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Unequal Partners: Cost-Benefit Analysis and Executive Review of Regulations

by Stuart Shapiro

Editors' Summary: This Article addresses the potentially conflicting roles played by the Office of Management and Budget in overseeing agencies' rulemaking: analyzing rules using cost-benefit analysis and exercising executive control of rulemaking. The author argues that the Office of Information and Regulatory Affairs' role as the eyes and ears of the president in overseeing regulatory agencies has led to its analytical mission playing a secondary role and is, in part, responsible for the lack of visible effects (positive or negative) of cost-benefit analysis. By using a simple model, the Article demonstrates how executive review and analytical requirements interact in presidential decision-making. The author offers alternative hypotheses for the negligible impact of cost-benefit analysis on rulemaking and suggests a research agenda that could answer questions about the institutional design of cost-benefit requirements. The Article concludes that the role of cost-benefit analysis in regulatory policy is necessarily limited by its linking with executive review.

I. Introduction

In July 2001, John Graham was confirmed as Administrator of the Office of Information and Regulatory Affairs (OIRA). The vote on his confirmation was 61 to 37.¹ Aside from the vote on U.S. Attorney General John Ashcroft, this was the closest vote on a President George W. Bush appointee in the first 18 months of the Bush II Administration. Eleven years earlier, during the term of President George H.W. Bush and the Bush I Administration, the U.S. Congress never confirmed an Administrator for the OIRA. Hearings were held for the nominee, James Blumstein, but confirmation was never granted.²

The OIRA has long had a controversial history. The debates over Blumstein's and Graham's confirmations, however, were markedly different from one another. The committee hearings on Blumstein's confirmation focused on the OIRA's role as the mechanism by which the president over-

saw the regulatory process.³ The debate focused on the question of whether or not the president had the authority to question or stop regulations promulgated by agencies pursuant to statutes passed by Congress.

Eleven years later, the floor debate on Graham's nomination was a debate on the merits of the OIRA's other key role, as the guardian of cost-benefit analysis in the regulatory process.⁴ Graham had been the director of the Harvard Center for Risk Analysis and was known as a strong advocate for risk assessment and cost-benefit analysis.⁵ Proponents of regulation see such analysis as biased against regulatory efforts and designed primarily to make the regulatory process more cumbersome.⁶

The key event in the intervening decade was President William J. Clinton and his Administration's endorsement of the idea of executive oversight of the regulatory process. With the adoption of Executive Order No. 12866⁷ by a Democratic president, the opposition to an increased role for the president in the regulatory process subsided over the past decade.⁸ Elena Kagan's discussion of how executive review

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1. U.S. Senate Roll Call votes, 147 CONG. REC. S7938 (daily ed. July 19, 2001).
2. James Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851 (2001).

3. *Id.*

4. 147 CONG. REC. S7906-S7938 (daily ed. July 19, 2001).

5. Graham also received criticism for industry funding of the Harvard Center.

6. *See, e.g.*, 147 CONG. REC. at S7920 (Sen. Lieberman's remarks).

7. Exec. Order No. 12866, 58 Fed. Reg. 51735, ADMIN. MAT. 45070 (Sept. 30, 1993).

8. Robert Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001) ("Because the Clinton Administration's regulatory review program

under Clinton was used to promote regulatory goals illustrates this change in philosophy.⁹

Meanwhile, the debate on economic analysis has remained as heated as ever. Supporters of analysis often include conservatives and industry trade groups who hope that the use of economics will concretely demonstrate the foolishness of some regulatory activity.¹⁰ Opponents argue that the benefits of regulations are difficult to monetize and that cost-benefit analysis is therefore inherently biased against regulation.¹¹ The debate over analysis is over 20 years old and shows no sign of abating. With each increase in the number and level of detail of analytical requirements in the regulatory process, supporters of economic analysis voice their hopes that regulation will become more cost effective and opponents argue that the regulatory process will be greatly harmed or that agencies will abandon rulemaking altogether.

Despite the stridency of this debate, there is little evidence supporting either side. Rulemaking has not been abandoned, nor have the net benefits of regulations been measurably increased. Each year many regulations are put in place, many of which have net benefits, and some of which do not.¹² Why have none of the successive attempts to enhance the role of economic analysis in the regulatory process produced any evidence that they either have succeeded in the ways hoped for by their proponents or crippled the regulatory process as envisioned by their opponents?

This Article argues that the OIRA's role as the eyes and ears of the president in overseeing regulatory agencies has led to its analytical mission playing a secondary role and is, in part, responsible for the lack of visible effects (positive or negative) of analytical requirements. The very virtues that advocates of executive review promote—bureaucratic efficiency¹³ and accountability¹⁴—may run counter to the objective of using analysis to choose between regulatory options. The Article uses a simple model to show that if cost-benefit analysis is subordinated to executive review, it is

generally was so well received, the controversy over presidential oversight of rulemaking died down.”)

9. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). Kagan notes: “Clinton chose to implement the order in a way generally sympathetic to regulatory efforts.” *Id.* at 2247.
10. See, e.g., Kip Viscusi & Ted Gayer, *Safety at Any Price?*, 25 REGULATION 54 (2002). See also Randall Lutter et al., *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations*, 37 ECON. INQUIRY 599 (1999); Kip Viscusi, *Mortality Effects of Regulatory Costs and Policy Evaluation Criteria*, 25 RAND J. ECON. 94 (1994); Randall Lutter, *The Role of Economic Analysis in Regulatory Reform*, 22 REGULATION 38 (1999); CASS SUNSTEIN, *RISK AND REASON* (Cambridge Univ. Press 2002); Robert Hahn, *The Economic Analysis of Regulation: A Response to the Critics*, 71 U. CHI. L. REV. 1021 (2004).
11. This argument has been made by a number of critics. See, e.g., Lisa Heinzerling, *The Humbugs of the Antiregulatory Movement*, 87 CORNELL L. REV. 648 (2002); Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345 (2003); Lisa Heinzerling & Frank Ackerman, *Pricing the Priceless Cost-Benefit Analysis of Environmental Protection*, 150 U. PENN. L. REV. 1553 (2002); SIDNEY A. SHAPIRO & ROBERT GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* (Stanford Univ. Press 2003).
12. Office of Management and Budget (OMB) reports to Congress on the costs and benefits of federal regulations from 1997 to 2005 can be found on the Internet at http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html (last visited May 9, 2005); see also *infra* note 48 (2002 and 2003 reports). Earlier reports are on file with the author or available from the OMB.
13. As opposed to economic efficiency.
14. See Kagan, *supra* note 9.

easier to explain regulatory outcomes from the past two decades than it would be by assuming analysis has had a large effect on regulations. If executive review is the more important of the OIRA's two roles, then this development has rendered somewhat hollow the debate on cost-benefit analysis. As long as cost-benefit analysis is the lesser partner of executive review in this marriage of procedural controls, it will be impossible to argue that regulatory policy decisions have been either improved or hurt by analytical requirements.

