

THE SOUNDS OF SILENCE: COST-BENEFIT CANONS IN  
*ENERGY CORP. V. RIVERKEEPER, INC.*

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I. INTRODUCTION

The debate over the use of cost-benefit analysis (“CBA”) in environmental, health, and safety (“EHS”) regulation has important cultural as well as methodological dimensions. Environmentalists and other pro-regulatory forces argue that CBA ignores the moral urgency of EHS regulation, is relentlessly anti-regulatory in its design and implementation, and impoverishes the political discourse.<sup>1</sup> On the other side, proponents of CBA argue that it is essential for balanced, welfare-enhancing regulatory decisions, is neutral as between pro- and anti-regulatory outcomes, and contributes to transparency and informed political debate.<sup>2</sup>

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<sup>1</sup> See, e.g., Amy Sinden, Douglas A. Kysar & David M. Driesen, *Cost-Benefit Analysis: New Foundations on Shifting Sand*, in 3 REGULATION AND GOVERNANCE 48, 63 (2009); FRANK ACKERMAN & LISA HEINZERLING, PRICELESS (2004); MARK SAGOFF, THE ECONOMY OF THE EARTH 92–95 (1988).

<sup>2</sup> See, e.g., Randall Lutter, John F. Morall III & W. Kip Viscusi, *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations*, 37 ECON. INQUIRY 599 (1999); CASS R. SUNSTEIN, RISK AND REASON 35 (2002) [hereinafter SUNSTEIN, RISK AND REASON]; MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 101–23 (2006).

Congress's approach to CBA is mixed: it sometimes expressly provides for the use of CBA, sometimes forbids its use, and sometimes is silent or ambiguous on the issue. Among ten major environmental regulatory statutes enacted in the 1960s, 1970s, and 1980s, only two expressly authorize the balancing of benefits and costs for core agency actions.<sup>3</sup> The remainder rely mainly on harm-based or technology-based approaches that either expressly exclude cost-benefit balancing or at least do not expressly provide for it. More recently, Congress provided for cost-benefit balancing in setting maximum contaminant levels for drinking water but precluded it in the setting of pesticide tolerances.<sup>4</sup> Congress has generally not shown great interest in reworking earlier provisions to specifically include CBA.<sup>5</sup>

By contrast, from the 1980s onward, the executive branch in both Republican and Democratic administrations has required CBA for all "significant" federal regulations unless conducting such analysis is legally prohibited.<sup>6</sup> Additionally, where the law permits, agencies are to propose and adopt only those regulations whose benefits justify their costs.<sup>7</sup> The requirement to conduct CBA applies even to regulations to implement statutory provisions that forbid weighing of costs and benefits.<sup>8</sup> This places agency officials potentially in the anomalous position of overseeing the development of a cost-benefit analysis of proposed rules that they must ignore in making their final decision.

This Article addresses what the courts are or should be doing to navigate this divide between the norms and practices of the two politically accountable branches of government on the use of CBA. In particular, focusing on the Supreme Court's recent decision in *Entergy Corp. v. Riverkeeper, Inc.*,<sup>9</sup> the Article examines whether courts are or should be ap-

<sup>3</sup> See Toxic Substances Control Act § 6(c)(1), 15 U.S.C. § 2605(c)(1) (2006); Federal Insecticide, Fungicide and Rodenticide Act § 2(bb), 7 U.S.C. § 136(bb) (2006). Statutes enacted during this period that did not authorize CBA include the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006); Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006); Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2006); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675; Safe Drinking Water Act (pre-1996 amendments), Pub. L. No. 93-523, 88 Stat. 1660 (1994); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6986; Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001–05, 11021–23, 11041–050; and the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762.

<sup>4</sup> Safe Drinking Water Act Amendments of 1996 § 103, 42 U.S.C. § 300g-1(b)(3); Food Quality Protection Act of 1996 § 405, 21 U.S.C. § 346a(b)(2)(A) (2006).

<sup>5</sup> Compare Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1508–09 tbl.2 (2002), with Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENVTL. L. 191, 196–97 & n.25 (2004), and Thomas O. McGarity, *Professor Sunstein's Fuzzy Math*, 90 GEO. L.J. 2341, 2343 (2002).

<sup>6</sup> See Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (repealed 1993); Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended* in 5 U.S.C. § 601 app. at 745–49 (2006).

<sup>7</sup> Exec. Order No. 12,866 § 6(a)(C)(1)(b), 3 C.F.R. at 638.

<sup>8</sup> For example, the Clean Air Act precludes consideration of implementation costs in developing National Ambient Air Quality Standards. See *infra* Part V.C.

<sup>9</sup> 129 S. Ct. 1498 (2009).

plying a cost-benefit “canon,” “presumption,” or “default rule” in interpreting statutes that are silent or ambiguous on the question. Proponents and opponents of CBA have advanced competing interpretive rules. Perhaps most notably, Cass Sunstein has argued for a default rule that favors agency use of CBA where the authorizing statute is silent or unclear.<sup>10</sup> His argument is both positive (that the federal courts are developing such a rule) and normative (that such a rule is desirable as part of progress toward a fully realized cost-benefit state).

Sunstein’s positive claim has been questioned in light of the Supreme Court’s historical reluctance to sanction agency balancing of costs and benefits in the absence of express congressional authorization. As Amy Sinden has demonstrated, the relevant Supreme Court cases have seemed “to endorse, if anything, a default principle *disfavoring* CBA.”<sup>11</sup> However, *Entergy*, decided on April 1, 2009, offers new encouragement to Sunstein and others in the pro-CBA presumption camp. The case addresses the question of whether the Environmental Protection Agency’s (“EPA”) use of cost-benefit analysis was permissible in setting standards under section 316(b) of the Clean Water Act (“CWA”)<sup>12</sup> for cooling water intake structures for electric power plants. As section 316(b) does not expressly address this issue, the Court’s interpretive challenge was what to make of the silence. By a vote of six to three, with Justice Breyer concurring in part and dissenting in part in a separate opinion, the Court upheld EPA’s use of CBA in setting the section 316(b) standards.<sup>13</sup>

Notwithstanding this outcome, there are questions about the extent to which the opinion for the Court by Justice Scalia or the partial concurrence by Justice Breyer reflect a pro-CBA presumption. If the ruling in *Entergy* can be said to reflect any presumption about CBA at all, that presumption may fall pointedly short of an embrace of strict CBA formulations. Justice Breyer’s partial concurrence is revealing on this issue. After carefully rehearsing the pros and cons of CBA, Justice Breyer countenances a rudimentary form of CBA — a rough balancing of costs and benefits to screen out regulatory options whose costs are wholly disproportionate to their benefits.<sup>14</sup> He excludes from his default interpretation a more rigorous CBA

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<sup>10</sup> CASS R. SUNSTEIN, *THE COST-BENEFIT STATE* 59–60 (2002) [hereinafter *SUNSTEIN, THE COST-BENEFIT STATE*]; *SUNSTEIN, RISK AND REASON*, *supra* note 2, at 202–05.

<sup>11</sup> Sinden, *supra* note 5, at 240.

<sup>12</sup> 33 U.S.C. § 1326(b) (2006).

<sup>13</sup> *Entergy*, 129 S. Ct. 1498. Justice Breyer agreed with the majority that EPA’s use of a cost-benefit comparison reflected a permissible interpretation of section 316(b), but differed with the majority opinion on the adequacy of EPA’s explanation for the standard applicable to site-specific variances from the section 316(b) standards (namely, a change from the agency’s “traditional ‘wholly disproportionate’ standard” to a “significantly greater” standard) and would have remanded on that question — hence the characterization of his opinion as “concurring in part and dissenting in part.” *See id.* at 1515–16 (Breyer, J., concurring in part, dissenting in part). This Article focuses on the concurrence element of Justice Breyer’s opinion.

<sup>14</sup> *See id.* at 1514–15.

keyed to achieving an efficient or welfare-maximizing outcome. While less definite on this question, Justice Scalia's opinion can also be read to suggest that in the absence of express statutory authorization, CBA should be limited to an informal weighing of costs and benefits as a reasonableness check. For their part, the three dissenting Justices are openly skeptical of CBA and the related efficiency goal as contrary to the purposes of remedial legislation such as the Clean Water Act. If the emergence of "the cost-benefit state" in America is inevitable, as Sunstein has argued,<sup>15</sup> the Supreme Court has not placed itself in the vanguard of that transformation.

By signaling greater receptivity to CBA in statutory interpretation, *Ennergy* takes a modest step toward reconciling modern executive branch practice with the legislation of the 1970s and 1980s. I argue that this is a defensible exercise of judicial power, but it is only a provisional step, unlikely to be the final resolution of interpretive doctrine affecting CBA. This provisional quality reflects the uncertain and transitional state of CBA itself. Further evolution of judicial doctrine will likely depend on further refinements in CBA methodology and a convergence of views both in and out of government on the appropriate uses of CBA in making regulatory policy.

## II. DEFINING CBA

My purpose here is not to critique or defend CBA, but to capture the debate about this methodology sufficiently to illuminate what is at stake in *Ennergy* and to determine whether the decision is a justifiable exercise of judicial power. For this analysis, I offer two versions of CBA, a weak form and a strong form, with differing methodological and substantive characteristics. This broad categorization necessarily ignores many of the differences between CBA proponents and critics, but it will do for the task at hand.

The strong form of CBA is a creature of welfare economics. It is both commensuralist and welfarist — that is, it describes the effects of regulatory options, both pro and con, on a single monetary scale, and its function is to maximize overall well-being.<sup>16</sup> Economists have viewed CBA as a tool for achieving Kaldor-Hicks efficiency.<sup>17</sup> Recently, however, Matthew Adler and Eric Posner have sought to uncouple CBA from Kaldor-Hicks efficiency and to provide independent justification for CBA as a welfare-maximizing procedure.<sup>18</sup> Procedurally, while some proponents of the strong form of CBA — Sunstein among them — acknowledge that it may not be possible to

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<sup>15</sup> SUNSTEIN, THE COST-BENEFIT STATE, *supra* note 10, at ix; SUNSTEIN, RISK AND REASON, *supra* note 2, at 4–5.

<sup>16</sup> Matthew D. Adler, *Cost-Benefit Analysis*, in 1 ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES 304 (David S. Clark ed., 2007).

<sup>17</sup> *Id.*

<sup>18</sup> ADLER & POSNER, *supra* note 2, at 25–26.

monetize all costs and benefits, complete monetization remains the goal.<sup>19</sup> Substantively, CBA's goal is to increase aggregate welfare. Therefore, there is a presumption against regulatory options whose costs exceed their benefits.<sup>20</sup> Sunstein would allow this presumption to be overcome in some circumstances — for example, where there are distributional concerns or where rights of those affected may be at issue.<sup>21</sup> Some (but not all) other CBA proponents agree that even a well-conducted CBA, while providing crucial input, is not necessarily decisive and that decision makers may take account of other morally relevant considerations, including non-welfarist values.<sup>22</sup>

The weak form of CBA is simply a weighing of all the desirable effects of a proposed action against all the undesirable effects. It shares neither the commensuralist nor welfarist features of the strong form of CBA. There is no imperative for pros and cons to be converted to a common metric, such as dollars; anticipated benefits of regulation may be considered in their natural units, such as lives saved, acres of habitat protected, or diversity of species restored.<sup>23</sup> This weak form of CBA is not tied to an optimizing goal, such as welfare maximization. It operates instead to weed out regulatory alternatives that may be perceived as absurd, irrational, or otherwise not in accord with common sense, as where an option's costs are grossly disproportionate to its benefits.<sup>24</sup> This distinction between reasonableness (in the sense of avoiding grossly disproportionate outcomes) and welfare maximization is important to the analysis that follows.

### III. CBA AND THE CULTURE WARS

CBA in its strong form is suspect to most environmentalists and health and safety advocates who see it as “a stand-in for a deregulatory agenda that simultaneously blocks important new . . . initiatives and seeks to undo past

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<sup>19</sup> SUNSTEIN, *THE COST-BENEFIT STATE*, *supra* note 10, at 20; SUNSTEIN, *RISK AND REASON*, *supra* note 2, at 110–11.

