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LOPER BRIGHT AND THE ASCENDANCY OF THE COST-BENEFIT STATE

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The Supreme Court's overturning of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*[1] launched an earnest debate about the decision's implications. Understandably, the debate focused on the expected impact of *Loper Bright's* standard for judicial review of agency statutory interpretations on agency win rates, with some legal scholars predicting that applying the "due respect" standard articulated in *Skidmore v. Swift & Co.*,[2] as *Loper Bright* provides for, will not change the outcome in most cases.[3] One issue that has not received the attention it deserves, however, is that *Loper Bright* also significantly advanced what President Barack Obama's former regulatory czar and leading academic Cass Sunstein has called the "cost-benefit state"—the principle that "government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation."[4]

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[1] 144 S. Ct. 2244 (2024).

[2] 323 U.S. 134, 140 (1944) (holding that an agency's interpretation of a statute does not bind a reviewing court, that a court may accord "respect" to an agency depending upon the "thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

[3] *See, e.g.*, Richard J. Pierce, Jr., Loper Bright Enterprises v. Raimondo, Chevron *is Dead; Long Live* Skidmore, GEO. WASH. L. REV. ON THE DOCKET (July 8, 2024), https://www.gwlr.org/loper-bright-enterprises-v-raimondo-chevron-is-dead-long-live-skidmore [https://perma.cc/E2FE-R3QQ] (predicting that *Loper Bright* "will have only a modest effect on the likelihood that any agency will win or lose in a particular case" and that "agencies now will lose about 10 percent of the cases that agencies would have won" under the previous *Chevron* deference doctrine).

[4] CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2002); *see also*, *e.g.*, Jonathan S. Masur & Eric A. Posner, *Cost-Benefit*

The consensus on the cost-benefit state is reflected in a series of presidential orders over many decades.[5] These executive orders recognize that, despite its limitations, benefit-cost analysis (BCA) is the best decisional tool to ensure that regulation enhances, not undermines, societal well-being.[6] As the Office of Information and Regulatory Affairs (OIRA) during the Clinton Administration put it:

> [R]egulations (like other instruments of government policy) have enormous potential for both good and harm. Well-chosen and carefully crafted regulations can protect consumers from dangerous products and ensure they have information to make informed choices. Such regulations can limit pollution, increase worker safety, discourage unfair business practices, and contribute in many other ways to a safer, healthier, more productive, and more equitable society. Excessive or poorly designed regulations, by contrast, can cause confusion and delay, give rise to unreasonable compliance costs in the form of capital investments, labor and ongoing paperwork, retard innovation, reduce productivity, and accidentally distort private incentives.
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> The only way we know to distinguish between the regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs. Such analysis can also often be used to redesign harmful regulations

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Analysis and the Judicial Role, 85 U. CHI. L. REV. 935 (2018); Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1 (2017) [hereinafter Sunstein, *Arbitrariness Review*]; Paul R. Noe & John D. Graham, *The Ascendancy of the Cost-Benefit State*?, 5 ADMIN. L. REV. ACCORD 85 (2020).

[5] *Compare* Exec. Order No. 12,291, 3 C.F.R. § 127 (1981), *reprinted in* 5 U.S.C. § 601 (1982) (Reagan & George H.W. Bush), *with* Exec. Order No. 12,866, 3 C.F.R. § 638 (1993), *reprinted in* 5 U.S.C. § 601 (1994) (Clinton, George W. Bush, Obama, Trump & Biden), *and* Exec. Order No. 13,563, 3 C.F.R. § 215 (2011), *reprinted in* 5 U.S.C. § 601 (2012) (Obama, Trump & Biden).

[6] BCA is "[a] systematic quantitative method of assessing the desirability of government projects or policies when it is important to take a long view of future effects and a broad view of possible side-effects." OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-94, GUIDELINES AND DISCOUNT RATES FOR BENEFIT-COST ANALYSIS OF FEDERAL PROGRAMS, Appendix A (1992). BCA includes calculating and comparing the benefits and costs of regulatory options, including accounting for foregone alternatives and the status quo, with the goal of identifying the option that will maximize societal welfare. The terms BCA and "cost-benefit analysis" are often used interchangeably. BCA is used in this article because it is the term preferred by most practitioners. *See* SOC'Y FOR COST-BENEFIT ANALYSIS, *About SBCA*, https://benefit costanalysis.org [https:// perma.cc/W8PL-QNTU] (last visited Nov. 15, 2024). BCA is a positive method, a technical activity to reveal "what is," while benefit–cost balancing is a normative decision-making rule about "what ought to be." Noe & Graham, *supra* note 4, at 89 n.8.