In addition to executive review, legal and organizational factors limit the role of economic analysis as the major determinant of policy. It is unclear whether any requirements for analysis—whether or not they are coupled with executive review—would make a significant difference in regulatory outcomes, or whether the rulemaking process would move on as it has until now, namely, more influenced by political and legal pressures regardless of the nature of requirements for cost-benefit analysis. Answering this question has important implications for the future of rulemaking and cost-benefit analysis.

This Article reviews the debate over cost-benefit analysis and the impact that the interaction between analytical requirements and executive control of rulemaking has had upon this debate. Part II reviews the history of analytical requirements at the federal level and outlines the arguments for and against these requirements. It also details the evidence that analytical requirements have not deterred rulemaking. Part III discusses the growth of executive control and argues that this is the largest reason for the limited effect of analytical requirements. Part IV develops a simple model of how executive review and analytical requirements interact in presidential decisionmaking. Part V offers alternative hypotheses for the negligible impact of economic analysis and looks at directions that research should take in this area in order to answer questions about the institutional design of analytical requirements. In Part VI, the Article concludes that the role of cost-benefit analysis in regulatory policy is necessarily limited by its linking with executive review.

II. Cost-Benefit Analysis at the Federal Level

The debate on the role of economic analysis in rulemaking began shortly after the blooming of the regulatory age in the early 1970s. From the beginning, attempts to integrate analysis into the rulemaking process involved delegating responsibility for supervising analytical requirements to an office within the Executive Office of the President. President Richard M. Nixon created a “Quality of Life Review” that gave the Office of Management and Budget (OMB) very limited authority to review regulations. President Gerald Ford required agencies to produce inflation impact statements that were reviewed by the Council on Wage and Price Stability. President Jimmy Carter established the Regulatory Analysis Review Group and issued Executive Order No. 12044, which, for the first time, required economic impact statements on all rules with an impact of more than \$100 million.¹⁵ While these were small steps, they increased the relevance of economics in regulatory decisionmaking.¹⁶

15. Exec. Order No. 12044, 3 C.F.R. pt. 152 (1978).

16. For a more detailed history, see Murray Weidenbaum, *Regulatory Process Reform From Ford to Clinton*, 16 REGULATION 1 (2000);

The use of economic analysis grew sharply under President Ronald Reagan when, in 1981, he issued Executive Order No. 12291.¹⁷ Executive Order No. 12291 centralized the review of regulations and regulatory impact analyses in a new office within the OMB: the OIRA.¹⁸ The order required agencies to submit all proposed and final regulations to the OIRA before publication.¹⁹ The OIRA was granted the authority to approve or disapprove regulations and regularly returned them if they did not meet cost-benefit tests.²⁰ Over the course of the Reagan Administration, the OIRA was often accused of being a bottleneck or black hole for regulations.²¹

Executive Order No. 12291 was soon followed by Executive Order No. 12498, which required agencies to publish a list of their upcoming regulatory activities and gave the OIRA authority to review these lists.²² The OIRA continued to play a pivotal role in assessing agency regulations throughout the Bush I Administration. This role was supplemented by the Council on Competitiveness, which was chaired by the vice president. The Clinton Administration disbanded the council.²³

The return of the Democrats to the executive branch did not end the requirement for the use of regulatory analysis or the role of the OIRA. While President Clinton rescinded Executive Order No. 12291, he replaced it with Executive Order No. 12866.²⁴ Executive Order No. 12866 cemented the place of regulatory impact analysis and the OIRA's review authority in the regulatory process while changing some of the details of how this review took place.²⁵ With the institutionalization of centralized executive review of regulations and their supporting analyses under a Democratic president, the presence of the OIRA can now be seen as a permanent part of the regulatory process. President Bush has not issued a new executive order, finding Executive Or-

der No. 12866 sufficient to exercise oversight over the regulatory process.²⁶

The institutionalization of economic analysis has not ended the debate on the appropriateness of economic analysis in the regulatory process. If anything, it has grown in stridency. The argument for cost-benefit analysis emerged in the 1970s after the creation of the U.S. Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). It is grounded in welfare economics and utilitarianism and premised on the proposition that government should intervene with the market only when the benefits of that intervention outweigh its costs.²⁷

Those who pushed for an increased role for cost-benefit analysis argued that many early regulations by EPA, OSHA, and other agencies would fail such a cost-benefit test.²⁸ John Morrall demonstrated that the cost per life saved of federal regulations varied from \$100 to \$72 million, which, he argued, was clear evidence that further economic analysis should be done in setting regulatory priorities.²⁹ This point was furthered by a 1995 study examining the cost-effectiveness of 500 life-saving interventions; this study again showed a wide variation.³⁰ The argument advanced by both studies is that regulatory costs were consuming large quantities of public resources and were in some cases not producing corresponding benefits. If resources devoted to complying with a rule costing \$72 million per life saved were instead devoted to a rule costing only \$100 per life saved, many more lives would be saved. The hope of those supporting more rigorous economic analysis is that public and private resources will be used more effectively if cost-benefit analysis is done before a regulation is promulgated and if decisions are based upon that analysis.

Arguments against cost-benefit analysis generally take two forms. Several scholars argue that cost-benefit analysis is inherently biased against safety and health regulations. They make several points:

- Because many regulations have costs in the present and benefits in the future, the discounting of future values undervalues the benefits of regulations.³¹
- Some benefits, like environmental goods and the value of a life, are inherently difficult to value, and, therefore, the benefits of regulations protecting these goods are underestimated whereas costs are easily quantified and hence given a greater weight.³²
- A cost-benefit analysis will typically evaluate a regulation based on its cost per life saved. This type of analysis assigns no value to many regulations

THOMAS MCGARITY, *REINVENTING RATIONALITY* (Cambridge Univ. Press 1993); and Richard Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

17. Exec. Order No. 12291, 3 C.F.R. pt. 127, ADMIN. MAT. 45025 (1982).

18. The OIRA was created in the Paperwork Reduction Act, which was passed in 1980. 44 U.S.C. §35.

19. Exec. Order No. 12291, *supra* note 17, §2.

20. Over the course of the Reagan Administration, the OIRA returned 293 rules or 1.5% of all rules submitted to agencies. Information on the number of rules returned each year is available at OMB, *Executive Order Reviews Completed*, at http://www.whitehouse.gov/omb/inforeg/concluded_executive_orders.html (last visited May 9, 2005).