<sup>20</sup> SUNSTEIN, *THE COST-BENEFIT STATE*, *supra* note 10, at ix.

<sup>21</sup> *Id.* at 21; SUNSTEIN, *RISK AND REASON*, *supra* note 10, at 112; CASS R. SUNSTEIN, *LAWS OF FEAR* 130 (2005). See Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, *REGULATION*, Jan.–Feb. 1981, at 33 (stating that CBA includes a presumption that action should not be taken unless benefits outweigh costs and arguing for desirability of expressing all benefits and costs in common scale).

<sup>22</sup> See RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 15 (2008); ADLER & POSNER, *supra* note 2, at 52–53.

<sup>23</sup> See Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 *HOUS. L. REV.* 97, 101 (1987) (describing a version of CBA not dependent on monetization); John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 *U. PA. L. REV.* 395, 447–48 (2008) (describing this form of CBA as “intuitive balancing”).

<sup>24</sup> See DANIEL A. FARBER, *ECOPRAGMATISM* 114–23 (1999) (proposing a form of CBA to assure that costs of policies are “not patently disproportional to the potential benefits”).

progress.”<sup>25</sup> This resistance is a function of history, methodology, and values.

Ronald Reagan, the first president to require CBA in centralized review of all significant federal regulations, used it to advance his deregulatory agenda.<sup>26</sup> Under Reagan, the Office of Management and Budget (“OMB”) delayed agency rulemakings by demanding additional information to complete cost-benefit analyses, and killed or modified rules by emphasizing industry costs over more difficult-to-quantify environmental and health benefits.<sup>27</sup> Pro-regulatory groups came to see the methodology itself as inimical to their interests and, in Richard Revesz and Michael Livermore’s account, passed up opportunities during the Clinton Administration to make CBA a “‘neutral stadium,’” even as anti-regulatory scholars continued to refine CBA in accordance with their policy preferences.<sup>28</sup>

In part as a function of this history, some features of CBA methodology in its strong form may stack the deck in favor of anti-regulatory outcomes. These features include failure to take wealth distribution into account in valuation, use of discount rates that unduly favor current consumption, failure to anticipate adaptive and cost-saving responses of regulated entities in estimating costs, and failure to account for the difference between willingness-to-pay and willingness-to-accept values (the endowment effect).<sup>29</sup> Revesz, Livermore, and other CBA proponents argue that by addressing these and other methodological issues, CBA can shed its historically anti-regulatory skin and be made a trusted neutral policy tool.<sup>30</sup> But critics maintain that CBA is inevitably skewed against regulation due to the relative ease of measuring monetary costs of regulation compared to measuring prospective benefits, monetary or otherwise.<sup>31</sup> They also argue that CBA suffers unavoidably from a level of indeterminacy that makes it of dubious value as an analytical device, much less as a rule of decision.<sup>32</sup>

Perhaps even more fundamentally, the strong form of CBA is subject to values-based attacks aimed at both its welfarist goal and its commitment to monetization.<sup>33</sup> These attacks typically reject the welfarist values advanced

<sup>25</sup> REVESZ & LIVERMORE, *supra* note 22, at 15–16.

<sup>26</sup> *See id.* at 24.

<sup>27</sup> *See id.* at 24–30.

<sup>28</sup> *Id.* at 31–39 (quoting Sally Katzen, Director of OMB’s Office of Information and Regulatory Affairs during the Clinton Administration).

<sup>29</sup> *See id.* at 14, 95–96, 131–39; Sinden et al., *supra* note 1, at 63; Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 401–07 (1981).

<sup>30</sup> REVESZ & LIVERMORE, *supra* note 22, at 10; ADLER & POSNER, *supra* note 2, at 171–72. Others argue that CBA is already being used neutrally to prompt deserving regulation and discourage ill-advised rules. *See* Graham, *supra* note 23, at 465–480; SUNSTEIN, THE COST-BENEFIT STATE, *supra* note 10, at 6–10; SUNSTEIN, RISK AND REASON, *supra* note 2, at 26–27.

<sup>31</sup> *See* ACKERMAN & HEINZERLING, *supra* note 1, at 37–40; Sinden et al., *supra* note 1, at 58–59.

<sup>32</sup> *See* Sinden, *supra* note 5, at 205–10.

<sup>33</sup> *See* Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CAL. L. REV. 323, 326 (2008).

by CBA in favor of an approach based on duties to avoid harm to others or the living environment. This duty-based approach elevates the priority of EHS concerns over competing considerations. For example, rather than evaluating regulatory options in terms of their overall effect on social well-being, environmentalists may urge that options be measured against a duty to avoid harm to others (e.g., ensure air quality requisite to protect human health) or to protect ecosystems or species (e.g., assure no jeopardy to continued existence of endangered species). Costs, if considered at all, are relevant only to whether regulation would be economically ruinous or otherwise insupportable, not to whether it would be welfare-enhancing. Provisions reflecting a duty-based approach are common in EHS laws, although these same provisions can also be defended on welfarist grounds.<sup>34</sup> As noted previously, some CBA proponents agree that welfare maximization is not the only morally relevant consideration, but critics argue that dominant “optimific frameworks such as welfarism [have] a tendency to crowd out competing frameworks.”<sup>35</sup>

For pro-regulatory factions, monetization also presents a moral problem with CBA in its strong form. Placing a monetary value on human life and health or on environmental goods that are normally not traded in markets ignores the fact that they belong to “the realm of specially valued things.”<sup>36</sup> Frank Ackerman and Lisa Heinzerling have developed this argument at length with their thesis that “human life, health, and nature cannot be described meaningfully in monetary terms; they are priceless.”<sup>37</sup> Mark Sagoff has argued similarly that monetizing environmental goods is a “category mistake,” confusing citizen values with consumer preferences.<sup>38</sup> In his view, pricing non-market environmental goods not only debases the value of the goods, but cheapens the public discourse.<sup>39</sup> Amy Sinden, Doug Kysar, and David Driesen link commensurability to concerns about the hegemony of welfarism, arguing that monetization inevitably elevates welfarism in the public discourse and reduces attention to other, non-consequentialist considerations.<sup>40</sup> The critics of “immoral commodification” stop short of claiming that we must protect human life, health, and the environment at any cost;

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<sup>34</sup> See Sinden et al., *supra* note 1, at 63–66; David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 6–7 (2005).

<sup>35</sup> Sinden et al., *supra* note 1, at 54–57.

<sup>36</sup> Kelman, *supra* note 21, at 36.

<sup>37</sup> ACKERMAN & HEINZERLING, *supra* note 2, at 8.

<sup>38</sup> See SAGOFF, *supra* note 1, at 92–97.

<sup>39</sup> See *id.* But see Carol M. Rose, *Environmental Faust Succumbs to Temptations of Economic Mephistopheles, or, Value by Any Other Name is Preference*, 87 MICH. L. REV. 1631 (1989) (reviewing SAGOFF, *supra* note 1). For a more recent assertion of the fundamental distinction between political and economic domains, see MARK SAGOFF, PRICE, PRINCIPLE, AND THE ENVIRONMENT 13 (2004).

<sup>40</sup> See Sinden et al., *supra* note 1, at 55.

their argument is that translating the value of non-market goods into monetary terms inevitably obscures or denigrates their real worth.<sup>41</sup>

Advocates on the other side display comparable moral intensity in defense of CBA. The comprehensive comparison of costs and benefits provided by CBA is designed to approximate overall welfare. While not perfect, CBA is much more likely to produce a welfare-enhancing result than procedures that maximize along only one dimension of well-being, such as workplace safety, or that ignore welfare considerations entirely in favor of deontological rights or duties, such as species protection. While well-being may not be the only morally relevant consideration, it is certainly an important one. CBA ensures that it is brought into the decision-making process, helping to avoid harmful misallocations of limited societal resources. To drive this point home, some CBA proponents have argued that EHS regulations untempered by cost-benefit balancing can cause more deaths than they prevent.<sup>42</sup>

CBA proponents respond to the commodification argument by distinguishing between pricing (a mechanism to facilitate allocation of scarce societal resources) and commodification (denying the special worth of life, health, and the environment).<sup>43</sup> Pricing for purposes of CBA, they argue, does not necessarily produce commodification; we trade many things we treasure in markets, including pets, wedding rings, and nature preserves. And there is no evidence that the mere pricing of goods itself, as part of the CBA process, reduces welfare by causing distress to individuals who value those goods.<sup>44</sup> Proponents also assert the advantages of systematically quantifying costs and benefits. In Sunstein's view, these include overcoming limitations in our intuitive assessment of risk (heuristics), limitations that can lead to significant errors in decision making. CBA functions as a "natural corrective . . . because it focuses attention on the actual effects of regulation."<sup>45</sup> By eliciting this information, it also enriches the public debate, increases the transparency of the regulatory process, and enhances the political accountability of agency decision makers.<sup>46</sup>

Despite the efforts of progressive advocates for CBA, such as Sunstein, Revesz, Livermore, Adler, and Posner, the EHS community continues to resist CBA as systematically undervaluing environmental and other health and safety concerns.<sup>47</sup> For their part, CBA proponents object to the willingness of EHS advocates to sacrifice the greater good to their specialized concerns. This continuing divide complicates attempts to reconcile competing institu-

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<sup>41</sup> See ACKERMAN & HEINZERLING, *supra* note 1, at 9; SAGOFF, *supra* note 1, at 80.

<sup>42</sup> See, e.g., Lutter et al., *supra* note 2; Cass R. Sunstein, *Cost-Benefit Analysis and the Environment* 18–19 (John M. Olin Law & Economics Working Paper No. 227, 2004).

<sup>43</sup> See, e.g., REVEZS & LIVERMORE, *supra* note 22, at 13–14; SUNSTEIN, RISK AND REASON, *supra* note 2, at 123–24.

<sup>44</sup> See ADLER & POSNER, *supra* note 2, at 164–65.

<sup>45</sup> SUNSTEIN, RISK AND REASON, *supra* note 2, at 35.

<sup>46</sup> See *id.*; ADLER & POSNER, *supra* note 2, at 101–23.

<sup>47</sup> See REVEZS & LIVERMORE, *supra* note 22, at 43; Sinden et al., *supra* note 1, at 54–57.



tional norms, such as we see between the robust embrace of CBA by the White House and OMB, and the ambivalence or skepticism reflected in many congressional enactments. The cost-benefit state that Sunstein envisions may someday materialize, but it currently lacks a cultural consensus, as Sunstein himself has acknowledged.<sup>48</sup>

#### IV. OF PRO- AND ANTI-CBA CANONS

This clash of normative ideals yields competing suggestions for how courts should interpret environmental and other regulatory statutes to determine whether agencies may use, or are required to use, CBA. The primary guide for courts in evaluating an agency's interpretation of its governing statute is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>49</sup> which establishes a presumption favoring agency interpretations. Within the *Chevron* framework, however, there is a role for possible CBA-related "canons," "presumptions," or "default principles" that courts might use in interpreting regulatory provisions that do not definitively address the role of CBA. For purposes of this discussion, I identify three possible canons that reflect the poles of the current dispute over CBA. An anti-CBA canon would provide that, unless CBA is clearly authorized by Congress, agencies may not use it. Instead, regulatory statutes would be read to require avoidance of environmental and other harm to the extent possible or feasible. This anti-CBA canon might have support as an extension of existing doctrines such as interpreting remedial statutes broadly to achieve their ameliorative purposes.<sup>50</sup> At the opposite pole, a pro-CBA canon would contend that unless Congress has clearly provided otherwise, agencies should be required to balance costs and benefits and avoid inefficient or disproportionate outcomes.<sup>51</sup> This canon might similarly be justified as an extension of established interpretive doctrines such as avoidance of irrational or absurd results. A moderate or permissive canon would provide that in cases of silence or ambiguity, the agency would be allowed, but not required, to use CBA.

The strong and weak forms of CBA provide a basis for further elaboration of these candidate presumptions. For example, a permissive canon might allow an agency a choice between no CBA and a weak form of CBA, but preclude use of the strong form of CBA. This permissive canon with weak-form CBA is similar to the "hybrid" canon proposed by Daniel Farber, who argues that ambiguous statutes should be construed to permit a rough weighing of costs and benefits without the requirement that all benefits be

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<sup>48</sup> SUNSTEIN, THE COST-BENEFIT STATE, *supra* note 10, at 20.