> so they produce more good than harm and redesign good regulations so they produce even more net benefits.[7]

Unfortunately, the benefit-cost executive orders "have been far less effective than they could have been."[8] *Loper Bright* should significantly change that.

THE "BEST READING" OF STATUTES SHOULD CURB ONE OF THE GREATEST IMPEDIMENTS TO THE COST-BENEFIT STATE

In *Loper Bright*, the Supreme Court overruled the *Chevron*[9] doctrine because it violated the Administrative Procedure Act (APA).[10] The Court instructed the lower courts that going forward under the APA—and under "the traditional understanding of the judicial function" that the APA incorporates[11]—they "must exercise independent judgment" in determining the "best reading" of statutory provisions,[12] applying the traditional tools of statutory construction.[13] This has major ramifications for the cost-benefit state.

To be sure, public policy problems often have many causes, and so too do the impediments to the cost-benefit state.[14] "But one of the greatest, yet most readily addressable, impediments to the cost-benefit state is that regulatory agencies have interpreted their statutes to limit their obligation to fully engage in benefit-cost balancing and thus to comply with the presidential directives."[15]

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[7] OFF. OF INFO. AND REGUL. AFFS., OFF. OF MGMT & BUDGET, EXEC. OFF. OF THE PRESIDENT, REPORT TO CONGRESS ON THE COSTS & BENEFITS OF FEDERAL REGULATION 10 (1997); *see also* John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 487 (2008).

[8] *See* Noe & Graham, *supra* note 4, at 93.

[9] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

[10] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024) ("*Chevron* defies the command of the APA [5 U.S.C. § 706] that 'the reviewing court'—not the agency whose action it reviews— is to 'decide *all* relevant questions of law' and 'interpret ... statutory provisions.'") (quoting *Chevron*, 467 U.S. at 843 n.11).

[11] *See id.* at 2262.

[12] *Id.* at 2262–63.

[13] *See id.* at 2264.

[14] *See* Noe & Graham, *supra* note 4, at 93–94 & nn.21–26 (expressing concerns about the institutional limitations of agencies and OIRA, including bureaucratic turf battles, failure to use internal and external expertise, bias, OIRA's lack of resources, the volume of rules not submitted for OIRA review, interest group dynamics and presidential electoral politics, poor compliance with the benefit-cost executive orders and guidelines, and the lack of judicial enforcement).

[15] *Id.* at 94; *see also id.* at 94 n.25 ("We use the term 'benefit-cost balancing' consistent with the executive orders on regulatory planning and review. At a minimum, the benefits of the rule should justify its costs. In its more robust form, benefit-cost balancing should, all else being equal, lead to the selection of the regulatory alternative that maximizes net benefits."); John D. Graham & Paul R. Noe, *A Paradigm Shift in the Cost-Benefit State*, REGUL. REV. (Apr. 26, 2016), https://theregreview.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/ [https://perma.cc/QSU3-3Q59] ("[A]gencies too often interpret

The *Chevron* deference doctrine enabled this fundamental dysfunction. Despite the longstanding benefit-cost presidential orders and interagency regulatory reviews led by OIRA, agencies regulating under a wide swath of statutory provisions often claimed that statutory provisions either prohibited BCA or constrained them to one of many less optimal forms of cost analysis, such as cost-effectiveness analysis or feasibility analysis[16]—if they engaged in any cost analysis at all.[17] That holds not only for the executive agencies subject to the presidential orders, but also for the independent regulatory agencies that the orders unfortunately do not cover.[18] In some cases, agencies used *Chevron* deference to promulgate regulations—including deregulatory actions—that evidently did not pass muster under BCA.[19]

Thus, *Chevron* deference enabled regulatory whiplash and undermined reliance interests.[20] One important way it did so was to enable agencies to operate outside the bounds of the long-accepted cost-benefit framework.