21. Alan Morrison, *OMB Interference With Agency Rulemaking; The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986).

22. Exec. Order No. 12498, 3 C.F.R. pt. 323 (1985), reprinted in 5 U.S.C. §601 note (1988), ADMIN. MAT. 45029.

23. Weidenbaum, *supra* note 16.

24. Exec. Order No. 12866, *supra* note 7.

25. The primary change was to increase the transparency of OIRA review, prohibiting contacts between the OIRA and outside parties concerning rules under review unless these contacts took place in meetings that were a public fact and to which the regulating agency was invited. The other most significant change was restricting OIRA review to "significant" regulatory actions rather than all regulations issued by agencies. The definition of "significant," however, is sufficiently broad to include any rule on which there is significant controversy. As a result of this change, the number of rules reviewed by the OIRA dropped from nearly 3,000 per year to approximately 600 per year. Exec. Order No. 12866, *supra* note 7, §11.

26. See John Graham, Presidential Management of the Regulatory State, Address Before the National Economists Club (Mar. 7, 2002), available at <http://www.whitehouse.gov/omb/legislative/testimony/graham030702.html> (last visited Apr. 19, 2005).

27. EDITH STOKEY & RICHARD ZECKHAUSER, *A PRIMER FOR POLICY ANALYSIS* (W.W. Norton & Co. 1978)

28. Christopher DeMuth & Douglas Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986).

29. John Morrall, *A Review of the Record*, 10 REGULATION 25 (1986).

30. Tammy Tengs et al., *Five Hundred Life-Saving Interventions and Their Cost-Effectiveness*, 15 RISK ANALYSIS 3 (1995).

31. Jeffrey C. Corey, *Discounting EPA's Nonroad Spark Engine Rule and the Hidden Antiregulatory Agenda of Cost-Benefit Analysis*, 22 UCLA J. ENVTL. L. & POL'Y 77 (2003)

32. FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND VALUE OF NOTHING* (The New Press 2004).

whose health benefits do not rise to the level of saving lives.³³

- Cost-benefit analyses tend to be biased in favor of the status quo, which makes regulatory changes appear to be bad options.³⁴

According to these scholars, cost-benefit analyses tend, misleadingly, to undervalue the benefits and overvalue the costs of regulations.³⁵

The second set of arguments focuses on the delay that requiring cost-benefit analysis introduces into the regulatory process. According to this argument, the regulatory process has become so burdened by analytical requirements that agencies avoid rulemaking altogether. The rulemaking process has become “ossified” as a result of requirements for analysis and other procedural hurdles that agencies must clear in order to promulgate a regulation.³⁶ Labor unions and environmental groups argue that requiring economic analysis is a backdoor way for opponents of statutes like the Clean Air Act (CAA)³⁷ and the Occupational Safety and Health Act³⁸ to delay those statutes’ implementation.³⁹

Neither the promoters nor the critics of cost-benefit analysis have seen their predictions realized. Although the two opposing views have emerged in every debate on a significant social regulation in recent times, there is little empirical evidence to support either side. Arguing against the claim that analysis requirements have stifled the regulatory movement is the fact that agencies have continued to regulate throughout the period during which cost-benefit analysis requirements for cost-benefit analysis have been in place. According to one study,⁴⁰ the number of *Federal Register* pages reached an all-time high in 2002 of 75,606 pages. The number of rules published in 2002 was 6,802,⁴¹ and estimates of the cost of regulations run as high as \$800 billion annually.⁴² In addition, there is little evidence that the time it takes to produce a rule has increased.⁴³

While there is little evidence that the requirement that agencies conduct cost-benefit analyses of significant regulatory efforts has deterred rulemaking, this leaves unanswered the question whether cost-benefit analysis has resulted in regulations with greater net benefits. No conclusive study exists comparing the net benefits of regulations promulgated before Executive Order No. 12291 and those promulgated in the 22 years since.⁴⁴ However, a number of economists have reviewed recent rules and have largely concluded that the requirements for cost-benefit analysis have not had their intended effect.⁴⁵ One study argued that the reason was agencies’ failure actually to follow the analysis requirements of the executive orders. The study noted that “[t]he RIAs [regulatory impact analyses] typically do not provide enough information to enable regulatory agencies to make decisions that will maximize the efficiency or effectiveness of a rule.”⁴⁶ Another advocate of economic analysis concluded: “Health and safety regulations have fallen short of any reasonable measure of performance.”⁴⁷ In addition, in the 2002 edition of the federal report on the costs and benefits of regulations, numerous rules had higher costs than benefits.⁴⁸

33. SHAPIRO & GLICKSMAN, *supra* note 11.

34. *Id.*

35. See various scholars’ literature *supra* note 11.

36. The seminal article advancing this argument is Thomas McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L.J. 1384 (1992).

37. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

38. 29 U.S.C. §§651-678.

39. This strategy is often derided as “Paralysis by Analysis.” David C. Vladeck & Thomas McGarity, *Paralysis by Analysis: How Conservatives Plan to Kill Popular Regulation*, AM. PROSPECT, Summer 1995.

40. CLYDE WAYNE CREWS, *TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE REGULATORY STATE* (Cato Institute 2004).

41. Of these, 4,147 were final rules according to the Regulatory Information Service Center. Both *Federal Register* pages and the number of rules are imperfect measures at best of regulatory activity. Pages are inaccurate since the *Federal Register* publishes more than just rulemakings. Number of rules is a better indicator but it does not distinguish between regulatory rules, deregulatory rules, and administrative rules. Also, the 2002 numbers were affected to a small degree by the number of regulations issued in response to the terrorist attacks on September 11, 2001. Despite these inadequacies, this data on the number of regulations issued, coupled with the information on the annual costs of regulations, argues against analysis requirements having a significant effect on the output of regulations.

42. In a speech on October 4, 2002, at Carnegie Mellon University, entitled “Presidential Oversight of the Regulatory State: Can It Work?,” OIRA Administrator Graham cited the annual costs of regulations as greater than \$800 billion.

43. Admittedly there have been no large-scale empirical analyses of this question. However, because numerous sources have noted that the rate at which regulations are produced has not decreased and that the resources devoted to rulemaking have not increased, it is reasonable to conclude that there has been at least no significant slowdown in rulemaking activity. One study of EPA rulemakings found only a statistically nonsignificant effect of OMB review on the time it took to review a rule. See Cornelius Kerwin & Scott Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113 (1992).