<sup>49</sup> 467 U.S. 837 (1984).

<sup>50</sup> See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1201-02 (2008).

<sup>51</sup> See SUNSTEIN, THE COST-BENEFIT STATE, *supra* note 10, at 31.

monetized.<sup>52</sup> He justifies the canon as combining respect for environmental values with the demands of rational decision making. The default standard would be elimination of environmental harm except to the extent not feasible, defined to exclude not only physical or economic impossibility but also costs grossly disproportionate to benefits.<sup>53</sup> This latter test would work to exclude a relatively narrow set of options that are deemed technologically and economically feasible but offer very small benefits at very high costs.<sup>54</sup> While not above criticism from both sides,<sup>55</sup> this hybrid approach blunts the moral objections of the anti-CBA camp regarding monetization and welfarism's crowding-out effect, while at least to some degree assuaging the fears of absolutism that stir the pro-CBA camp.

These candidate presumptions are substantive, rather than textual, directing statutory construction in furtherance of a norm of policy or practice rather than providing linguistic or syntactical guidelines for interpretation.<sup>56</sup> Canons have struggled to regain respectability since Karl Llewellyn's ridicule of them six decades ago.<sup>57</sup> Among other recent critics, Justice Scalia has portrayed substantive canons as "dice-loading" rules of interpretation that favor one substantive outcome over another, allowing the subjective preferences of judges to condition the objective evidence of the text.<sup>58</sup> But he has also defended, and utilized, preferred substantive canons such as the rule of lenity and the presumption against elimination of state sovereign immunity.<sup>59</sup>

Commentators traditionally have offered two broad justifications for substantive canons: (1) that they reflect prevailing legislative norms which shape how Congress adopts statutes and how people understand them, and (2) that they force Congress to address and resolve important but unsettled

<sup>52</sup> See FARBER, *supra* note 24, at 123–32.

<sup>53</sup> See *id.* at 124; see also SAGOFF, *supra* note 1, at 220.

<sup>54</sup> See FARBER, *supra* note 24, at 131.

<sup>55</sup> See, e.g., Lisa Heinzerling, *Justice Breyer's Hard Look*, 8 ADMIN. L.J. AM. U. 767, 771–73 (1995) (critiquing Justice Breyer's use of a weak form of CBA as discouraging protective policies); Graham, *supra* note 23, at 447–48 (critiquing the weak form of CBA as lacking a "normative framework" (i.e., welfarism), and assuming "a high degree of cognitive capacity and good motivation on the part of the regulator"); ADLER & POSNER, *supra* note 2, at 87–92 (critiquing "hybrid procedures" such as weak CBA as leading to welfare losses).

<sup>56</sup> See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 848 (3d ed. 2001).

<sup>57</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

<sup>58</sup> See ANTONIN SCALIA, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and the Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 27–29 (Amy Gutmann ed., 1997). Others have argued that canons are contradictory, see Llewellyn, *supra* note 5, at 401–05; may enlarge the scope of judicial decisionmaking, see Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815–17 (1983); and do not reliably reflect congressional purpose, see *id.* at 812–13.

<sup>59</sup> See SCALIA, *supra* note 58, at 29.

normative questions.<sup>60</sup> The second justification is typically offered for presumptions that have no tenable claim to the first. Because I conclude that the *Energy* decision can be justified on a variant of the first rationale and because there is no evidence either in Justice Scalia's opinion for the Court or in Justice Breyer's partial concurrence of any intent to provoke a response from Congress, I focus on the role of presumptions in expressing rather than eliciting the norms of our political culture.

Although leery of substantive canons generally, Justice Scalia offers one version of the prevailing norms rationale in his defense of the presumption against elimination of state sovereign immunity, calling it "merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway," in light of established norms affecting congressional behavior.<sup>61</sup> An implication of Justice Scalia's account is that a judge's perceptions of background norms may influence her understanding of legislative text without resort to explicit canons.<sup>62</sup> Sunstein argues that there can be no interpretation without presumptions, both textual and substantive, "that fill gaps in the face of legislative silence and provide the backdrop against which to read linguistic commands."<sup>63</sup> The rest of this Article's analysis assumes a significant role for substantive presumptions in "normal interpretation" that does not rely on formal canons. In this role, presumptions are inconspicuous and may not even be explicitly invoked by the courts, but nevertheless provide background principles or expectations that influence interpretation.

Under *Chevron*, reviewing courts will defer to reasonable agency interpretations on statutory issues that Congress has not directly addressed. Courts and commentators are divided on whether substantive presumptions should apply in *Chevron* analysis at all and, if they do, whether they should apply at Step 1 of the *Chevron* analysis (determining whether Congress resolved the issue at hand), or at Step 2 (deciding whether an agency's interpretation is a permissible reading of statutory silence or ambiguity).<sup>64</sup> *Chevron* said that courts should use "traditional tools" of statutory construc-

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<sup>60</sup> See Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2607, 2609 (2006); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2164 (2002).

<sup>61</sup> SCALIA, *supra* note 58, at 29. For theoretical support for presumptions based on prevailing norms, see Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2032 (2002) (advancing the role of statutory default rules that "maximize political preference satisfaction").

<sup>62</sup> See SCALIA, *supra* note 58, at 29.

<sup>63</sup> Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 504 (1989). To similar effect, see William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1009 (1989).

<sup>64</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001).

tion in the Step 1 inquiry.<sup>65</sup> A majority of courts have concluded that normative canons are among the “traditional tools” that they may use at this stage, emphasizing judicial vindication of values that the agency may not have the expertise or incentives to observe.<sup>66</sup> Kenneth Bamberger argues, however, that substantive canons should be applied at Step 2 of the *Chevron* analysis rather than at Step 1. Application at Step 2, he argues, would allow courts to strike an appropriate balance between enforcing extra-statutory norms and preserving agency discretion — courts could strike down interpretations at odds with substantive norms as unreasonable, but not limit agency choice further by giving a definitive reading of the statute.<sup>67</sup> Finally, a minority of courts, with some support in the commentary, have determined that substantive canons have no place at all in judicial review under *Chevron*, based on the supposition that agencies are the appropriate fora for integrating the values represented by the canons.<sup>68</sup>

The analysis that follows accepts the appropriateness of presumptions — in the broad sense of that term<sup>69</sup> — at either Step 1 or Step 2 of the *Chevron* inquiry. If it is correct that substantive as well as textual presumptions are an essential part of the interpretive background against which courts read and understand statutes, then use of substantive presumptions would seem inevitable under *Chevron*. Although there remains a fair concern that presumptions will be used to unduly limit agency discretion under *Chevron*, there is the possibility that presumptions may operate at the margins to expand rather than restrict an agency’s interpretive options. That is, presumptions at Step 1 may be ambiguity-creating as well as ambiguity-resolving, and at Step 2 they may confirm rather than undermine the reasonableness of the agency’s interpretation. Assume, for example, a statutory requirement that a pollution source apply the “strictest feasible controls” to reduce its emissions. On its face, this language could be read several different ways.<sup>70</sup> A court applying an anti-CBA canon would likely interpret it as limited to considerations of technical or economic practicability and as precluding CBA; application of a pro-CBA canon would likely limit agency discretion in the opposite direction, requiring use of CBA. A permissive presumption of the sort described above, however, might lead a court to conclude that the provision, which the court might otherwise read as either precluding or requiring CBA, is ambiguous on the question and that at least a rough balancing of costs and benefits is permitted, while not required. Or alternatively, the presumption might act to validate the reasonableness of a pro-CBA interpretation by the administering agency.

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<sup>65</sup> 467 U.S. at 843.

<sup>66</sup> See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 *YALE L.J.* 64, 78–79 (2008).

<sup>67</sup> See *id.* at 112–14.

<sup>68</sup> See *id.* at 81–84; Elhauge, *supra* note 61, at 2126–31.

<sup>69</sup> See *supra* notes 62–64.

<sup>70</sup> See Sunstein, *supra* note 63, at 492–93.

Substantive presumptions take on an even more controversial role in the interpretive response to changes in public values or legislative and administrative practice.<sup>71</sup> For example, assume that when our hypothetical “strictest feasible controls” statute was adopted forty years ago, the EHS movement was in full flower and the prevailing public view was that the most aggressive environmental controls were in order, short of causing substantial economic dislocations. Assume further, in the intervening years, the emergence of the pervasive use of CBA in administrative practice mirroring an efficiency norm. Application of that norm might lead to a different interpretation of “feasibility” — from precluding CBA to permitting or even requiring CBA. Sunstein argues that “[t]here are good reasons to permit courts to go beyond the original understanding” in circumstances such as this, by reading ambiguous older statutes to require consideration of costs and benefits to reflect current administrative practice.<sup>72</sup>

This dynamic use of presumptions is subject to criticism on at least two grounds. First, it undermines the reliance interests served by canons in providing a stable interpretive regime against which the legislature and the citizenry understand statutes.<sup>73</sup> Those reliance interests may be of less concern, however, when the changes acknowledged in the new presumption are widely understood and have a degree of official acceptance. Second, crediting values or practices different from those that prevailed at the time of enactment challenges legislative supremacy. Cass Sunstein and Einer Elhauge both address this problem through the fiction that, under the right circumstances, if the enacting Congress were informed of post-enactment developments in law or policy, it would agree with the changed interpretive presumption.<sup>74</sup> For Elhauge, changed presumptions should be applied only in cases in which the statutory meaning is indeterminate in the absence of a presumption. In those cases he argues, “[c]ontrary to ordinary supposition, . . . the default rule that overall best maximizes the political preferences of the *enacting* government will track the preferences of the *current* government where they can be reliably ascertained from official action.”<sup>75</sup> That is so because the enacting coalition would likely prefer default rules that maximize current preferences rather than the rules that prevailed at the time of enactment. To ensure that the new presumption reflects current public preferences rather than simply judicial fiat, however, Elhauge requires that it be validated by “some relatively well-defined official political action,” such as a competent agency interpretation.<sup>76</sup> This is consistent with the view that the

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<sup>71</sup> See *id.* at 494–96; WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 148–51 (1994).

<sup>72</sup> See Sunstein, *supra* note 63, at 493–96.

<sup>73</sup> See ESKRIDGE ET AL., *supra* note 56, at 917, and articles cited therein.

<sup>74</sup> See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 125–27 (1990); Elhauge, *supra* note 61, at 2038–40.

<sup>75</sup> Elhauge, *supra* note 61, at 2037.

<sup>76</sup> *Id.* at 2107.

main driver of interpretive dynamism in the administrative state should be the agencies themselves, given *Chevron* and its underlying recognition of the political accountability and policy expertise of agencies.<sup>77</sup>

## V. THREE CASES IN SEARCH OF A CANON

Three pre-*Energy* Supreme Court decisions offer insights into the possible framing of a CBA canon. Each of them addresses the priority to be accorded EHS concerns and the appropriateness of a weighing of costs and benefits as affecting that priority. To the extent relevant to our inquiry, these cases offer contrary indications. Among the majorities in these cases, there is no apparent urge to establish a presumption in favor of CBA; indeed, there is some inclination toward a contrary presumption in the absence of express authorization for CBA. The concurring and dissenting Justices in these cases, however, associate balancing of costs and benefits with avoidance of irrational or absurd results in a way that would support a presumption permitting or perhaps even requiring CBA in cases of ambiguity or silence.

