limited epidemiological studies; are subject to significant uncertainty, such that zero benefits cannot be ruled out; lead to seemingly absurd results, such as the conclusion that up to a quarter of deaths are related to particulate-matter concentrations; and are primarily the result of reductions below the level that the EPA recently identified as "requisite to protect human health."[129]

Commercial, and Institutional Boilers and Process Heaters Hazardous Air Pollutant Rule, at 1-4 to 1-5, Tables 1-1 & 1-2, 7-21, Tables 7-2 & 7-3 (Feb. 2011) (same); RIA, Final Ozone NAAQS at 34, Figs. S2.5 & S2.6 (July 2011) (showing particulate-matter monetized benefits greatly outweighing ozone benefits); RIA, New Source Performance Standards and Existing Source Emission Guidelines for Sewage Sludge Incineration Units at 1-3, Table 1-1, 5-10, Table 5-3 (Sept. 2010) (projecting particulate-matter-related benefits of $110 to $270 million, out of total monetized benefits of $130–320 million).

[125] 79 Fed. Reg. 34,830, 34,840–41, Table 2 (June 18, 2014).

[126] *Id*. at 34,937–39, Tables 14–16.

[127] See 135 S. Ct. at 2725–26 (Kagan, J., dissenting).

[128] Compare 42 U.S.C. § 7410 (authorizing states to develop implementation plans to achieve ambient air quality standards for "criteria" pollutants, including particulate matter), with *id.* § 7412 (authorizing the EPA to directly regulate emissions of hazardous air pollutants from listed source categories). See also Cato Michigan Brief, *supra* note 49, at 30–33.

[129] See Sean Mulholland & James Broughel, Comment on Control of Air Pollution from Motor Vehicles, Mercatus Center, June 28, 2013, available at http://mercatus.org/sites/default/files/Mulholland_EPA_PIC_062813.pdf (surveying literature).

But a judge need not be especially skeptical to wonder whether it is proper for the EPA to use a program aimed at emissions of certain hazardous air pollutants to achieve a completely different purpose. *Michigan* suggests that it is not: an agency directed to determine whether "[Section 112] regulation is appropriate and necessary" must take that problem as Congress has framed it and may not "rel[y] on factors which Congress has not intended it to consider."[130] Under *Michigan's* logic, that includes projected benefits relating to things other than the statutory objective of reducing emissions of hazardous air pollutants. Such considerations are untethered from the EPA's Section 112 authority and from the provision's objective of addressing emissions of hazardous air pollutants.

Without definitively resolving this question, the *Michigan* majority flags it as one of concern and hints at its answer. The opinion pointedly observes that, per the EPA's projections, "[t]he costs to power plants [of regulation] were thus between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions of hazardous air pollutants."[131] When describing the EPA's attribution of billions in benefits to the rule, it notes that these are due almost entirely to reductions in emissions of "substances that are not covered by the hazardous-air-pollutants program."[132] The majority declines to "uphold the EPA's action because the accompanying regulatory impact analysis shows that, once the rule's ancillary benefits are considered, benefits plainly outweigh costs" on the ground that the agency did not follow that reasoning, while criticizing the dissent for looking to co-benefits at all.[133] And then, of course, there is the majority's reasoning regarding the relationship between statutory authority and consideration of cost.

Moreover, consideration of co-benefits chafes against broader principles of administrative law, as well as the constitutional separation of powers. At base, arbitrary-and-capricious review constrains agency discretion to the parameters set by Congress, prophylactically ensuring that agencies are carrying out the law rather than

[130] State Farm, 463 U.S. at 43. Cf. Mass. v. EPA, 549 U.S. 497, 533 (2007) ("But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute."); see also Am. Trucking, 531 U.S. at 466–67.

[131] 135 S. Ct. at 2706.

[132] *Id*.

[133] *Id*. at 2711.

creating it.[134] One need not be a separation-of-powers formalist to recognize the problem inherent in, say, the EPA administrator setting a particularly stringent emissions standard with the expectation that it will force the development of technology that may prove beneficial to his first love, space exploration. Even if that expectation is rational—that is, the technology likely will be developed and will be an enormous boon to spaceflight and to the nation as a whole—the consideration of that benefit when setting emissions standards is not rational, for the simple reason that space exploration is not an objective of any provision of the Clean Air Act.[135] With respect to the authority conferred by Congress to issue emissions standards, its advancement is an irrelevant consideration. Deeming that advancement a "benefit" doesn't change the result.[136]

Yet that is the approach that the EPA appears poised to adopt in reaffirming the MATS Rule on remand.[137] And it is the approach that the agency is being encouraged to take in future rules targeting greenhouse-gas emissions—to use co-benefit projections as "an overarching justification for setting more stringent GHG reduction targets and timelines."[138] But if the lower courts are faithful to *Michigan's* logic, that approach will be soundly rejected.