44. In comparing proposed and final rules, Scott Farrow found that “such review appears to have no efficiency improving impact on the difference between proposed and final regulations or on the cost effectiveness of regulations that are implemented.” SCOTT FARROW, *IMPROVING REGULATORY PERFORMANCE: DOES EXECUTIVE OFFICE OVERSIGHT MATTER?* 2 (American Enterprise Institute/Brookings Joint Center Working Paper 2001).

45. Morral argues that while the net benefits of rules have not improved over the history of the executive orders, the fact that they haven’t gotten worse indicates a successful role for analysis. Since rules with high net benefits were more likely to be promulgated first, maintaining a constant level of net benefits shows that analysis has had an impact. John F. Morral III, *Saving Lives: A Review of the Record*, 27 J. RISK & UNCERTAINTY 221 (2003).

46. Robert Hahn, *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply With Executive Order 12866*, 23 HARV. J. L. & PUB. POL’Y 859 (Summer 2000).

47. Viscusi & Gayer, *supra* note 10, at 54.

48. These included the U.S. Department of the Interior’s Roadless Area Conservation rule (66 Fed. Reg. 3243 (Jan. 12, 2001)) and EPA’s Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring rule (66 Fed. Reg. 6975 (Jan. 22, 2001)). In addition, there are numerous rules with significant costs for which benefits were not estimated. These include the U.S. Department of Agriculture’s Retained Water in Raw Meat and Poultry Products rule (66 Fed. Reg. (Jan. 9, 2001)) and the U.S. Department of Labor’s Amendments to Summary Plan Descriptions rule (65 Fed. Reg. 70225 (Nov. 21, 2000)). See STIMULATING SMARTER REGULATION: 2002 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES (OMB 2002), available at http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html (last visited May 9, 2005) [hereinafter 2002 OMB REPORT]. The 2003 OMB report, INFORMING REGULATORY DECISIONS: 2003 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES (OMB 2003), available at http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html (last visited May 9, 2005) [hereinafter 2003 OMB REPORT], which covers a period over which far fewer rules were promulgated, cites as an example a U.S. Department of Transportation

Further evidence that the cost-benefit analysis requirements have had little effect are the constant attempts to strengthen them. These include actual laws passed, including the Unfunded Mandates Reform Act (UMRA)⁴⁹ and the Congressional Review Act (CRA),⁵⁰ many proposed bills,⁵¹ and proposals to augment the cost-benefit analysis requirement by requiring peer review for regulatory analyses.⁵² Proponents have justified these changes, proposed and enacted, largely in order to reduce the costs of federal regulations, thereby implying that the current requirements still result in regulations whose benefits do not justify their costs.⁵³ Those supplemental requirements that have been enacted, such as the UMRA and the CRA, appear to have done little to change the situation. This leads to the question of why economic analysis requirements have neither stopped the regulatory process cold, as feared by regulatory advocates, nor led to more economically efficient regulations, as anticipated by regulatory critics.

III. Executive Review

As noted above, the OIRA has responsibility both for ensuring that agencies base their regulatory decisions on impact analyses and for exercising control over these agencies on behalf of the president. The second of these missions has also had a controversial history. The discussion of the role of the president in overseeing regulatory decisionmaking has taken place largely within the administrative law literature and compares presidential control with alternatives such as congressional control,⁵⁴ interest group control, and bureaucratic discretion.⁵⁵ As Richard Pildes and Cass Sunstein note, discussion of presidential control over federal agencies has been going on for more than 100 years.⁵⁶

A number of prominent authors have praised the concept of presidential control. Kagan, citing the Clinton Administration's use of executive review, argues that the president is uniquely positioned to enhance both the accountability and the efficiency of administrative decisions.⁵⁷ Others support executive review on the grounds that it yields better management of executive agencies and implementation of a uni-

form regulatory policy⁵⁸; that it encourages policy coordination, political accountability,⁵⁹ and more balanced decisionmaking; and that the president is more likely to advance national over factional interests.⁶⁰ In the late 1980s, the Administrative Conference of the United States and the American Bar Association endorsed executive oversight of the regulatory process.⁶¹ Finally, others advance constitutional arguments in favor of substantive executive oversight: Steven Calabresi and Saikrishna Prakash assert that only such oversight can confer legitimacy upon the regulatory state,⁶² and Lawrence Lessig and Sunstein argue that the 20th century development of the administrative state has made executive control essential to fulfilling the goals of the original constitutional system.⁶³

Critics writing during the Reagan Administration contended that executive review gave unelected bureaucrats authority over Cabinet officials who were supposed to be responsible to Congress.⁶⁴ With President Clinton's adoption of Executive Order No. 12866, opposition to the unitarian position of executive control over rulemaking has abated.⁶⁵ It has not, however, vanished. Cynthia Farina, writing more recently,⁶⁶ assailed the new assertions of presidential power over the regulatory regime as inherently antiregulatory and as increasing the likelihood that the regulatory system will collapse under its own weight.⁶⁷

Regardless of scholars' positions on whether increased presidential oversight of the regulatory process is a positive or a negative development, there is widespread agreement that with Executive Order Nos. 12291 and 12866, the role of the president in the regulatory process has permanently increased.⁶⁸ Now that the role of the OIRA has been affirmed

(DOT) rule (Tire Pressure Monitoring Systems, 67 Fed. Reg. 38703 (June 5, 2002)) in which the benefits of the rule were not monetized but the costs were estimated at \$749 million to \$1.2 billion. Finally, it should be noted that the numbers in this report are based on agency estimates with which outside parties have occasionally disagreed, saying that the agencies overestimate benefits and underestimate costs.

49. Pub. L. No. 104-4 (1995).

50. Pub. L. No. 104-121 (1995).

51. See, e.g., Congressional Regulatory Review Reform Act of 2000, S. 2670, 106th Cong., and the Regulatory Improvement Act of 2000, H.R. 3311, 106th Cong.

52. See OMB, Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (Jan. 14, 2005).

53. Kip Viscusi, *Regulating the Regulators*, 63 U. CHI. L. REV. 1423 (1996).

54. WILLIAM WEST, *CONTROLLING THE BUREAUCRACY* (M.E. Sharpe 1995).

55. Although, this issue also came up in the confirmation hearings of Blumstein as OIRA Administrator during the Bush I Administration. Blumstein asserted that the OIRA was the "eyes and ears of the President" much to the consternation of the Senate committee. Blumstein, *supra* note 2.

56. See Pildes & Sunstein, *supra* note 16.

57. Kagan, *supra* note 9.

58. Blumstein, *supra* note 2.

59. Shane argues that executive decisionmaking is no more accountable to the public than legislative decisionmaking. Peter Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995).