### A. *Tennessee Valley Authority v. Hill*

In *Tennessee Valley Authority v. Hill*,<sup>78</sup> the Court famously interpreted section 7 of the Endangered Species Act as precluding the completion and operation of the Tellico Dam, a project of the Tennessee Valley Authority (“TVA”). Section 7 requires federal agencies such as TVA to ensure that their actions will not jeopardize the continued existence of a threatened or endangered species or degrade critical habitat of the species;<sup>79</sup> a majority of the Court interpreted this language as an absolute prohibition.<sup>80</sup> The Tellico Dam was more than eighty percent complete and represented an investment of over \$50 million, but the Court ruled that it could not go forward at the expense of the snail darter, a recently listed fish species whose critical habitat included the area that would be flooded by the dam. While the Court acknowledged that “in this case the burden on the public through the loss of millions of unrecoverable dollars [might be argued to] greatly outweigh the loss of the snail darter,” it concluded that Congress had not authorized the courts to make “such fine utilitarian calculations.”<sup>81</sup> There is no evidence in the opinion that the Court’s reading of the statute is animated by a presumption against the “fine utilitarian calculations” that it excludes. Quite to the contrary, while submitting to the ostensible will of Congress, Chief Justice Burger’s opinion for the Court insinuates the Court’s own view that sacrificing a completed dam to protect an obscure species of no economic value

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<sup>77</sup> See Eskridge & Baer, *supra* note 50, at 1196 & n.360.

<sup>78</sup> 437 U.S. 153 (1978).

<sup>79</sup> 16 U.S.C. § 1536(a)(2) (2006).

<sup>80</sup> 437 U.S. at 187.

<sup>81</sup> *Id.*

lacks common sense and is contrary to the public good.<sup>82</sup> The opinion sends a clear, preference-eliciting message to Congress.

Justice Powell, joined by Justice Blackmun in dissent, chose not to be passive in the face of the statute's formidable language and legislative history on this issue.<sup>83</sup> Arguing that Congress should not be presumed to have intended the "absurd result" in this case, he worked to find room in the statute for the kind of balancing the Court precluded.<sup>84</sup> His approach rests on a strong presumption in favor of weighing costs and benefits, at least as necessary to weed out cases in which costs are grossly disproportionate to benefits. In his formulation, this presumption would be attached to (perhaps merely a manifestation of) the absurd results doctrine, allowing courts to construe congressional directives to avoid obviously irrational outcomes. He uses this presumption both to generate ambiguity in a key statutory term ("action") that the majority concluded was clear, and to construe the term in a manner that avoids the absurd outcome.<sup>85</sup> The rationalist Justice Powell thus lays the doctrinal groundwork for a canon favoring some form of CBA, groundwork on which Justice Breyer and Justice Scalia would build in *Entergy*.

#### B. *American Textile Manufacturers Institute v. Donovan*

In *American Textile Manufacturers Institute, Inc. v. Donovan*,<sup>86</sup> the Court addressed whether the Occupational Safety and Health Administration ("OSHA") was required to apply a quantitative cost-benefit analysis in adopting a workplace standard for cotton dust and to ensure that the costs of the standard bore a reasonable relationship to its benefits. Section 6(b)(5) of the Occupational Safety and Health Act requires the agency to set "the standard which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity."<sup>87</sup> Reading "feasible" to mean "capable of being done, executed, or effected" a majority of the Justices concluded that Congress had excluded CBA: "Congress itself defined the basic relationship between costs and benefits, by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable."<sup>88</sup>

The reasoning of the majority opinion suggests a presumption against the use of CBA in the absence of express statutory authorization — the anti-CBA canon. The Court offers a blanket observation, apparently encompassing all federal statutes, that "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the

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<sup>82</sup> See *id.* at 187, 194–95.

<sup>83</sup> *Id.* at 195 (Powell, J., dissenting).

<sup>84</sup> See *id.* at 166–67 (majority opinion).

<sup>85</sup> See *id.* at 202–06 (Powell, J., dissenting).

<sup>86</sup> 452 U.S. 490 (1981).

<sup>87</sup> 29 U.S.C. § 655(b)(5) (2006).

<sup>88</sup> 452 U.S. at 509.

face of the statute.”<sup>89</sup> “Feasibility,” as the Court construes it, does not convey such an intent. The necessary inference, then, is that CBA is not authorized under section 6(b)(5) of the Occupational Safety and Health Act.<sup>90</sup> The Court concludes that cost-benefit analysis by OSHA “is not required by the statute because feasibility analysis is.”<sup>91</sup>

In dissent, however, while agreeing that “feasibility” is the crucial term, then-Justice Rehnquist argues that its meaning is indeterminate and reads the Court’s conclusion that CBA is not “required” as implying that it is permitted at the agency’s option.<sup>92</sup> In *Entergy*, Justice Scalia adopts this reading of *American Textile* in sanctioning agency use of CBA.<sup>93</sup>

Prior to Justice Scalia’s revisionist reading in *Entergy*, Sunstein argued that *American Textile* was a poor decision.<sup>94</sup> In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,<sup>95</sup> also decided under the Occupational Safety and Health Act, the Court had held that the Act required OSHA to document a significant risk before regulating a toxic substance. Putting the two holdings together, Sunstein lamented “the basic irrationality of a system in which OSHA is required to find a significant risk, but is prohibited from undertaking cost-benefit analysis. . . . A rational system of regulation looks not at the magnitude of the risk alone, but assesses the risk in comparison to the costs.”<sup>96</sup> The holding in *Entergy* vindicates Sunstein’s critique, but with an important limitation on the terms under which this comparison may be carried out.

### C. *Whitman v. American Trucking Associations*

In *Whitman v. American Trucking Associations, Inc.*,<sup>97</sup> the Court held that section 109 of the Clean Air Act (“CAA”) precluded consideration of the costs of implementation in setting National Ambient Air Quality Standards (“NAAQS”). Section 109 requires EPA to set NAAQS at a level “requisite to protect the public health” with “an adequate margin of safety.”<sup>98</sup> In his opinion for a unanimous Court, Justice Scalia considered industry’s arguments that the words of section 109 — “public health,” “requisite,” “adequate” — were sufficiently flexible to accommodate consideration of the costs, as well as the health benefits, of a new or revised NAAQS. But Congress had made specific reference to costs in related provisions of the CAA, and consideration of costs in setting NAAQS was too important, Justice

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<sup>89</sup> *Id.* at 510.

<sup>90</sup> *See id.* at 509.

<sup>91</sup> *Id.*

<sup>92</sup> *See id.* at 544–45 (Rehnquist, J., dissenting).

<sup>93</sup> *See Entergy*, 129 S. Ct. at 1508.

<sup>94</sup> *See* Sunstein, *supra* note 63, at 492–93. To similar effect, see Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 437 (1990).

<sup>95</sup> 448 U.S. 607 (1980).

<sup>96</sup> Sunstein, *supra* note 63, at 493.

<sup>97</sup> 531 U.S. 457 (2001).

<sup>98</sup> 42 U.S.C. § 7409(b)(1) (2006).



Scalia concluded, to be authorized “in vague terms or ancillary provisions”: Congress “does not, one might say, hide elephants in mouseholes.”<sup>99</sup> The burden was on industry to “show a [clear] textual commitment of authority to the EPA to consider costs in setting NAAQS,” and industry failed to carry that burden.<sup>100</sup> In the absence of such a commitment, EPA is not only not compelled to consider costs; it has no authority to do so.<sup>101</sup>

Justice Scalia’s formulation echoes the presumption-instantiating language of *American Textile*, that is, when Congress intends an agency to use CBA, it makes that clear in the statute. But it is unclear whether Justice Scalia’s presumption is local, limited to the NAAQS provisions of the CAA, or has broader applicability. If the former, then it hardly qualifies as a presumption at all, but rather is an interpretive gloss on the text and structure of the statute at issue. If the latter, it could have sweeping implications for the interpretation of regulatory legislation on this crucial issue.

Concern over these possible implications sparked a separate concurrence in the case by Justice Breyer. If followed generally, Justice Breyer feared, a presumption against consideration of costs would produce irrational results. Regulators often must consider “all of a proposed regulation’s adverse [as well as beneficial] effects, at least where those adverse effects clearly threaten serious and disproportionate public harm. Hence, . . . we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation.”<sup>102</sup> Justice Breyer was able to subscribe to the Court’s interpretation of section 109 only by persuading himself that EPA had “sufficient flexibility [in mechanisms for implementing NAAQS] to avoid setting ambient air quality standards ruinous to industry.”<sup>103</sup>

## VI. THE DECISION IN *ENERGY*

With these precedents as prologue, the Supreme Court decided *Energy Corp. v. Riverkeeper, Inc.*,<sup>104</sup> upholding EPA’s use of CBA in regulating cooling water intake structures for existing electric power plants. Section 316(b) of the Clean Water Act provides for the establishment of standards for cooling water intake structures at power plants; these structures can kill large numbers of fish and shellfish by squeezing them against the intake screens (“impingement”) or sucking them into the cooling system (“entrainment”). The provision requires that these standards “reflect the best technology available [“BTA”] for minimizing adverse environmental impact” but does not specify factors that EPA is to consider in determining BTA

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<sup>99</sup> 531 U.S. at 468.

<sup>100</sup> *Id.* at 468–71.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 490 (Breyer, J., concurring).

<sup>103</sup> *Id.* at 494.

<sup>104</sup> 129 S. Ct. 1498 (2009).

standards.<sup>105</sup> For new power plants, EPA adopted regulations that required reductions in fish and shellfish mortality that could be achieved by “a closed-cycle, recirculating cooling system.”<sup>106</sup> For existing large power plants (some 500 facilities nationwide), EPA declined to impose this level of reduction but imposed less demanding standards based on a combination of less expensive technologies. The standards for existing large power plants, known as the “Phase II rules,” were the subject of the litigation.

EPA estimated that the cooling water intake structures covered by its Phase II rules withdraw more than 214 billion gallons of water a day, resulting in the death of more than 3.4 billion fish and shellfish each year.<sup>107</sup> The closed-cycle cooling water system rejected by EPA for existing large power plants would have reduced impingement and entrainment mortality by up to 98%.<sup>108</sup> The standards adopted by EPA required Phase II facilities to meet BTA standards by reducing impingement mortality by 80–95% and, for a subgroup of Phase II facilities, also reducing entrainment by 60–90%. The regulations also provided for facility-specific variances from the standards where the facility could demonstrate that the costs of compliance would be “significantly greater” than the benefits.<sup>109</sup>

Although EPA’s rationale for adopting the Phase II standards is less than clear, its weighing of the costs and benefits of alternative technologies appears to have played a role in its rejection of the closed-cycle cooling water system in favor of the suite of technologies it embraced.<sup>110</sup> While the closed-cycle cooling system would have achieved greater reductions in fish and shellfish mortality, it would have cost substantially more than the alternative technologies (\$3.5 billion per year versus \$389 million per year).<sup>111</sup>

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<sup>105</sup> 33 U.S.C. § 1326(b) (2006).

<sup>106</sup> Phase II Final Cooling Water Rule, 69 Fed. Reg. 41,576, 41,601 & n.44 (July 9, 2004).

<sup>107</sup> *Id.* at 41,586.

<sup>108</sup> *Id.* at 41,601.

<sup>109</sup> 40 C.F.R. §§ 125.94(a)(5), (b)(4) (2008).

<sup>110</sup> *See* 69 Fed. Reg. at 41,605–06. Finding the Agency’s rationale unclear, the Second Circuit remanded for further clarification on whether EPA had relied on a cost-effectiveness determination (permissible in the Second Circuit’s view) or cost-benefit analysis (impermissible in the Second Circuit’s view). *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 104–05 (2d Cir. 2007). Briefs before the Supreme Court on behalf of Riverkeeper argued that EPA had used “formal” CBA to select among options, *see* Brief for OMB Watch as Amicus Curiae Supporting Respondents at 4–5, *Entergy*, 129 S. Ct. 1498 (Nos. 07-588, 07-589 & 07-597), or CBA designed “to identify allocatively efficient regulation,” Brief for Economists Frank Ackerman et al. as Amici Curiae Supporting Respondents at 11, *Entergy*, 129 S. Ct. 1498 (Nos. 07-588, 07-589 & 07-597). Justice Scalia’s opinion for the Court and Justice Breyer’s concurrence understand EPA as having based its decision at least in part on a comparison of costs and benefits, but they characterize that comparison not as a “rigorous” or “formal” CBA designed to ensure that benefits equaled or exceeded costs, but rather as a form of CBA seeking to avoid “extreme disparities between costs and benefits,” 129 S. Ct. at 1509 (opinion of Scalia, J.), or to “prevent results that are absurd or unreasonable in light of extreme disparities between costs and benefits,” 129 S. Ct. at 1515 (opinion of Breyer, J.). This Article’s analysis accepts this characterization of EPA’s decision methodology, focusing instead on the defensibility of the Court’s decision to uphold the legality of that methodology.