A close review of a host of statutory interpretations shows that such anti-BCA interpretations, if not implausible, are hard to justify as the "best reading" of the statute required by *Loper Bright*.[21] Although many statutes are silent or ambiguous on the role of BCA, in *Entergy Corp. v. Riverkeeper, Inc.*[22] and *Michigan v. EPA*,[23] the Supreme Court applied the classic *State*

[statutes that are silent or ambiguous on benefit-cost balancing] as only allowing limited consideration of costs and benefits.").

[16] *See* Jonathan S. Masur & Eric A. Posner, *Norming in Administrative Law*, 68 DUKE L. J. 1383, 1388–93 (2019); Noe & Graham, *supra* note 4, at 117–18.

[17] *See* Noe & Graham, *supra* note 4, at 112–129.

[18] *See, e.g.*, *id.* at 128–29 (analyzing Business Roundtable v. SEC, 647 F.2d 1144, 1148–49 (D.C. Cir. 2011)).

[19] *See*, *e.g.*, Jonathan S. Masur & Eric A. Posner, *Chevronizing Around Cost-Benefit Analysis*, 70 DUKE L.J. 1109, 1116, 1123–24 (2021) (providing examples of agencies using *Chevron* to promulgate regulations that failed BCA).

[20] *See, e.g.*, Richard J. Pierce, Jr., *Two Neglected Effects of* Loper Bright, REGUL. REV. (July 1, 2024), https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/ [https://perma.cc/FU6F-ST85].

[21] *See, e.g.*, Noe & Graham, *supra* note 4, at 112–129; Masur & Posner, *supra* note 4, at 981 (arguing that "agencies should use [BCA], and courts are capable of forcing them to do so"); *id.* at 982–86 (appendix listing many statutory provisions that could be revisited); Jonathan S. Masur & Eric A. Posner, *Against Feasibility Analysis*, 77 U. CHI. L. REV. 657, 713–16 (2010) (appendix listing statutes that could be revisited).

[22] 556 U.S. 208, 222 (2009) (holding that EPA reasonably interpreted a Clean Water Act provision that is silent on cost but requires the "best technology available for minimizing adverse environmental impact" to allow a BCA approach). Notably, even though Justice Scalia cited *Chevron*, he also applied the traditional tools of statutory construction to hold that the statutory standard could reasonably be read to require efficient control technology. *See id.* at 217–223 (analyzing the statutory text as well as the text and structure of parallel Clean Water Act provisions).

[23] 576 U.S. 743, 752 (2015) (holding that EPA misconstrued the "capacious" statutory language "appropriate and necessary" as prohibiting it from considering the cost of implementing a regulation). Despite the *Chevron* deference doctrine, Justice Scalia concluded that the meaning of the statutory provision, read in context, was clear and thus did not warrant *Chevron* deference. *See id.*

Farm precedent—which held that reasoned decision-making requires consideration of all relevant factors[24]—to establish the background principle that regulatory agencies must consider costs and benefits, unless Congress explicitly prohibits doing so.[25]

Statutes can broadly be grouped into three categories: (1) statutes that seem to *require*[26] *or authorize* BCA; (2) statutes that are *silent or ambiguous* on BCA, such as technology-forcing statutes (for example, statutes that require the "best" technology)[27] or statutes that contain a broad "omnibus factor"[28] requiring consideration of all relevant factors (for example, statutes that authorize an agency to regulate as "appropriate," "reasonable," "necessary," "relevant," "practical," or "in the public interest"); and (3) statutes that seem to *prohibit* BCA.[29] Careful reviews have shown that there are very few statutes that prohibit BCA, and the combination of the first two categories under the cost-benefit default rule, which is further discussed below, means that the vast majority of regulatory statutes *require* BCA.[30]

Going forward, agencies claiming that a statute prohibits them from considering costs will bear the burden of showing that this is the best reading of the statute, without a thumb on the scale.

THE COST-BENEFIT DEFAULT RULE INFORMS THE "BEST READING" OF STATUTES AND "REASONED DECISION MAKING"

Loper Bright makes clear that, in exercising the independent judgment required by the APA, courts must ensure that (1) there has been a lawful delegation of authority from Congress to the agency; (2) the agency acted within statutory limits, and (3) the agency engaged in "reasoned decision

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[24] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[25] *See, e.g.*, Graham & Noe, *supra* note 15; Sunstein, *Arbitrariness Review*, *supra* note 4, at 40; Masur & Posner, *supra* note 4, at 976–81; Noe & Graham, *supra* note 4, at 85–87, 108–111.