134 At the outer limits, failure to constrain agencies in this fashion—particularly with respect to the use of co-benefits—may raise nondelegation issues. See C. Boyden Gray, The Nondelegation Canon's Neglected History and Underestimated Legacy, 22 Geo. Mason L. Rev. 619, 643 (2015).

135 Cf. Mass. v. EPA, 549 U.S. at 533 ("Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.") (citation omitted).

136 Cf. Bluestone Energy Design, Inc. v. FERC, 74 F.3d 1288, 1294–95 (D.C. Cir. 1996) (holding that agency acted impermissibly when it considered "staff time and resources"—a cost factor—in making its determination).

137 David Doniger, Steady as She Goes: Lessons for the Clean Power Plan from the Supreme Court's Mercury and Healthcare Decisions, Huffington Post (July 6, 2015), http://www.huffingtonpost.com/david-doniger/steady-as-she-goes-lesson_b_7737828.html (citing co-benefit projections as evidence that "the MATS rule can be easily fixed" on remand); Dan Farber, Interpreting *Michigan v. EPA*, LegalPlanet.org (June 29, 2015), available at http://legal-planet.org/2015/06/29/interpreting-michigan-v-epa (similar).

138 Alice Kaswan, Climate Change, the Clean Air Act, and Industrial Pollution, 30 UCLA J. Envtl. L. & Pol'y 51, 74 (2012).

V. Conclusion

The majority opinion in *Michigan* does not stand alone, but is one of a number of recent opinions concerned with the enormous power and policymaking discretion wielded by the administrative state. Despite its modesty, it may have—in the near term, at least—the greatest impact of them all. *King v. Burwell*, for example, places limits on judicial deference to agencies' statutory interpretations,[139] but it is much too soon to tell how broadly applicable its reasoning may be or whether its approach was entirely opportunistic. Likewise, *Horne v. Department of Agriculture*[140] and *Yates v. United States*[141] both pushed back against dramatic government overreaching, albeit with reasoning that may be "a ticket good for one day only."[142] And across six separate opinions this past term—including one in *Michigan*—Justice Clarence Thomas laid out an originalist approach to the issues of administrative law, calling into question agency rulemaking, judicial deference to agencies, and certain agency adjudications.[143] If these seeds of doubt ever do bear fruit, it will not be for years or decades. And momentum continues to build for denying deference to agencies' interpretations of their own regulations, but with a majority decision supporting that result still elusive.[144]

But *Michigan* addresses more mundane matters and for that reason may have real impact. Every day, federal agencies take actions

[139] 135 S. Ct. 2480, 2488–89 (2015) (denying *Chevron* deference in "extraordinary case[]" of "deep economic and political significance" where agency lacks relevant expertise) (quotations omitted). That said, *King* may prove relevant to the lawfulness of the EPA's "Clean Power Plan" greenhouse gas regulations. See, e.g., Jeremy Jacobs, Lawyers Mine Health Care Ruling for Clean Power Plan Clues, Greenwire (June 25, 2015), available at http://www.eenews.net/greenwire/stories/1060020908/climate_digest.

[140] 135 S. Ct. 2419 (2015).

[141] 135 S. Ct. 1074 (2015).

[142] Richard M. Re, On 'A Ticket Good for One Day Only,' 16 Green Bag 2d 155 (2013), available at http://www.greenbag.org/v16n2/v16n2_articles_re.pdf.

[143] See Brian Lipshutz, Justice Thomas and the Originalist Turn in Administrative Law, Yale L.J. Forum, July 18, 2015, available at http://www.yalelawjournal.org/pdf/LipshutzForumEssayForWebsitePDF_zxeyeenu.pdf.

[144] See, e.g., Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in judgment) (questioning validity of this form of deference); *id.* at 1211–12 (Scalia, J., concurring in judgment) (same); *id.* at 1213 (Thomas, J., concurring in judgment) (same).

where costs should be a relevant consideration. After *Michigan*, agencies no longer have discretion to disregard the costs of their actions, or to proceed with actions whose costs are disproportionate to their benefits, in most instances. If one subscribes to the view that agencies, in some proportion of proceedings, disregard or downplay cost considerations so as to pursue preferred policies that may not pass cost-benefit muster, then this new attention to the costs of regulatory actions should promote cost-effectiveness and efficiency, at least at the margins. Given the enormous scope of federal agency activity, even a marginal improvement in overall efficiency can translate into substantial economy-wide benefits.

And that's just the small stuff. *Michigan* stands as an impediment to several of the Obama EPA's major actions under the Clean Air Act due to their reliance on co-benefits to justify otherwise excessive costs. While the majority opinion does not definitively resolve the permissibility of considering co-benefits in agency decisionmaking, its logic clearly constrains agencies to focus on the factors and objectives identified by Congress. Of all the Court's recent decisions attempting to cabin agency discretion, *Michigan* is the most modest and yet may also be the most consequential.