<sup>111</sup> 69 Fed. Reg. at 41,605, 41,666.

EPA was able to monetize benefits of saving fish and shellfish only for those species of value to commercial or recreational fishers (less than two percent of the total aquatic life at risk).<sup>112</sup> Nevertheless, it concluded that the benefits of the Phase II rules, measured by reductions in impingement and entrainment, could approach those of closed-cycle recirculating at substantially less cost and would avoid other negative impacts such as the energy penalty associated with cooling towers.<sup>113</sup>

On direct review, the Second Circuit concluded that section 316(b) precluded cost-benefit balancing in determining BTA.<sup>114</sup> EPA could consider costs in determining whether standards were economically feasible (i.e., capable of being “reasonably borne” by the industry) and cost-effective (i.e., minimizing the costs of achieving a given level of performance), but could not choose among options with different performance outcomes based on comparison of their costs and benefits. Congress’s own cost-benefit analysis was embedded in the statutory language requiring the “best available” technology and precluded a reweighing by EPA. In support of its interpretation, the Second Circuit read *American Textile* as prohibiting the weighing of costs and benefits in regulatory decisions in the absence of express permission from Congress.<sup>115</sup> Concluding that it was unclear whether EPA had based its decision on CBA, the court remanded to EPA for further explanation.<sup>116</sup>

The Supreme Court granted certiorari on the question of whether section 316(b) authorizes EPA “to compare costs with benefits in determining ‘the best technology available for minimizing adverse environmental impact’ at cooling water intake structures.”<sup>117</sup> In the opinion for the Court, Justice Scalia, joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Alito, concluded that the statute was sufficiently ambiguous to permit EPA’s balancing of costs and benefits.<sup>118</sup> A dissent by Justice Stevens, joined by Justices Souter and Ginsburg, argued that the statute precluded CBA.<sup>119</sup> A separate opinion by Justice Breyer, concurring in part and dissenting in part, largely agreed with the Court’s views.<sup>120</sup> This alignment of the Justices falls for the most part along predictable ideological lines. The five conservatives (Justice Kennedy swinging here to the right) endorse an interpretation less hospitable to aggressive regulation; three of the four liberals advance a reading more hospitable to such regulation.<sup>121</sup> But the partial concurrence of

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<sup>112</sup> *Id.* at 41,660–61.

<sup>113</sup> *Id.* at 41,605.

<sup>114</sup> *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007).

<sup>115</sup> *Id.* at 99.

<sup>116</sup> *Id.* at 104–05.

<sup>117</sup> *Entergy*, 129 S. Ct. 1498, 1505 (2009).

<sup>118</sup> *Id.* at 1506.

<sup>119</sup> *Id.* at 1516 (Stevens, J., dissenting).

<sup>120</sup> *Id.* at 1515–16 (Breyer, J., concurring in part, dissenting in part).

<sup>121</sup> I include Justice Stevens in the liberal camp, although he was appointed by a Republican president.

Justice Breyer makes clear that the case cannot be explained simply as a function of the Justices' general ideological orientations.

One might argue alternatively that the difference in results is due to differences among the Justices in their methods of statutory interpretation — one metric being textualist (employed by Justice Scalia in considering only the Act's language and structure), the other intentionalist (employed by Justice Stevens in considering legislative history as well as statutory language and structure). But this view of the case is complicated again by Justice Breyer's opinion. A committed intentionalist, Justice Breyer relies crucially on legislative history in his analysis, making clear that the different outcomes reached by the two factions are not due wholly to differences in interpretive method.<sup>122</sup>

Closer examination shows that the Justices' views turn at least in part on presumptions about the use of CBA and associated decision criteria (such as "reasonableness" and "efficiency") in regulatory policy making. These presumptions mirror the battle lines that have formed around these issues in the public debates but defy easy classification along ideological lines. Although none of the opinions in *Energy* speaks of "default rules" or "canons," one can see evidence of them at work in shaping the conclusions in this case, as shown below.

#### A. Justice Breyer's Partial Concurrence

Justice Breyer's opinion provides a useful point of entry because it is relatively transparent about the Justice's views of the pros and cons of CBA and their effects on the interpretive enterprise, and because those views reflect serious engagement with these issues in prior judicial opinions and academic writings. In his book *Breaking the Vicious Circle*, Justice Breyer attacked what he called the "tunnel vision" problem of EHS regulation.<sup>123</sup> He began with the premise that the incremental costs of protection will increase with stringency; for example, removing the last ten percent of a toxic chemical from the environment is likely to cost many times more than removing the first ten percent.<sup>124</sup> Regulators in single-minded pursuit of a toxics-free environment may seek removal of the last ten percent, even though the incremental costs could dwarf the incremental benefits and much greater health protection could be purchased for the same amount elsewhere.<sup>125</sup> To illustrate his point, Justice Breyer cited *United States v. Ottati & Goss, Inc.*,<sup>126</sup> in which he wrote the opinion while on the First Circuit. EPA sought to require a private party to spend \$9.3 million dollars to clean up the "last little bit" of contamination at a site to protect nonexistent "dirt-eating chil-

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<sup>122</sup> See 129 S. Ct. at 1513–15.

<sup>123</sup> See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* 11–19 (1993).

<sup>124</sup> See *id.* at 11; STEPHEN BREYER, *REGULATION AND ITS REFORM* 264 (1982).

<sup>125</sup> See BREYER, *supra* note 123, at 11–19.

<sup>126</sup> 900 F.2d 429 (1st Cir. 1990).

dren.”<sup>127</sup> The First Circuit upheld the district court’s refusal to grant EPA’s request, and then-Judge Breyer’s majority opinion as well as his later characterizations convey his strong sense of the irrationality of EPA’s request.<sup>128</sup> Lisa Heinzerling argues that Justice Breyer’s response in *Ottati & Goss* establishes a pattern in his judging and writing of using rough cost-benefit balancing to detect irrationality.<sup>129</sup> This pattern was evident in *American Trucking* and surfaces decisively again in *Entergy*.

In his partial concurrence in *Entergy*, Justice Breyer expands on his performance in *American Trucking* as a progressive voice of reason on the Court, blending pro-regulatory sympathies with a sense of proportion. His *Entergy* opinion becomes a kind of teaching platform and guide for how CBA can be integrated into a regulatory regime that takes EHS regulation seriously.

In siding with the majority in *Entergy*, Justice Breyer acknowledges that Congress had reason to limit reliance on cost-benefit analyses: CBA may unduly delay the regulatory process, may underemphasize factors less susceptible to quantification (e.g., the value of preserving non-marketable fish and shellfish), and may reduce incentives for development of advanced treatment technologies which might, “whatever the initial inefficiencies, . . . eventually mean cheaper, more effective cleanup.”<sup>130</sup> Although Justice Breyer references these criticisms to comments in the legislative history, they echo common pro-regulatory concerns.

On the other side, Justice Breyer offers two reasons why Congress might not have wanted to forbid CBA entirely. A prohibition on CBA would be hard to enforce because every “real choice” requires such a comparison; furthermore, “an absolute prohibition would bring about irrational results.”<sup>131</sup> Justice Breyer does not key these observations on the need for CBA to the legislative history; these pro-CBA arguments are his own, although he relates the latter argument to a concession in the brief for Riverkeeper.<sup>132</sup> These are both powerful contentions, which if true would seem to compel CBA, not merely tolerate it. If agency decision makers are making “real choice[s]” — if they are not, what kind of choices are they making? — they cannot avoid some sort of cost-benefit comparison; is it not better to have the trade-offs made openly and explicitly rather than under the guise of a technology-based or harm-based approach that ostensibly precludes them? Similarly, if some CBA is necessary to avoid “irrational results,” then it is hard to imagine how agency decision makers could meet the most basic conditions for legitimate governance without it. In *Entergy*, however, Justice Breyer is content to deploy these pro-CBA arguments toward a more modest end.

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<sup>127</sup> BREYER, *supra* note 123, at 12.

<sup>128</sup> *See id.* at 11–12.

<sup>129</sup> *See* Heinzerling, *supra* note 55, at 768–71.

<sup>130</sup> *Entergy*, 129 S. Ct. at 1513 (Breyer, J., concurring in part, dissenting in part).

<sup>131</sup> *Id.*

<sup>132</sup> *See id.*

After parsing the language, structure, and legislative history of section 316(b) and related provisions, Justice Breyer concludes that the “statute does not require the Agency to compare costs to benefits when determining ‘best available technology’ but neither does it expressly forbid such a comparison.”<sup>133</sup> The crux of his analysis is his reading of a written statement by Senator Muskie, the principal sponsor of the Act, distributed upon the submission of the conference bill for consideration and action by the Senate.<sup>134</sup> Justice Breyer acknowledges Muskie’s statement as “[t]he strongest evidence in the legislative history” in support of a prohibition on CBA and spends more than half his opinion coming to terms with it.<sup>135</sup> Yet this document is far from clear. It does not address section 316(b)’s BTA standard for cooling water intake structures but does discuss an analogous requirement in the Act, the “best available technology economically achievable” (“BATEA”) for dischargers of pollutants. The statement provides that “while cost should be a factor [in determining BATEA], no balancing test will be required.” Rather, “the Administrator will be bound by a test of reasonableness,” and “the reasonableness of what is ‘economically achievable’ should reflect an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and what is achievable through the application of available technology — without regard to costs.”<sup>136</sup>

Justice Breyer works hard to interpret this document to reflect the limited but fundamental role he sees for CBA. The result is an interpretation of section 316(b) that permits the approach EPA arguably used in establishing its Phase II rule: presenting environmental benefits in non-monetized terms and avoiding “results that are absurd or unreasonable in light of extreme disparities” while taking into account “Congress’ technology forcing objectives.”<sup>137</sup> To read Senator Muskie’s statement and the statute differently, Justice Breyer concludes, would “put the Agency in conflict with the test of reasonableness by threatening to impose massive costs far in excess of any benefit.”<sup>138</sup> Justice Breyer’s “last ten percent” paradigm is not far below the surface, as he supports his reading by reference to a concession in Riverkeeper’s brief that “it would make no sense to require plants to ‘spend billions to save one more fish or plankton’ . . . even if the industry might somehow afford those billions.”<sup>139</sup>

Extrastatutory precepts are clearly at work in Justice Breyer’s analysis, conditioning his reading of the crucial legislative history to uphold EPA’s interpretation as permissible under *Chevron*. While the reasons he offers for limiting CBA are largely imported from the legislative record, Justice Breyer’s reasons for not prohibiting CBA are based instead on his own un-

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<sup>133</sup> *Id.* at 1512 (emphasis removed).

<sup>134</sup> 118 Cong. Rec. 33,694–33,702 (1972) (statement of Sen. Muskie).

<sup>135</sup> 129 S. Ct. at 1513.

<sup>136</sup> *Id.* at 1514.

<sup>137</sup> *Id.* at 1515.

<sup>138</sup> *Id.* at 1514.

<sup>139</sup> *Id.* at 1513.

derstanding of established norms or practices of rational decision making. The resulting pro-CBA presumption is a modest one, permitting a rough nonmonetized version of CBA designed to avoid irrational results rather than to achieve an optimal outcome. Justice Breyer makes clear in his concurrence that he is not inviting EPA to recalibrate the technology-forcing policy that animates section 316(b) but merely to temper that policy at the margins.<sup>140</sup> His concern to limit the use of cost-benefit comparisons under section 316(b) also appears in the dissenting part of his opinion, in which he questions the portion of EPA's rule allowing variances from the national standard where EPA determines that a facility's costs would be "significantly greater than the benefits of complying."<sup>141</sup> He would support a remand to EPA either to affirm its traditional "wholly disproportionate" standard for case-by-case determinations or to better explain why it changed to the "significantly greater" formulation.