60. DeMuth & Ginsburg, *supra* note 28.

61. A GUIDE TO FEDERAL AGENCY RULEMAKING (Administrative Conference of the United States 1988).

62. Steven Calabresi & Saikrishna B. Prakash, *The President's Powers to Execute the Laws*, 104 YALE L.J. 541 (1994).

63. Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

64. Erik D. Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291*, 4 VA. J. NAT. RESOURCES L. 1 (1984); Robert Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127 (1991); James Bowers, *Looking at OMB's Regulatory Review Through a Shared Powers Perspective*, 23 PRESIDENTIAL STUD. Q. 331 (1993). See also Morrison, *supra* note 21.

65. Blumstein, *supra* note 2.

66. Cynthia Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227 (1998). See also SHAPIRO & GLICKSMAN, *supra* note 11, Percival, *supra* note 8, and Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429 (1999).

67. An outstanding overall summary of the debate over executive control can be found in Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003).

68. As Pildes and Sunstein note: "Presidential oversight of the regulatory process, though relatively new, has become a permanent part of the institutional design of American government." Pildes & Sunstein, *supra* note 16, at 15. See also Robert J. Duffy, *Regulatory Oversight in the Clinton Administration*, 27 PRESIDENTIAL STUD. Q. 71 (1997).

both by Republican and Democratic administrations, its place seems secure: future presidents are likely to continue to use the OIRA to impose their agendas on regulatory agencies. Blumstein notes that “[f]rom controversial to mainstream in twenty years, centralized presidential regulatory review has now taken center stage as an institutionalized part of the modern American presidency.”⁶⁹

Are the two missions of the OIRA—reviewing the analytical bases for agencies’ regulatory activity and furthering presidential agendas—compatible? Many of the articles mentioned above deal explicitly with only one of the missions and pay only glancing attention to the other. Christopher DeMuth and Douglas Ginsburg, writing during the early years of the OIRA, call the two complementary.⁷⁰ Pildes and Sunstein also note some level of compatibility between the technocratic goals of cost-benefit analysis and the democratic goals of presidential reviews; they suggest ways to make them more compatible.⁷¹

Thomas McGarity addresses this question thoroughly in his book on the role of economic analysis in the federal government.⁷² With several chapters devoted to OMB review under the Reagan and Bush I Administrations, McGarity discusses the perception that analysis was just a cover for antiregulatory policy preferences. Since the publication of McGarity’s work, the OIRA’s executive review and analysis functions have interacted through two additional administrations, increasing our ability to evaluate their relationship.⁷³

Joseph Cooper and William West also look at the intersection between economic analysis and executive control during the Reagan Administration.⁷⁴ Like McGarity, they argue that analysis was used in the Reagan Administration to give greater legitimacy to the executive’s authority to review agency actions. They also recognize the inherent tension between the two missions of the OIRA, saying: “The theory and practice of OMB review testify to a deep seated and continual tension between political control and neutral competence.”⁷⁵ In a more recent work, West argues that regulatory review has been quite responsive to presidential preferences and that this responsiveness is more characteristic of the OIRA than neutral competence.⁷⁶

Scholarship considering the OIRA’s dual goals is the exception, however. The literature on the OIRA’s two missions has largely focused on one or the other, generally ignoring their effect on one another. Because there is much more consensus in the literature that executive review is here to stay and play an important role in the rulemaking process, and because of the serious questions about whether cost-benefit

analysis has played a significant role in rulemaking, this Article focuses on the effect of executive review on cost-benefit analysis.

To simplify the question of how executive review affects cost-benefit analysis, four basic scenarios, outlined in Table I, below, are considered. The two missions of the OIRA will converge on common goals when the existing administration supports a regulation with positive net benefits (Box A) or opposes one with negative net benefits (Box D). To see the effect of this interaction between cost-benefit analysis and executive review on the regulatory process, one must examine those cases where there is administration support for regulations (or regulatory alternatives) whose costs outweigh their benefits (Box C) or where there is administration opposition to regulations supported by cost-benefit analysis (Box B).

Table I: Interaction of Cost-Benefit Analysis and Executive Review

	Administration Supports	Administration Opposes
Analysis Supports	(A) Regulation promulgated.	(B) Regulation promulgated if analysis prevails.
Analysis Does Not Support	(C) Regulation promulgated if politics prevail.	(D) Regulation not promulgated.

Locating Box B scenarios is the most difficult. If analysis prevails and a regulation is issued, the administration will nearly always claim after-the-fact that it supported the regulation all along. By contrast, if the administration’s political preference prevails over analysis in Box B, the only evidence will be that a particular rule was not promulgated, something which is very difficult to find out. The best support for the existence of cases in Box B comes from Reagan Administration interviews cited by Erik Olson showing that analysis took a backseat to political preferences of the executive under Reagan:

As one key OMB official notes, “debate on the merits of the economic analysis doesn’t help resolve the real issues where OMB has budgetary, philosophical, or political problems with a rule, the regulatory analysis is used as a ‘key’ in holding up or changing the EPA action.”⁷⁷

This shows that in these Box B occasions, economic analysis was a secondary concern in the review process. McGarity provides additional evidence, presenting several cases in which political preferences trumped analysis. In his discussion of EPA’s national ambient air quality standard rules, McGarity cites an internal Reagan Administration dispute in which additional analysis might have shown that a stricter air quality standard was justified, but in which that analysis was not carried out. “Apparently a conflict erupted in OMB between the purists who were keen on analysis and the ‘realists’ who were keen on analysis so long as it signaled less burdensome regulation but were willing to ignore

69. Blumstein, *supra* note 2, at 855.

70. DeMuth & Ginsburg, *supra* note 28.

71. See Pildes & Sunstein, *supra* note 16.

72. See McGarity, *supra* note 16.

73. A recent work, *PAINTING THE WHITE HOUSE GREEN* (Randall Lutter & Jason Shogren eds., Resources for the Future Press 2004) [hereinafter *PAINTING THE WHITE HOUSE GREEN*], looks at the use of economic analysis in the White House generally and finds similar limitations to those found by McGarity.

74. Joseph Cooper & William West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. POL. 864 (1988).

75. *Id.* at 887.