[26] Noe & Graham, *supra* note 4, at 126–29; *see, e.g.*, Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (holding that in determining whether regulation is necessary or appropriate in the public interest, SEC must consider whether regulation will promote efficiency, competition, and capital formation).

[27] Noe & Graham, *supra* note 4, at 119–124; *see, e.g.*, *Entergy*, 556 U.S. at 213, 224–26 (holding that maximal regulation provision of Clean Water Act—"reflect the best technology available for minimizing adverse environmental impact"— allows benefit-cost balancing).

[28] Noe & Graham, *supra* note 4, at 124–125; *see, e.g.*, *Michigan*, 576 U.S. at 759–60 (holding that capacious Clean Air Act provision to regulate as "appropriate and necessary" required consideration of cost in determining whether to regulate).

[29] Masur & Posner, *supra* note 21, at 670; *see, e.g.*, Food Additives Amendment of 1958, Pub. L. No. 85-929, § 409(c)(3)(A) (codified at 21 U.S.C. § 348(c)(3)(A) and in scattered sections of 21 U.S.C.) ("Delaney Clause").

[30] *See* Noe & Graham, *supra* note 4, at 112–134 (analyzing many statutes that should be reexamined and implemented through quantitative benefit–cost balancing); *see also* Masur & Posner, *supra* note 4, at 977, 982–86 (appendix listing dozens of statutes that should be reexamined); Masur & Posner, *supra* note 21, at 713–16 (appendix listing statutes that should be reexamined).

making" within those boundaries.[31] In explaining "reasoned decision making," the Court referenced *State Farm* for the general principle that reasoned decision means that the agency cannot ignore an important aspect of the problem and must consider "all relevant factors."[32] The Court also directly quoted two pages of *Michigan*[33] that illuminate statutory interpretation and make clear that the relevant factors include cost.[34] As the *Michigan* Court explained, agencies have "long treated" cost "as a centrally relevant factor when deciding whether to regulate."[35] The exception would be if Congress instructed an agency to ignore cost in a statute authorizing a rule, which Congress did not do in using the "capacious" Clean Air Act language "appropriate and necessary" at issue in *Michigan*. Congress very rarely requires agencies to ignore costs, for obvious reasons.[36]

Specifically, the *Loper Bright* Court's citations of *Michigan* reflect its guidance to the lower courts and its understanding of "reasoned decision making." First, *Loper Bright* makes clear that the longstanding cost-benefit principle informs and constrains the best reading of the agency's statutory authority, including under broad and all-encompassing terms. While the *Loper Bright* framework provides for application of the non-delegation doctrine and "fixing the boundaries of the delegated authority,"[37] the Court also acknowledged that sometimes an agency may properly exercise a relatively broad delegation of authority. Even in such cases, however, *Loper Bright* counsels restraint. Citing *Michigan*, *Loper Bright* explains that statutes may empower an agency "to regulate *subject to the limits imposed* by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'"[38] In that passage in *Michigan*, the Court discussed not only the classic *State Farm* principle that an agency may not entirely fail to consider an important aspect of a problem, but also that important aspects of the problem include cost:

> In particular, "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes

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[31] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

[32] *Id.* (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

[33] 576 U.S. at 752, 750.

[34] *See Loper Bright,* 144 S. Ct. at 2263 & n.6 (recognizing that a statute may authorize an agency to exercise a degree of discretion, such as regulating subject to the limits imposed by a flexible statutory phrase or term such as "appropriate" or "reasonable," and noting as examples 42 U.S.C. § 7412(n)(1)(a), at issue in Michigan v. EPA, 576 U.S. 743, 752 (2015), as well as 33 U.S.C. § 1312(a), authorizing EPA to establish water-quality-related effluent limitations).

[35] 576 U.S. at 752–53; *see generally* Exec. Order No. 12,866, 3 C.F.R. § 638 (1993), *reprinted in* 5 U.S.C. § 601 (1994) (benefits of a regulation must justify the costs to the extent permitted by law); Exec. Order No. 13,563, 3 C.F.R. § 215 (2011), *reprinted in* 5 U.S.C. § 601 (2012) (same).