### B. Justice Scalia's Opinion for the Court

Justice Scalia's textualist analysis for the Court ignores the Muskie statement that is crucial to Justice Breyer's analysis. Also, unlike Justice Breyer's opinion, the majority opinion does not offer views on the desirability of CBA independent of the text or otherwise express a presumption for or against CBA. Nevertheless, despite its ostensibly quite different approach to interpretation, the result is something close to what Justice Breyer achieves with his intentionalist approach and his modestly pro-CBA canon. In its selective treatment of precedent and the language and structure of the Clean Water Act, Justice Scalia's opinion reflects an unspoken preference in favor of the weak form of CBA used by EPA — an extratextual preference, like Justice Breyer's, rooted in a concept of rational governance. The exact shape of that preference for Justice Scalia, however, is less distinct than it is for Justice Breyer.

Justice Scalia frames his analysis under *Chevron*. Like his antagonist in this case, Justice Stevens, Justice Scalia strongly supports the principle of judicial deference to agency interpretations represented by *Chevron*.<sup>142</sup> A recent statistical study of the Justices' positions in statutory cases, however, suggests that allegiance to that principle varies with the ideological coloration of the agency interpretation at issue.<sup>143</sup> Justice Scalia is significantly more likely to uphold conservative agency interpretations. While his overall rate of agreement with agency interpretations during his tenure on the Court is 65%, Justice Scalia agrees with only 54% of liberal interpretations compared to 72% of conservative interpretations.<sup>144</sup> Justice Stevens, in contrast,

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<sup>140</sup> See *id.* at 1513–15.

<sup>141</sup> *Id.* at 1515–16.

<sup>142</sup> See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

<sup>143</sup> See Eskridge & Baer, *supra* note 50, at 1154 tbl.20.

<sup>144</sup> *Id.*

is significantly more likely to uphold liberal interpretations. His overall agreement rate of 61% is comparable to Justice Scalia's, but he agrees with 79% of liberal interpretations compared to 50% of conservative interpretations.<sup>145</sup> In upholding an agency interpretation that limits the stringency of utility regulations, Justice Scalia's opinion in *Entergy* is consistent with his pattern of substantive preference in *Chevron* cases. But as discussed below, what shapes his opinion is not merely a general tendency to limit EHS regulation but a notion of what constitutes rational decision making.

For Justice Scalia, *Chevron* mandates that EPA's view of section 316(b) as permitting CBA "governs if it is a reasonable interpretation of the statute — not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts."<sup>146</sup> The dissent criticizes Justice Scalia's formulation as eliding the two-step *Chevron* inquiry into a single question — whether EPA has plausibly interpreted the statute — and omitting the prior inquiry of whether Congress has spoken directly to the issue.<sup>147</sup> Justice Scalia responds that "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."<sup>148</sup> Justice Scalia's one-step approach draws applause from Matthew Stephenson and Adrian Vermeule, who argue that *Chevron*'s two steps are an artificial construct: "There is . . . no good reason why we should decide whether the statute has only one possible reading before deciding simply whether the agency's interpretation falls into the range of permissible interpretations."<sup>149</sup> Although this is convincing as a logical proposition, the single-inquiry approach may have the subtle effect of increasing the discretion of the reviewing court by allowing it to deploy the "traditional tools" of interpretation either in a vigorous search for definitive statutory meaning (the traditional Step 1 analysis) or in a more deferential examination of permissibility (the traditional Step 2 analysis), or some combination of the two. Justice Scalia has said that as a textualist he is more likely than his intentionalist counterparts to find plain meaning at Step 1 of the *Chevron* analysis and thus limit the interpretive discretion of agencies.<sup>150</sup> But eliding Steps 1 and 2 gives Justice Scalia greater freedom to direct his textualist tools either to limit or to enhance agency discretion according to his substantive preferences. In recent cases, he has used this approach both to attack and to defend agency interpretations.<sup>151</sup> In *Entergy*, he uses this discretion to create

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<sup>145</sup> *Id.*

<sup>146</sup> *Entergy*, 129 S. Ct. at 1505 (majority opinion).

<sup>147</sup> *See id.* at 1518 n.5 (Stevens, J., dissenting).

<sup>148</sup> *Id.* at 1505 n.4 (majority opinion).

<sup>149</sup> Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 602 (2009). *But see* Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 612 (2009) (arguing that the single-inquiry approach undermines limits imposed by *Chevron* on the scope of judicial decision making).

<sup>150</sup> Scalia, *supra* note 142, at 521.

<sup>151</sup> *Compare* *Rapanos v. United States*, 547 U.S. 715 (2006) (writing to invalidate expansive agency interpretation of jurisdictional scope of CWA), *with* *Massachusetts v. EPA*, 549 U.S. 497, 549 (2007) (Scalia, J., dissenting) (writing to uphold restrictive interpretation of jurisdictional scope of CAA).



an exact space for EPA's interpretation of section 316(b), large enough to permit a weak form of CBA, but arguably no larger.

Justice Scalia finds ample support for the reasonableness of EPA's interpretation in the CWA's language and structure. Beginning with the language of section 316(b), he argues that "best technology available for minimizing adverse environmental impact" might mean the most stringent pollution-reducing technology that is economically feasible.<sup>152</sup> But "best" does not necessarily mean most stringent; it could also mean most efficient. The modifying phrase, "minimizing adverse environmental impact," does not necessarily preclude that meaning because "minimize" does not specify any particular degree of reduction. Therefore, section 316(b) "does not unambiguously preclude cost-benefit analysis."<sup>153</sup> Here, as he has in other cases in which the agency's interpretation has a regulation-limiting thrust,<sup>154</sup> Justice Scalia uses his textualist tools to open the possibilities of language to make room for the interpretation, not foreclose it. Construing "best" and "minimizing" to incorporate notions of "efficiency" in this context may not be the most compelling interpretation, but it does not need to be, because Justice Scalia is operating here in deferential Step 2 mode.

Justice Scalia offers a similarly deferential analysis of section 316(b)'s statutory context. Recall that in *American Trucking*, dealing with similar questions of statutory context, Justice Scalia read other provisions of the Clean Air Act expressly authorizing consideration of costs as evidence that the NAAQS provision, which contained no such authorization, did not permit such consideration.<sup>155</sup> The Clean Water Act offers a similar pattern. In addition to section 316(b)'s BTA requirement for water intake structures, the CWA establishes a range of pollution reduction standards for various categories of dischargers and pollutants; these standards, in general order of ascending stringency, include best practicable technology ("BPT"), best conventional technology ("BCT"), best available technology economically achievable ("BATEA"), and best available demonstrated technology ("BADT").<sup>156</sup> The statutory factors for BPT and BCT expressly include consideration of the relationship between costs and benefits; the statutory factors for BATEA and BADT do not.<sup>157</sup> Citing *American Trucking*, Justice Stevens's dissent argues that section 316(b)'s silence on this issue of obvious importance in setting BTA — where Congress expressly granted authorization for cost-benefit analysis in some, but not all, related CWA provisions — compels a reading that prohibits comparison of costs and benefits.<sup>158</sup> This

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<sup>152</sup> *Entergy*, 129 S. Ct. at 1507.

<sup>153</sup> *Id.* at 1506.

<sup>154</sup> *E.g.*, *Massachusetts v. EPA*, 549 U.S. at 549 (Scalia, J., dissenting).

<sup>155</sup> *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 466–68 (2001).

<sup>156</sup> 33 U.S.C. §§ 1311(b), 1316(a) (2006).

<sup>157</sup> *Compare id.* § 1314(b)(1)(B) ("consideration of the total cost . . . in relation to . . . benefits), and *id.* § 1314(b)(4)(B) ("consideration of the reasonableness of the relationship between the costs . . . and the . . . benefits"), with *id.* § 1314(b)(2)(B) (including "cost" in factors to be taken into account but not mentioning "benefits"), and *id.* § 1316(b) (same).

<sup>158</sup> *Entergy*, 129 S. Ct. at 1517 (Stevens, J., dissenting).

reading has further support in BTA's linguistic similarity to BATEA and BADT.

Justice Scalia rejects these arguments. *American Trucking*, he says, stands only for the proposition that "sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion."<sup>159</sup> Sometimes, as in the case of section 316(b), it does not. Despite its surface similarities to the other "best technology" provisions that can be read to preclude CBA, BTA has differing (more modest, according to Justice Scalia's analysis) environmental objectives than BATEA and BADT and therefore "need not be interpreted to permit only what these two other tests permit."<sup>160</sup> Moreover, section 316(b) specifies no factors for consideration at all. "If silence . . . implies prohibition, then the EPA could not consider *any* factors in implementing [section 316(b)] . . . ."<sup>161</sup>

Near the end of the opinion, however, Justice Scalia undercuts his own analysis with an acknowledgement that statutory context may limit the kind of CBA available under section 316(b). Having read silence to authorize the use of CBA in this case, he comments that "[o]ther arguments may be available to preclude . . . a rigorous form of cost-benefit analysis" of the sort the CWA prescribes for the BPT standard.<sup>162</sup> It is not clear why Justice Scalia bothers to make this observation.<sup>163</sup> As he is quick to note, it is not necessary: because EPA didn't undertake a "rigorous form" of CBA in its Phase II standard-setting, there is no need to opine on whether it has the authority to do so. The effect of this addendum is to move Justice Scalia's opinion closer to Justice Breyer's. But it's not clear what strategic benefit that accommodation might confer, since Justice Scalia has a majority without Justice Breyer.<sup>164</sup>

The exact rationale for this addendum is equally mysterious. Justice Scalia doesn't specify the "other arguments" that might be available. He simply refers us to the portion of his opinion discussing related provisions like BPT. The implication is that because the BPT provision expressly authorizes CBA (although not by its terms a "rigorous" version), BTA under section 316(b) is limited to a less demanding form of the methodology. But having asserted that express authorizations for CBA in the BPT and BCT provisions do *not* preclude reading CBA authority into the silence of section 316(b), Justice Scalia would seem to have difficulty maintaining that these

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<sup>159</sup> *Id.* at 1508 (majority opinion).

<sup>160</sup> *Id.* at 1507.

<sup>161</sup> *Id.* at 1508.

<sup>162</sup> *Id.*

<sup>163</sup> See 129 S. Ct. at 1521 n.11 (2009) (Stevens, J., dissenting) (characterizing Justice Scalia's suggested limitation "as a concession that cost-benefit analysis, as typically performed, may be inconsistent with the BTA mandate").

<sup>164</sup> Richard Lazarus, who briefed and argued the case for respondents Riverkeeper, Inc. et al., suggests that Justice Scalia offered this addendum to hold Justice Kennedy, who at argument seemed to grasp the difference between weak and strong CBA, related it to BPT/BAT, and seemed inclined to support a position that drew such a distinction or at least left the door open. E-mail from Richard Lazarus, Professor of Law, Georgetown University Law Center, to author (Aug. 9, 2009, 8:27 PM) (on file with author).

same express authorizations nevertheless *limit* the permissible scope of CBA under section 316(b). The impetus behind this unexplained move in the opinion to suggest preclusion of “rigorous” CBA may lie in Justice Scalia’s extrajudicial views on CBA, as discussed below.

In addition to his pro-agency gloss on the language and structure of section 316(b), Justice Scalia provides new interpretations of precedent to make room for CBA in the statute’s silence. He limits *American Trucking* to its unique statutory circumstances and forecloses the potential reading of his opinion for the Court in that case as establishing a general presumption against consideration of costs and benefits in cases of silence or ambiguity. Effectively, eight years after the fact, he responds to Justice Breyer’s concerns about the broad inferences that might be drawn from *American Trucking* by cutting those inferences off. Similarly, he neutralizes *American Textile*, reading the case as permitting while not requiring CBA in setting workplace standards. In doing so, Justice Scalia adopts then-Justice Rehnquist’s characterization of the Court’s holding in his dissent in that case,<sup>165</sup> even though the logic of the opinion for the Court supports an anti-CBA presumption, as the Second Circuit assumed in the ruling under review in *Entergy* and as Justice Stevens argues in dissent.<sup>166</sup> After *Entergy*, it would be difficult to argue that the Court’s decisions support a general interpretive rule prohibiting CBA in cases of silence or ambiguity. That in itself represents an important, conscious evolution in the Court’s position.