76. William West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 PRESIDENTIAL STUD. Q. 76 (2004).

77. See Olson, *supra* note 64, at 53.

it when it argued for greater stringency. The realists carried the day.”⁷⁸

Examples corresponding to Box C are easier to find. They show that when an administration's political preferences conflict with economic analysis, analysis loses. If we assume that the purpose of cost-benefit analysis is to select regulatory alternatives with net social benefits,⁷⁹ then numerous rules promulgated over the past 20 years fail this test. One study of 48 rules with regulatory impact analyses promulgated during the Clinton Administration⁸⁰ notes that only 31 calculated both benefits and costs, and of those, only one-half had positive net benefits.⁸¹ While comparable data has not yet been compiled on rules from the Bush II Administration, there are many examples of regulations related to homeland security with ill-defined benefits and very high costs.⁸² In the case of both the Clinton Administration rules and the Bush II Administration homeland security rules, a natural assumption is that the administrations supported these rules despite the negative or indeterminate results of the analysis.⁸³

It is possible that these examples are exceptions and that by and large cost-benefit analysis requirements have led to more efficient and cost-effective regulations. This is unlikely, however. First, if these examples were exceptional, one would expect a significant number of Box C regulations (which were preferred by the administration but not supported by analysis) to have been returned to agencies for failing to meet cost-benefit requirements during the same time period as the examples cited above. During the eight years of the Clinton Administration, however, only 16 rules were returned for agency reconsideration,⁸⁴ and it is hard to argue that any of them had significant political support. In

the Bush II Administration, no rule regarding homeland security has been rejected.⁸⁵ Second, even in the Bush I Administration, there were only 9 rules returned during the last year of the Administration (compared to 28, 21, and 29 during each of the first three years)⁸⁶ when the first President Bush was running for reelection and therefore reluctant to offend constituencies by returning regulatory initiatives with supporters in the center of the political spectrum.

In addition to the empirical evidence cited above, there is also a theoretical argument as to why economic analysis has played a subordinate role to executive review. The very virtues promoted by supporters of executive review may very well run counter to the goals of regulatory impact analyses. As discussed above, chief among these virtues are that executive review promotes the accountability of bureaucrats to the popular will and that executive review leads to greater efficiency in the regulatory process.⁸⁷ By contrast, requiring thoughtful and thorough analysis is not intended to make the regulatory process more efficient. McGarity cites requirements for analysis as one of the reasons for the “ossification” of rulemaking,⁸⁸ and many of the critiques of analysis (including those voiced during the Graham confirmation battle) complained about “paralysis by analysis” crippling the regulatory process.⁸⁹

Even if one does not believe that economic analysis requirements have imposed significant delays on the rulemaking process, there is little doubt that requiring a thorough analysis to support significant rulemakings does add some time to the regulatory process. Therefore, if we accept the proposition that executive review increases the bureaucratic efficiency of the rulemaking process, it is difficult to believe that the very agency charged with increasing the efficiency of the regulatory process⁹⁰ will be able to enforce a requirement that, if done thoroughly, will slow the process down. In fact, there is little evidence that federal rulemakings are taking longer as a result of Executive Order No. 12866, and some research of state rulemaking has also shown that analysis requirements have not noticeably slowed the regulatory process.⁹¹

This does not mean that cost-benefit analysis requirements have had no effect. It is quite possible or even likely that absent the requirements of Executive Order No. 12866, the regulations issued over the past 23 years would have been more costly and that regulations that would have badly failed cost-benefit tests would have been issued. What is clear is that such analysis requirements have not had the effects envisioned by their advocates or critics. One plausible reason is the coupling of the requirements with an executive review that is, by necessity and design, politically responsive.

78. See MCGARITY, *supra* note 16, at 61. Similarly, in his discussion of OSHA's hazard communication standard, McGarity discusses differences in OSHA and OMB analyses but notes that “the Vice President sided with OSHA, more for institutional and political reasons than because of the acuity of its analysis.” *Id.* at 109.

79. This is weaker than cost-benefit advocates would like and stronger than some opponents would prefer. Cost-benefit analysis supporters believe alternatives with the greatest net benefits should be chosen, while opponents would argue that if any test is to be used, the test should be whether the benefits of the regulatory alternative chosen justify its costs.

80. Another example of a Clinton Administration rule is discussed in Cary Coglianese & Gary Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PA. L. REV. 1255 (2004).

81. Hahn, *supra* note 46.

82. These include Food & Drug Administration regulations on protecting the food supply and DOT regulations on passenger screening, checked baggage, and cockpit weapons. The 2003 OMB report to Congress on the benefits and costs of regulations cites 69 rules related to homeland security promulgated since September 11, 2001. Of these, the costs were calculated for only 16 rules and the benefits were calculated for only 2. See 2003 OMB REPORT, *supra* note 48. Also, the OMB notes in its draft 2005 report: “Seven of the rules for which we were not able to present estimates of both costs and benefits implemented homeland security programs where the benefits of improved security are very difficult to quantify and monetize.” 2005 DRAFT REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS 3 (OMB 2005), available at http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html (last visited May 9, 2005).

83. There are also examples in the Reagan Administration when the requirements to conduct an analysis were waived for deregulatory actions showing that officials cared more about the direction of regulation than the results of analysis. See MCGARITY, *supra* note 16; and MARC ALLEN EISNER, *REGULATORY POLITICS IN TRANSITION* (Johns Hopkins Univ. Press 1993).

84. See OMB, *supra* note 20.

85. A list of the rules returned during the Bush II Administration can be found at OMB, *OIRA Return Letters*, at http://www.whitehouse.gov/omb/inforeg/return_letter.html (last visited Apr. 19, 2005).

86. See OMB, *supra* note 20.

87. Kagan, *supra* note 9.

88. McGarity, *supra* note 36.

89. Vladeck & McGarity, *supra* note 39.

90. Efficiency here is taken to mean the speed with which agencies produce regulation. It can also be taken to mean encouraging agencies to coordinate with each other. Requiring economic analysis should not have an impact in either direction on coordinative efficiency.

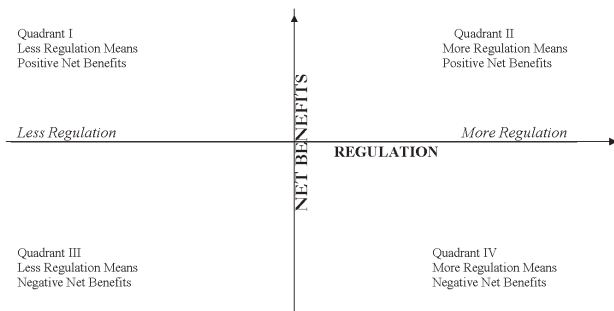
91. Stuart Shapiro, *Speed Bumps and Roadblocks: Procedural Controls and the Regulatory Process*, 12 J. PUB. ADMIN. RES. & THEORY 29 (2002).

What about accountability? Part IV develops a simple framework for thinking about the interaction between accountability and regulatory analysis. To presage the results of using this framework, the interaction of the two will depend on the nature of the net benefit curve and on the interests holding the executive accountable in a particular rule-making effort. In some cases, subordinating analysis requirements to executive review will lead to analytically supported outcomes, while in others it will not. This theoretical model yields results more consistent with actual outcomes over the past 20 years than does the hypothesis that cost-benefit analysis drives policy.