[36] *See, e.g.*, Noe & Graham, *supra* note 4, at 114–15.

[37] *Loper Bright*, 144 S. Ct. at 2262.

[38] *Id.* at 2263 & n.6 (citing *Michigan*, 576 U.S. at 752) (emphasis added).

> consideration of *all relevant factors*." Although this term *leaves agencies with flexibility*, an agency may not "entirely fai[l] to consider an important aspect of the problem" when deciding whether regulation is appropriate.
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> Read naturally in the present context, the phrase "appropriate and necessary" *requires* at least some attention to *cost*. … EPA's interpretation precludes the Agency from considering *any* type of cost—including, for instance, harms that regulation might do to human health or the environment. … No regulation is "appropriate" if it does significantly *more harm than good*.[39]

Second, in explaining that the role of a reviewing court is to ensure that the agency engaged in "*reasoned decisionmaking*" within the boundaries of flexible statutory terms or phrases, the Court again cited *Michigan*.[40] There, the *Michigan* Court explained that EPA's refusal to consider costs in deciding to regulate power plants was arbitrary and capricious because if "agencies are required to engage in *'reasoned decisionmaking'* … it follows that agency action is lawful only if it rests 'on a *consideration of the relevant factors*.'" EPA's decision to regulate power plants cost $10 billion a year, however, and "*EPA refused to consider whether the costs of its decision outweighed the benefits*."[41] Accordingly, the "reasoned decisionmaking" required by *Loper Bright* incorporates the consideration of costs and benefits when regulating, absent a clear statutory instruction to the contrary.

Thus, *Loper Bright* provides a legal foundation for the background cost-benefit principle reflected in a series of lower court[42] and Supreme Court opinions from *State Farm* (1983)[43] to *Entergy* (2009)[44] to *Michigan* (2015).[45] Legal scholars had advanced different theories for the legal foundation of this cost-benefit background principle, particularly federal common law[46] versus

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[39] *Michigan*, 576 U.S. at 750 (2015) (first quoting White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1266 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part), *rev'd sub nom.* Michigan v. EPA, 576 U.S. 743 (2015); then quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)) (emphasis added).

[40] *Loper Bright*, 144 S. Ct. at 2248 (citing *Michigan*, 576 U.S. at 750 (emphasis added)).

[41] *Id.* (citations omitted; emphasis added).

[42] *See, e.g.*, Business Roundtable v. SEC, 647 F.2d 1144, 1148–49 (D.C. Cir. 2011) (holding that SEC's "failure to 'apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation' makes promulgation of the rule arbitrary and capricious") (citations omitted).

[43] *See* 463 U.S. at 43 (explaining that an agency acts arbitrarily and capriciously if, among other things, it "entirely failed to consider an important aspect of the problem").

[44] *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 222 (2009).

[45] *See* 752 U.S. at 760; *see generally, e.g.*, Noe & Graham, *supra* note 4.

[46] *See* Masur & Posner, *supra* note 4, at 976 (discussing an "emerging default rule" under federal common law—which was not yet law—that "agencies must weigh costs and benefits, at least in some fashion, absent an explicit statement to the contrary").

the APA.[47] The search[48] for the legal foundation for the cost-benefit principle is over. In *Loper Bright*, the Supreme Court grounded the consideration of all relevant factors (including cost) in the APA. The APA incorporates "the traditional understanding of the judicial function,"[49] and there is good reason to think that this cost-benefit default rule applies in non-APA cases as well.[50]

Fortunately, BCA is the optimal decision procedure to ensure agencies engage in "reasoned decision making" by considering "all relevant factors." Done properly, BCA considers all welfare effects of regulation. BCA also is the best decision procedure for promoting public welfare because it seeks the option that maximizes societal well-being. In theory, BCA could support the same outcome as a perfectly functioning, fully informed free market would produce.