Justice Scalia’s opinion reflects a series of choices about language, structure and precedent to support the use (at EPA’s option) of a weak form of CBA, but to preclude (at least arguably) a rigorous form of this methodology. A clearer idea of what may be animating these choices emerges from remarks on CBA that Justice Scalia delivered in a 1987 lecture at the University of Houston. In that speech he described a broad concept of cost-benefit balancing, as “a weighing of all the desirable effects of a proposed action against all the undesirable effects, whether or not they are susceptible of being expressed in economic terms.”<sup>167</sup> He distinguished this concept from CBA “in the narrow sense, which has become popular of late, of quantifying all the pro and con effects of a proposed action in dollar and cents terms.”<sup>168</sup> CBA in this narrow sense, he said, “is feasible, and usually determinative, if the pros and cons are purely economic ones.”<sup>169</sup> CBA in the broader sense, however, is appropriate for “weighing the impact of the proposed action upon two quite different social values — for example . . . aesthetic values versus full employment, or minor health risk versus low consumer prices.”<sup>170</sup> Justice Scalia legitimates this earlier, nonmonetized CBA as “*always* [hav-

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<sup>165</sup> See *supra* text accompanying notes 92–93.

<sup>166</sup> See *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 99 (2007); *Entergy*, 129 S. Ct. at 1517 (Stevens, J. dissenting).

<sup>167</sup> Scalia, *supra* note 23, at 101.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

ing been] part of rational administration,” while he marginalizes the rigorous form of CBA as new and narrowly applicable.<sup>171</sup> This distinction prefigures the line that Justice Scalia draws in *Entergy* between the CBA he sanctions in the silence of section 316(b) and the “rigorous form” of CBA that he does not.

Thus, where the statute is silent or ambiguous, the default positions of both Justices Scalia and Breyer are to allow, but not require, a rough weighing of costs and benefits in setting technology-based standards. These positions are shaped by background understandings — explicit in Justice Breyer’s opinion, implicit in Justice Scalia’s — about the value of this intuitive form of CBA and its established (Justice Scalia’s “we have always done it”) or inevitable (Justice Breyer’s “we cannot avoid it”) use in decision making. But there remains a possible difference of some significance between these two Justices on the permissible use of CBA in cases of silence or ambiguity. While Justice Breyer makes clear that CBA is authorized only to weed out irrational options, Justice Scalia is less clear on this point. Unlike Justice Breyer, Justice Scalia does not object to EPA’s substitution of “significantly greater than” for “wholly disproportionate” in framing its cost-benefit test and acknowledges that the two standards “may be somewhat different.”<sup>172</sup> But he also interprets EPA’s cost-benefit approach to be of limited scope — “only to avoid extreme disparities between costs and benefits” — and emphasizes the role of that approach to determine the “reasonableness” of costs.<sup>173</sup> Similarly, in support of EPA’s discretion to use CBA, he reads “best technology” as reasonably encompassing “the technology that *most efficiently* produces some good.”<sup>174</sup> “Most efficiently” could certainly be read as authorizing use of CBA to determine the optimal level of protection. The context suggests, however, that Justice Scalia is using “efficiently” here not as welfare-maximizing but as minimizing per-unit costs of production — a use consistent with Justice Breyer’s “last ten percent” concerns.<sup>175</sup> Justice Scalia also suggests this more modest role for CBA in his reliance on EPA’s longstanding use of CBA under section 316(b) to avoid costs wholly disproportionate to benefits, rather than to determine an optimal level of protection.<sup>176</sup> While not unambiguous, Justice Scalia’s opinion can be read to suggest that optimizing applications of CBA would be impermissible.

### C. Justice Stevens’s Dissent

Based on skepticism of CBA that has both statutory and extrastatutory sources, Justice Stevens’s dissent concludes that Congress intended to pre-

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<sup>171</sup> *Id.*

<sup>172</sup> *Entergy*, 129 S. Ct. at 1509 (majority opinion).

<sup>173</sup> *Id.* at 1509–10.

<sup>174</sup> *Id.* at 1506.

<sup>175</sup> See BREYER, *supra* note 123, at 11–19.

<sup>176</sup> See *Entergy*, 129 S. Ct. at 1510.

clude use of CBA. The dissent largely talks past Justices Scalia and Breyer's opinions by focusing its attack on the strong form of CBA — CBA as “typically performed by EPA,” requiring monetization of costs and benefits and maximization of net benefits<sup>177</sup> — not the weak form that Justices Scalia and Breyer conclude was relied upon by EPA. In a footnote near its end, the dissent acknowledges EPA's reliance on “a mild variant of cost-benefit analysis” but declares that fact “irrelevant” to the legal conclusion.<sup>178</sup>

Having established its target, the dissent offers two objections to CBA drawn from the common pool of such objections: the comparative difficulty of quantifying environmental benefits, and the tendency of CBA “often, if not always” to favor results that do “not maximize environmental protection.”<sup>179</sup> These criticisms directly support the dissent's conclusion that CBA “fundamentally weakens” section 316(b)'s ambitious environmental “mandate” and therefore Congress meant to preclude it.<sup>180</sup> They also support the dissent's embrace of a general presumption against CBA in the absence of express congressional authorization, following the Second Circuit's reading of *American Textile*.<sup>181</sup> While these criticisms are also among the reasons for limiting CBA that Justice Breyer mentions in his opinion, the dissent does not balance them with pro-CBA considerations and thus gives them unqualified sway.

In addition to these background understandings of CBA, Justice Stevens supports his conclusion with an analysis of the structure and legislative history of section 316(b) and related provisions of the CWA.<sup>182</sup> The analysis serves to amplify Justice Stevens's going-in concerns about CBA. He finds that, far from being agnostic, Congress in the Clean Water Act viewed CBA with even more than the usual suspicion (“special skepticism”) and “controlled its use accordingly,” limiting it to a transitional role in provisions such as BPT.<sup>183</sup> Because CBA would undermine section 316(b)'s ambitious environmental protection mandate with “tangential economic efficiency concerns,” *American Trucking* requires that section 316(b)'s silence be read as prohibition.<sup>184</sup>

The skepticism about CBA that animates the dissent, particularly the assumption that CBA is inimical to regulation, reflects a view widespread among EHS advocates.<sup>185</sup> But because the dissent focuses on the strong form of CBA and assumes that the weak form is objectionable on the same grounds, it does not fully engage the cultural debate underlying the case. It assumes, for example, that EPA's resort to CBA incorporated “economic ef-

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<sup>177</sup> *Id.* at 1516 (Stevens, J., dissenting).

<sup>178</sup> *Id.* at 1521 n.13.

<sup>179</sup> *Id.* at 1516.

<sup>180</sup> *Id.* at 1521.

<sup>181</sup> *See id.* at 1517–18.

<sup>182</sup> *See id.* at 1518–21.

<sup>183</sup> *Id.* at 1520 n.9.

<sup>184</sup> *Id.* at 1517–18.

<sup>185</sup> *See supra* text accompanying notes 29–41.

efficiency concerns.”<sup>186</sup> But was the form of CBA employed by EPA designed to import efficiency concerns or to apply a standard of reasonableness? And what is the significance of the difference, if any? The dissent’s failure to separately address the merits of the weak form of CBA sanctioned by Justices Scalia and Breyer leaves open the possibility that normatively the factions of the Court are not as far apart they as may seem.

## VII. LIMITS OF PRESUMPTION

*Entergy* marks an important shift in the Court’s orientation toward cost-benefit balancing in EHS regulation. Departing from the anti-CBA canon arguably established in *American Textile*, precluding CBA in the absence of a clear statement allowing it, the *Entergy* Court countenances an agency’s use of CBA in the face of an ambiguous statute. While significant, however, the shift marked by *Entergy* reflects a relatively modest and defensible exercise of judicial power, assuming the shift is limited to the weak form of CBA clearly embraced in Justice Breyer’s opinion and arguably in Justice Scalia’s. The shift is defensible because (1) it reflects a political consensus on the use of cost-benefit comparisons to screen for irrational outcomes; (2) it preserves the executive agency’s choice to balance costs and benefits or not; and (3) it does not purport to change the statute itself but operates within a space that the Court plausibly determines was left by Congress to be filled by the agency, the courts, or both.

### A. Political Consensus Justification

The most plausible justification for a pro-CBA canon of the sort that animates the *Entergy* decision is that it reflects a political consensus or prevailing norm on the use of CBA in regulatory decision making. A shift in presumptions may be justified when there is a new political preference. There is a range of scholarly views on what proof is necessary to justify a shift in presumptions based on political norms, when such a shift is appropriate, and what the underlying rationale should be.<sup>187</sup> These views reflect different tolerances for “dynamic interpretation” and different levels of concern about injection of judicial preferences into statutory interpretation.<sup>188</sup> For my analysis here, I use a relatively demanding measure of political consensus, something close to Elhauge’s “enactable political preferences,” which restricts the scope of judicial discretion in interpretive choices.<sup>189</sup>

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<sup>186</sup> *Entergy*, 129 S. Ct. at 1518.

<sup>187</sup> See Elhauge, *supra* note 61, at 2081–84 (identifying scholars that subscribe to “the position that statutory interpretation should be sensitive to changes in political preferences,” but disagreeing with their approach in significant respects).

<sup>188</sup> See *id.* at 2081–82 n.153.

<sup>189</sup> *Id.* at 2034.

To the extent that it represents a shift away from a contrary anti-CBA presumption in *American Textile*, the *Entergy* presumption has support in recent actions and practices of the executive branch. It accords with EPA's own interpretation of section 316(b). It is consistent with the preference in recent decades of both Republican and Democratic administrations to consider costs and benefits of significant rulemaking decisions.<sup>190</sup> These congruences make it more likely that the presumption reflects the current political culture and not merely the preferences of a majority of the Justices now on the Court.

But controversy continues to surround both the morality and methodology of the CBA of welfare economics. Scholars such as Adler and Posner continue the effort to find the right moral footing and placement for CBA.<sup>191</sup> Others like Revesz and Livermore seek major revisions in its application to achieve neutrality as between pro- and anti-regulatory outcomes.<sup>192</sup> Although arguably the strong form of CBA is codified for significant rulemakings in federal administrative practice, the particulars of its use are subject to ongoing debate within the executive branch as well as in the broader public.<sup>193</sup> Continuing moral concerns and the lack of settled methodology prevent the kind of cultural consensus favoring formal CBA that could comfortably support a substantive presumption favoring its use. That may change, of course, if the relevant public becomes convinced that the methodological challenges of CBA have been addressed and that the threat of CBA's displacement of non-welfarist values has been resolved.

In light of all this, it may be important to the defensibility of the presumption that it be limited to the weak form of CBA and preclude the strong form of CBA unless the statute has specifically authorized it. Because the weak form is based on a concept of rationality, with links to the canon of avoidance of absurd or irrational results, it has a stronger cultural claim than the more recently evolved (and still evolving) strong form. This rough balancing of costs and benefits may or may not be unavoidable, as Justice Breyer claims, but it has broad intuitive appeal. It is also pluralist, allowing welfarist values to broadly frame decisions but not to dictate them. While some do contest its desirability as a tool in EHS policymaking, it does not provoke the level of resistance or skepticism that currently attaches to the strong form of CBA, and it better represents the diversity of practice in legislative enactments.<sup>194</sup> Most importantly perhaps, the canon against absurd results to which it is linked is universally accommodated by legislatures within the United States.<sup>195</sup>

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<sup>190</sup> See *supra* text accompanying notes 6–7.

<sup>191</sup> See ADLER & POSNER, *supra* note 2.

<sup>192</sup> See REVEZ & LIVERMORE, *supra* note 22.

<sup>193</sup> See, e.g., President's Memorandum on Regulatory Review, DAILY COMP. PRES. DOC., 2009 DCPD No. 00287 (Jan. 30, 2009) (ordering a reassessment of OMB procedures for reviewing agency rulemakings, including CBA).

<sup>194</sup> See *supra* note 55.

<sup>195</sup> See Elhauge, *supra* note 61, at 2053.