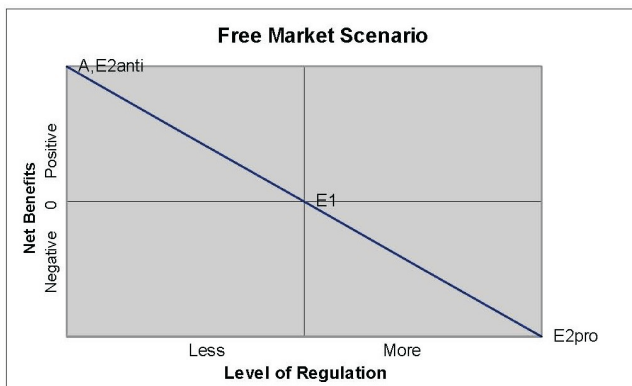
IV. A Model of Interaction Between Cost-Benefit Analysis and Executive Review

Envision a two-dimensional graph (see Table II, below). On the x-axis is the level of regulation, and on the y-axis are the net benefits of the various regulatory options. Positive values on the y-axis represent net benefits, and negative values represent net costs.

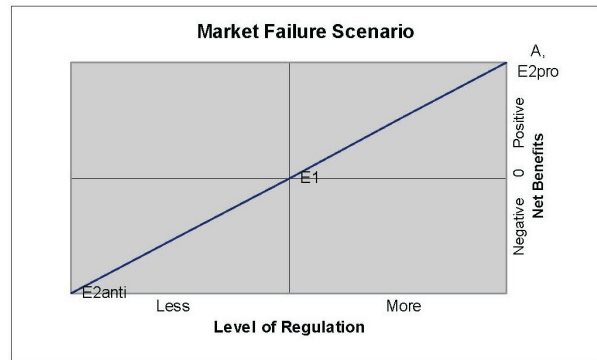
Table II: Graphing Net Benefits Versus Level of Regulation



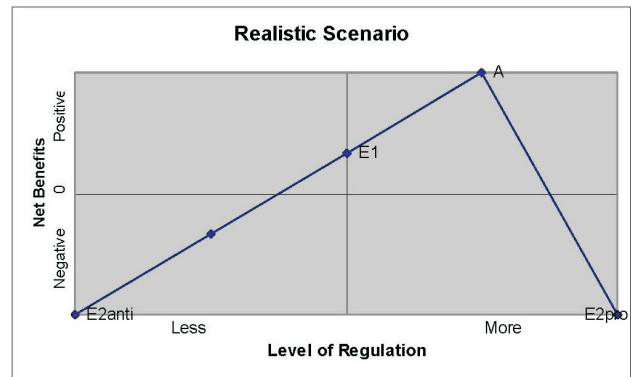
How net benefits will vary with the level of regulation will depend on the economics of the particular issue. I call a scenario in which net benefits are highest with no regulation and decrease with more regulation the “Free Market Scenario” (the designation of points with letters will be explained below):



I call a scenario in which net benefits are highest with high levels of regulation and decrease with decreasing regulation the “Market Failure Scenario”:



Finally, I call a scenario where net benefits are highest at some point between “no regulation” and “stringent regulation” the “Realistic Scenario” (revealing my own biases):



In a system where all decisions were made according to the results of a perfectly conducted regulatory impact analysis,⁹² the regulatory option chosen would be the one for which net benefits were the highest (point “A” on each graph). We know from the discussion above that this is not currently the case, possibly because executive review constrains the choices of decisionmakers.

How does it constrain these choices? The literature on executive review gives us several possibilities. Kagan argues that executive review leads to regulatory choices that better reflect the preferences of the electorate, i.e., to greater accountability in regulatory decisionmaking.⁹³ If this is the case, then according to the median voter model,⁹⁴ the president and his staff will restrict the regulatory choices to those

92. This model obviously ignores the fact that different parties will have different estimates of where along the spectrum the greatest net benefits will occur.

93. See Kagan, *supra* note 9.

94. Duncan Black, *On the Rationale of Group Decisionmaking*, 56 J. POL. ECON. 23-34 (1948).

in the middle of the spectra above. (This assumes that, as in the median voter model, voters are distributed symmetrically on regulatory issues.) This may mean that choices are constrained to a very narrow range of options where the median voter falls. It could also mean that any option between the 25th and 75th percentile of regulatory activity is acceptable. How wide or narrow this constraint is likely to be will depend on a range of factors such as the salience of the issue, the timing of the regulation, and the intensity of the interest group climate. On the graphs above, the points labeled “E1” reflect the policy choices of an executive choosing an option in the absolute middle of the spectra.

In those scenarios in which either no regulation or stringent regulation produces the highest net benefits (“Free Market Scenario” and “Market Failure Scenario”), the executive review constraint (the point at which “E1” appears) will ensure that the choice with highest net benefits is not selected. Any choice not on either extreme of the spectrum produces less than optimal net benefits. In fact, depending on how narrowly the president and his staff restrict agency choices, and depending upon where the graph crosses the x-axis (the x-axis represents the point where net benefits are equal to zero), it is possible that the result will be a choice with negative net benefits.⁹⁵ This would certainly explain why critics on the left and right complain that OMB review has not led to wise policy choices.⁹⁶

In the “Realistic Scenario,” the prospects are somewhat more sanguine. If a level of regulation toward the middle of the spectrum leads to the greatest net benefits, then an executive responsive to the general electorate will encourage agencies to choose options that are analytically supported. It should be noted, however, that the peak representing the greatest net benefits may be more toward one side or the other, in which case while a regulatory option with positive net benefits may be chosen, it is not likely to be the option with the greatest net benefits. Once again, this depends on how much the executive restricts the policy choices.

However, critics of executive review argue that the president is more subject to pressure from powerful interest groups than from the general electorate.⁹⁷ If this is indeed true, we can expect the president’s staff to constrain agency choices toward one end of the spectrum or the other. An administration beholden to industry groups would constrain choices to the left end of the spectrum (“no or little regulation”), while one that listens primarily to proregulation groups would constrain choices to the right end (“stringent regulation”). Once again, the width of this constraint will vary from issue to issue. Points reflecting the policy choices of an executive responsive to interest groups on either end of the political spectrum are indicated with an “E2” on the graphs above. “E2anti” refers to an executive responsive to antiregulation groups and “E2pro” refers to an executive responsive to proregulation groups.⁹⁸

95. In the market failure and free market graphs above, the point E1 occurs where the net benefits equal zero. This is for illustrative purposes and need not be the case (the net benefit line need not cross the x-axis right at the middle of the political spectrum).