Other forms of decision procedures that agencies often use instead of BCA fall short—often far short—of considering all welfare effects of regulation. Examples of sub-optimal decision procedures that agencies use instead of BCA include the following:

- *feasibility analysis*—regulating as strictly as the affected industries can sustain—for example, regulating to the degree technologically feasible, unless triggering widespread plant shutdowns or unacceptably high unemployment;

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[47] *See* Sunstein, *Arbitrariness Review*, *supra* note 4, at 40 ("Under the APA, agencies must avoid arbitrariness, and a regulation that imposes costs without conferring benefits is arbitrary. The same is true of a regulation that increases environmental risks on net, or that imposes very high costs for trivial gains."); *see also id.* at 15 ("The dissenters [in *Michigan*] clearly adopted a background principle that would require agencies to consider costs unless Congress prohibited them from doing so. There is every reason to think that the majority—which did, after all, invalidate EPA's regulation—would embrace that principle as well."); Noe & Graham, *supra* note 4, at 94 (agreeing that "the courts are in the process of developing a cost-benefit default rule").

[48] *See, e.g.*, John D. Graham & Paul R. Noe, *Beyond Process Excellence: Enhancing Societal Well-Being*, *in* ACHIEVING REGULATORY EXCELLENCE 27 (Cary Coglianese ed., 2016) (discussing concern about "a large void in the architecture of administrative law: there is no general legal framework to require regulators to balance tradeoffs and design regulations that do more good than harm"); Graham & Noe, *supra* note 15 (recommending a presidential directive for all agencies to reexamine their statutory interpretations and implement their statutes through benefit-cost balancing). One EPA study found that "the return to society from improved environmental regulation is more than one thousand times EPA's investment in cost-benefit analysis." U.S. ENVT. PROT. AGENCY, EPA-230-05-87-028, EPA'S USE OF BENEFIT-COST ANALYSIS: 1981–1986, 5-2 (1987).

[49] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024).

[50] *Id.* at 2263 (by independently interpreting the statute, recognizing constitutional delegations, fixing the boundaries of the delegated authority and ensuring the agency has engaged in "reasoned decisionmaking" within those boundaries, "a court upholds the traditional conception of the judicial function that the APA adopts"); Michigan v. EPA, 576 U.S. 743, 759–60 (2015) (applying the Clean Air Act's judicial review provision, 42 U.S.C. § 7607(d), in a non-APA case and holding that EPA interpreted the statute, 42 U.S.C. § 7412(n)(1)(A), unreasonably when it deemed cost irrelevant to the decision whether to regulate power plants); *cf.* United States Sugar Corp. v. EPA, 113 F.4th 984 (D.C. Cir. 2024) (applying *Loper Bright* in a non-APA Clean Air Act case).

- *narrow tradeoffs*—focusing on a few important effects of regulation while ignoring others;
- *quality adjusted life years/cost-effectiveness analysis*—determining how a particular budget can be best spent to advance well-being, but without BCA or other welfare analysis to determine the budget in advance;
- *break-even analysis*—a kind of incomplete and deficient BCA sometimes used when benefits (or rarely, costs) are highly uncertain, estimating a "break-even point" of the quantify of benefits that the regulation must produce for costs to equal benefits;
- *democratic procedures*—soliciting the views of interested parties to try to ensure that a regulation reflects their views, but at the risk of excluding some affected people, giving undue weight to others, and gaming;
- *norming*—surveying firms and choosing a standard somewhere in the distribution of existing practices; and
- *intuitive, ad hoc balancing*—assessing possible effects of regulation broadly and informally, without monetization of benefits (and sometimes costs). This approach is prone to error and bias, is likely not to consider or properly weight certain benefits and costs, presumes extraordinary intellectual and moral clarity of the decider, lacks transparency, and is easily manipulated.[51]

Finally, courts already have shown that they are quite capable of reviewing agency BCA.[52] Properly performed, quantitative BCA enhances review by generalists and courts.[53] And as advancements have been made in BCA practice, BCA has been gaining acceptance as an essential part of reasoned agency decision-making.[54] Greater use of BCA also could support greater regulatory stability.[55]

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[51] *See* Masur & Posner, *supra* note 16, at 1388–93; *see also* Noe & Graham, *supra* note 4, at 115–19; John D. Graham & Paul R. Noe, *A Reply to Professor Amy Sinden's Critique of the Cost-Benefit state*, REGUL. REV. (Sept. 17, 2016), https://www.theregreview.org/2016/09/27/graham-noe-reply-critique-cost-benefit-state/ [https://perma.cc/85BB-TEYB] (arguing that BCA is the optimal decision procedure to maximize societal well-being and other decision procedures are flawed).