*B. Preserving Agency Prerogatives*

The *Entergy* presumption's framing as permissive rather than mandatory respects executive branch prerogatives, leaving the agency with the discretion to choose a weak form of CBA or none at all, and acknowledges the potential rationality of decisions that do not employ any CBA. In contrast to *American Textile*, which arguably denied OSHA the option of using CBA in cases of silence or ambiguity, *Entergy* leaves the choice with a politically accountable agency. Making the presumption for use of CBA permissive rather than mandatory seems, on the face of it, to defy the logic of Justice Breyer's partial concurrence,<sup>196</sup> and of Justice Scalia's Houston speech that a rough balancing of costs and benefits is essential for rational decision making.<sup>197</sup> But Justice Breyer is careful not to carry this logic too far. As he points out, there are valid reasons why Congress or an agency might decide to forgo CBA, even if efficiency is the ultimate goal.<sup>198</sup>

A choice by an agency not to engage in any cost-benefit balancing does not necessarily mean that its decision will be irrational or even that it will be less welfare-enhancing than if CBA were employed. Adler and Posner argue that CBA tracks overall well-being better than competing methodologies, including the feasibility requirement common in environmental law and implicated in *Entergy*. Based on a narrow construction of "feasibility," limited to technological considerations, the authors conclude that the feasibility test "is clearly suboptimal with respect to welfare."<sup>199</sup> In excluding any consideration of costs, however, this version of the feasibility test is even more restrictive than the test argued for by the environmental parties in *Entergy*.<sup>200</sup> Sinden, Kysar, and Driesen examine a broader version of the test that considers economic feasibility (e.g., whether a measure's costs would cause widespread plant shutdowns) as well as technological capacity, while still avoiding the weighing of costs against benefits. In light of the real-world limitations on information necessary to quantify the full range of health and environmental effects, they conclude that feasibility analysis of this sort is more likely to reflect overall well-being than CBA.<sup>201</sup> While the relative merits of CBA and feasibility analysis remain disputed, the argument by Sinden, Kysar, and Driesen offers support for the intuition in Justice Breyer's opinion that technology-forcing requirements untempered by CBA may be welfare-regarding while also serving other values.<sup>202</sup>

One might be concerned that a presumption favoring delegation to an agency of the choice to use or not to use a weak form of CBA would invite

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<sup>196</sup> *Entergy*, 129 S. Ct. at 1512–16 (Breyer, J., concurring in part and dissenting in part).

<sup>197</sup> See Scalia, *supra* note 23.

<sup>198</sup> *Entergy*, 129 S. Ct. at 1513.

<sup>199</sup> ADLER & POSNER, *supra* note 2, at 91.

<sup>200</sup> Brief for Respondents Riverkeeper, Inc. et al. at 26, *Entergy*, 129 S. Ct. 1498 (Nos. 07-588, 07-589 & 07-597).

<sup>201</sup> See Sinden et al., *supra* note 1, at 65.

<sup>202</sup> *Entergy*, 129 S. Ct. at 1513 (Breyer, J., concurring in part and dissenting in part).



abuse. There are at least two possible pathologies. Environmental agency officials, for example, might harbor strong personal or institutional preferences for environmental protection that they are inclined to indulge even at the expense of important competing values. By declining to apply the weak form of CBA, as permitted by the *Entergy* court, those officials would be in a position to advance overly zealous regulation without the reasonableness constraint. Capture of the officials by outside environmental interests could produce the same result. Alternatively, the same officials might be captured by industry interests seeking to weaken environmental regulation in a way contrary to the public interest. In that case, we would expect the agency not only to invoke the weak form of CBA but to apply it in ways that do not give due regard to environmental interests. Room for such abuse exists, because reasonableness or proportionality of costs and benefits may be even less determinate than technological or economic infeasibility.

While the agency has the primary decision-making role, oversight mechanisms in the executive, legislative, and judicial branches have some potential to check abuses in the scenarios described above. These include centralized review by OMB, which extends to all significant rules and includes review and comment by other federal agencies.<sup>203</sup> In the course of reviewing instances of both overzealous regulation and overly lax regulation, OMB or others within the executive branch might pressure the agency to reconsider its preferred interpretation about the availability of CBA, although historically OMB is much more likely to favor weaker regulation than stronger regulation.<sup>204</sup> Pressure on the agency to correct its course in either scenario might also come from congressional committees exercising their oversight function.

The courts also perform an oversight function. In the scenario where CBA is not employed, an agency defending its choice under *Chevron* must persuade the reviewing court that its interpretation that no CBA is to be used is a permissible one.<sup>205</sup> The permissiveness of the *Entergy* presumption helps the agency here, but it will not overcome a statute's plain meaning or intent that is inconsistent with that interpretation. Scholarly consensus suggests that judicial review of the agency's interpretation should also "incorporate a 'reasonableness' requirement drawn from the arbitrary and capricious case law."<sup>206</sup> But whether or to what degree that reasonableness review is the same or different compared to other policy decisions made on an administrative record is subject to debate.<sup>207</sup>

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<sup>203</sup> See *supra* note 7 and accompanying text.

<sup>204</sup> Sinden et al., *supra* note 1, at 66. It is possible, of course, that OMB and the White House have been captured while the agency has not.

<sup>205</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>206</sup> M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, in *A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES* 85, 99 (John F. Duffy & Michael Herz eds., 2005); see Bamberger & Strauss, *supra* note 149, at 621 n.39.

<sup>207</sup> Compare Stephenson & Vermeule, *supra* note 149, at 606, with Bamberger & Strauss, *supra* note 149, at 621–22.

The scenario of overly lax regulation readily lends itself to established requirements for arbitrary and capricious review. The reviewing court would ensure that the agency provided a reasoned explanation of its determination that more demanding regulatory measures would impose costs disproportionate to the benefits, that the agency had addressed significant public comments on the question, and that its rationale was supported by the administrative record.

### C. Congressional Supremacy

Finally, in *Entergy* the pro-CBA presumption operates within the colorable limits of the language and structure of the CWA. In Justice Scalia's and Justice Breyer's opinions, as I hope I have demonstrated, the presumption is doing work. It guides the inquiry on whether the statute grants interpretive discretion to the agency and on what the limits of that discretion might be. It encourages the rejection of other defensible and perhaps even better readings in favor of a reading consistent with its substantive preference. But its dice-loading effect is a modest one; it does not stretch the reading of the CWA beyond the plausible. Its finding of ambiguity in text and legislative history sufficient to accommodate the agency's reading seems less strained, for example, than Justice Powell's interpretive efforts to avoid "absurd result[s]" in *Tennessee Valley Authority v. Hill*.<sup>208</sup>

However, the statute would have difficulty accommodating more robust versions of the presumption that would require or permit a strong form of CBA. The fact that section 316(b) does not specify any factors for consideration does not reasonably imply that either all factors or none may be considered. As the dissent argues, and as Justice Scalia himself ultimately seems to concede, the purpose and context of the provision do suggest the appropriateness of excluding or limiting consideration of some factors but not others.<sup>209</sup>

In its array of "best technology" standards, Congress struck a balance in favor of technology-forcing regulation to reduce environmental impacts. As Justice Breyer's partial concurrence suggests, this may be because Congress believed that, while not efficient now, such regulation would become so as industry adapted and costs declined, or because Congress was concerned that EPA would give too little weight to environmental factors if left to strike the balance itself.<sup>210</sup> Avoiding standards that are economically infeasible or that impose costs grossly disproportionate to benefits is not basically at odds with either rationale for a technology-forcing strategy. But using CBA to set standards for an optimal level of protection — for example, the level of reduction of harm to aquatic life that EPA determined would maximize net benefits — might conflict with both rationales and risk alter-

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<sup>208</sup> 437 U.S. 153, 196 (1978).

<sup>209</sup> *Entergy*, 129 S. Ct. at 1508–09 (majority opinion); *id.* at 1518 (Stevens, J., dissenting).

<sup>210</sup> *Id.* at 1513 (Breyer, J., concurring in part and dissenting in part).

ing the balance struck by Congress. This is likely to be the case for the great majority of technology-based provisions in EHS laws that do not expressly provide for CBA.

This risk that use of a strong form of CBA would conflict with Congress's technology-forcing goals could be reduced by adopting changes to CBA as previously mentioned. For example, adequately anticipating adaptive cost-saving measures by industry could significantly affect the cost-benefit balance in favor of more demanding regulation. But these reforms have not been widely embraced or implemented. And without such reforms there seems little reason to believe that the downsides of CBA identified by Justice Breyer have ceased to be material to statutory interpretation.

### VIII. CONCLUSION

Although *Entergy* does not purport to overrule the Court's precedents, it interprets *American Textile* and *American Trucking* in ways that cut against the grain of those prior decisions, and suggests a new presumption for the interpretation of ambiguous EHS regulatory provisions on the use of CBA. I have argued that the shift is significant but justifiable. It is appropriately limited: the presumption is still against the strong form of CBA. It reflects actions and practices of the political branches and also has a basis in established legal doctrine. It respects both the political accountability and policy expertise of the responsible agency by preserving its choice to balance costs and benefits or not as circumstances may warrant.<sup>211</sup> And it does not purport to change the statute itself but operates within a space that the Court plausibly determines was left by Congress to be filled by the agency, the courts, or both. The decision was by no means inevitable. The legal arguments in the dissent are also plausible. The reason that they did not prevail, I believe, has much to do with the native appeal of the weak form of CBA used by EPA as a tool of rational decision making in a world of difficult choices. But *Entergy* remains a somewhat awkward resting point in the evolution of judicial doctrine on CBA.

If we take the Second Circuit's interpretation of *American Textile* as the baseline, one likely consequence of *Entergy* will be to increase the ability of agencies to adjust the relative priority of EHS concerns downward. Thus, *Entergy* joins a list of Supreme Court rulings that seem intended in one way or another to correct for perceived excesses of the ambitious EHS legislation of the 1960s, 1970s, and 1980s.<sup>212</sup> This tendency to reach for balance may be inherent in the judiciary, reflected in the equity traditions and reasonableness doctrines that have long permeated judicial practice. Or it may be a

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<sup>211</sup> The Obama EPA remains free to reinterpret section 316(b) and issue a new standard based on closed-cycle cooling systems if a reasonable basis for such regulation exists.

<sup>212</sup> See Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 *ECOLOGY L.Q.* 363, 432–40 (2006).

function of the Court's increasing conservatism regarding EHS concerns over the past several decades. In a study of over one hundred environmental cases decided by the Court through 1998, Richard Lazarus found that "the Court as a whole is steadily becoming less responsive to environmental protection."<sup>213</sup> That trend continues. All five environmental decisions in the Court's 2008–2009 Term, including *Entergy*, were adverse to environmental interests; four of the five preserved executive branch determinations that curtailed environmental protections.<sup>214</sup> All five were cases in which courts of appeals had reached contrary conclusions, a selectivity that suggests the Court's determination to signal concern about excessive regulation, or at least support for executive branch efforts to limit regulation at the margin.

But *Entergy* expresses only qualified support for a methodology that has traditionally been associated with resistance to regulation, and its hesitancy to go further is an appropriate reflection of the transitional state of CBA. The debate over CBA continues to be divisive, but there is also constructive movement. Revesz and Livermore, with help from others, advance methodological changes to eliminate anti-regulatory bias in CBA.<sup>215</sup> Adler, Posner and others work to establish a moral footing for CBA that does not crowd out non-welfarist values.<sup>216</sup> These efforts may over time relax the crucial objection of the critics that CBA allows too little weight to be given to environmental and other health and safety factors. Such détente will likely depend on changes not only in theory and methodology, but also in practice and results. If achieved, a new consensus on CBA would almost certainly be more eclectic and plural than suggested by the "cost-benefit state." But it would provide a welcome basis for convergence of congressional and executive-branch practice — with less need for the courts to navigate between.

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<sup>213</sup> Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 735–36 (2000).

<sup>214</sup> See *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008) (invalidating lower court injunction protecting whales from military sonar tests); *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (upholding EPA's use of CBA to select less protective standard for cooling water structures); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009) (upholding less protective interpretation of CWA requirements for gold mine discharges); *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009) (limiting scope of liability under CERCLA); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009) (denying standing to environmental plaintiffs).

<sup>215</sup> See *supra* text accompanying notes 29–30.

<sup>216</sup> See *supra* text accompanying notes 18–22.