[52] *See*, *e.g.*, Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575 (2015); Masur & Posner, *supra* note 4, at 981 ("agencies should use [BCA], and courts are capable of forcing them to do so"); *id.,* at 982–86 (appendix listing many statutory provisions that could be revisited); Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593 (2019); *see also*, Reeve T. Bull & Jerry Ellig, *Judicial Review of Agency Regulatory Impact Analysis: Why Not the Best?*, 69 ADMIN. L. REV. 725 (2017) (arguing that courts could effectively review the quality of agencies' regulatory impact analyses if they were given more concrete guidance on what a regulatory impact analysis must include); Reeve T. Bull & Jerry Ellig, *Statutory Rulemaking Considerations and Judicial Review of Regulatory Impact Analysis*, 70 ADMIN. L. REV. 873 (2018) (arguing that judicial review is a key element that induces agencies to respond to analytic requirements).

[53] Masur & Posner, *supra* note 4, at 939–40.

[54] *See* Cecot, *supra* note 52.

[55] *See id.* at 1593–94 (arguing that BCA promotes regulatory stability around transparent and increasingly efficient policies, including because (1) a prior BCA provides a powerful reference point for courts to take a "hard look" if an agency contradicts its factfinding, and

Thus, BCA is the best decision procedure for ensuring reasoned decision making.[56] Proponents of rational regulation no longer need to tentatively navigate through silent or ambiguous authorizing statutes.[57] The default rule that agencies must consider the costs and benefits of regulations is now anchored in the APA's arbitrary and capricious standard.

"DUE RESPECT" SHOULD ADVANCE THE COST-BENEFIT STATE

Although *Loper Bright* makes quite clear that courts—not agencies—must say what the law is, the Court also recognized that the interpretations of agencies' administering statutes may deserve "due respect."[58] The Court instructed lower courts that they "*may* ... seek aid from" an agency's statutory interpretations,[59] when the agency is exercising its official duties and specialized experience.[60] This body of experience and informed judgment—especially if it rests on factual premises within the agency's expertise—may provide courts (and litigants) with *"guidance*."[61] The *weight* a court should accord an agency's interpretation depends on the (1) "*thoroughness* evident in its consideration," (2) "*validity* of its *reasoning*," (3) "*consistency* with earlier and later pronouncements" (especially if issued contemporaneously with the statute), and (4) "all those factors giving it power to *persuade*" (not control).[62] In cases implicating technical statutory interpretations, *Loper Bright* also recognizes that courts can benefit from the expertise of the agency—and challengers.[63]

Agencies that embrace benefit-cost balancing should thrive under these *Skidmore* factors. BCA provides the optimal framework to advance societal well-being in regulatory decision-making[64] while fostering thoroughness in consideration, the validity of reasoning, consistency, and other factors with the power to persuade.

CONCLUSION

Loper Bright is about more than who is the decider on statutory interpretations and whether agencies are more likely to win or lose cases compared with the *Chevron* regime (assuming nothing else changes). *Loper*

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(2) by focusing on incremental costs and benefits, BCA can reveal whether it is reasonable to change course).

[56] *See*, *e.g.*, Masur & Posner, *supra* note 16, at 1383, 1388–93, 1430–31; Noe & Graham, *supra* note 4, at 118; *see also* Graham, *supra* note 7; U.S. ENVT. PROT. AGENCY, *supra* note 48, at 2, S-3, S-4.

[57] *See, e.g.*, Noe & Graham, *supra* note 4, at 112–134.

[58] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267 (2024).

[59] *Id.* at 2262 (emphasis added).

[60] *See id.* at 2259 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[61] *Id.* (citing *Skidmore*, 323 U.S. at 140) (emphasis added).

[62] *Skidmore*, 323 U.S. at 140 (emphasis added).

[63] *See Loper Bright*, 144 S. Ct. at 2259, 2262, 2267 ("The parties and *amici* in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives.").

[64] *See, e.g.*, Noe & Graham, *supra* note 4, at 92–93; Graham & Noe, *Beyond Process Excellence*, *supra* note 48, at 72–87.

Bright can change how regulations are developed. It can curb the deadweight loss from the regulatory whiplash that is far too common in our politically polarized times. It can lead to more evidence-based, efficient and sustainable regulations that stand the test of time. The cost-benefit state is here.