96. Because critics on the right are most likely to believe that no regulation leads to high net benefits, whereas critics on the left are likely to believe that extensive regulation leads to high, if perhaps difficult to measure, net benefits.

97. See various scholars’ literature *supra* note 64.

98. This is an obvious simplification. An executive may be responsive to interest groups with preferences for regulatory solutions toward the

Interestingly, the effect of accountability to interest groups will be nearly the opposite of accountability to the general electorate.⁹⁹ Under the “Realistic Scenario,” analytically sound options were likely to be chosen if the president was accountable to the general electorate (“E1” occurred where there were positive net benefits) because the electorate wants a result that is in the middle of the spectra, which is where the options that have positive net benefits are also found, i.e., E1 lies above the x-axis. By contrast, if the president is accountable to interest groups under this scenario, then options with low or negative net benefits are likely to be chosen. (Both “E2” points occur where there are negative net benefits.)

In those cases where net benefits are greatest either with no regulation or stringent regulation, the analytical soundness of the policy chosen will vary with the interest groups to which the administration listens. An administration that is supported by antiregulation constituent groups will choose regulatory options with high net benefits in the “Free Market Scenario” (“E2anti” and “A” occur at the same point) and negative net benefits in the “Market Failure Scenario” (“E2anti” occurs at the point of lowest net benefits). An administration responsive to proregulation groups will choose an option with high net benefits in the “Market Failure Scenario” (“E2pro” and “A” occur at the same point) and negative net benefits in the “Free Market Scenario” (“E2pro” occurs at the point of lowest net benefits).¹⁰⁰

The observable implications of this model are several:

(1) If an administration were beholden to antiregulation interest groups, one would expect analytically superior options to be chosen only in those cases where there is little justification for government intervention (cases where the “Free Market Scenario” holds).

(2) If an administration were beholden to proregulation interest groups, one would expect analytically superior options to be chosen only in those cases where there are significant market failures and the need for government intervention is acute (cases where the “Market Failure Scenario” holds).

(3) If executive review leads instead to greater accountability to the general electorate, one would expect analytically superior options to be chosen in cases where a moderate amount of government intervention leads to the outcomes with significant net benefits.

Which of these implications is true depends on who is doing the analysis. Conservatives would argue that in most cases the best option is no or little regulation, but over the past 20 years, many costly regulations have been promul-

middle of the spectrum or may want to be responsive to multiple groups with differing preferences. In either of these scenarios, accountability to interest groups will start to look more like accountability to the general public.

99. *But see id.*

100. A cynic might argue that this is why there is so much variation in estimates of the costs and benefits of controversial rules. Those supporting the regulation want to convince skeptics that we are in the “Market Failure Scenario” and, hence, regulations have high net benefits. Those opposing the regulations wish to make the opposite case. Both sides find economists capable of making their case. See McGarity’s discussion of OSHA’s hazard communication standard for an excellent example of this, *supra* note 16.

gated.¹⁰¹ Many have argued that these promulgations have occurred both under the proregulatory Clinton Administration and the ostensibly antiregulatory Bush II Administration.¹⁰² This point of view is consistent with implication (3) above. In this view, both the Clinton and Bush Administrations have used executive review to ensure widespread public support for agency regulatory actions rather than actions that maximize net benefits.

Liberals or supporters of regulation would likely argue that in most cases, the greatest (if difficult to measure) benefits are achieved when the level of regulation is high.¹⁰³ They would also argue that only under the Clinton Administration has such a level of regulation been achieved.¹⁰⁴ This would be consistent with implications (1) and (2) above. Executive review leads to regulations preferred by interest groups supporting that administration. According to this view, the Clinton Administration was proregulatory, the Reagan and two Bush Administrations were antiregulatory, and only the Clinton Administration took actions that were generally beneficial.

Either of these views is consistent with the observed data that regulatory options only sporadically correspond with the options that would be chosen by policy officials employing a strict cost-benefit test. The requirement that agencies conduct cost-benefit analysis has not led to the outcomes hoped for by its supporters or feared by its opponents. The chief reason is that analysis has played a subordinate role to executive review in regulatory decisionmaking over the past two decades at the federal level. As the model above shows, when it plays such a subordinate role, the role of economic analysis in determining regulatory decisions will be circumscribed. Kagan argues persuasively that executive review leads to greater accountability and efficiency in the bureaucracy.¹⁰⁵ One side effect of this benefit, however, is that the substantive results of policy may or may not pass cost-benefit tests. Not passing a cost-benefit test is more likely when the same office is charged with both overseeing analytical requirements and assisting the president in exercising oversight.

V. Other Factors

There are several other plausible reasons why cost-benefit analysis on the federal level has neither led to more regulations that maximize net benefits nor resulted in an abandonment of the regulatory process (besides its coupling with executive review). This section briefly discusses some of those hypotheses and comments upon further directions that empirical research could assist in answering this important question.

A. Cost-Benefit Analysis Is Not Intended to Lead to Efficient Regulation

Eric Posner argues that agencies are required to conduct cost-benefit analysis in order to provide information to principals such as the president about the merits of agency proposals.¹⁰⁶ According to Posner's model, while such analyses may lead to more efficient regulations, this is not a primary goal of requiring them.¹⁰⁷ If this were indeed the case, then it would also serve as an explanation for the seeming failure of Executive Order Nos. 12291 and 12866 to lead to regulations with significant net benefits.

The difficulty with Posner's model is that, as noted by Kagan and others,¹⁰⁸ Executive Order No. 12866 explicitly includes as part of the OIRA's mission, "to ensure that regulations are consistent with . . . Presidential priorities . . ."¹⁰⁹ If the sole purpose of cost-benefit analysis is to aid in oversight, why is such a requirement necessary given that the OIRA and the rest of the Executive Office of the President already engages in that oversight without the assistance of the analysis. It is possible, as Posner notes, that the analysis requirements may merely be symbolic politics, but if so, then a great deal of rhetorical power and academic literature has been spent debating the merits of this purely symbolic issue.

Rather, it is more plausible that those supporting the role of cost-benefit analysis both within and outside of government should be taken at their word on the importance of cost-benefit analysis. As the OIRA itself noted in its 2002 report on the costs and benefits of regulations, "through OIRA, the Administration is striving for a regulatory process that adopts new rules when necessary to serve the public interest, simplifies and modifies existing rules to make them more effective and/or less costly or less intrusive and rescinds outmoded rules whose benefits do not justify their costs."¹¹⁰ The question then remains: why hasn't economic analysis played more of a role in regulatory decisionmaking?

B. Public Misperceptions of Risk Prevent Acceptance of Cost-Benefit Analysis

Sunstein argues that regulations with high costs and low benefits arise from public support for such measures. The public support originates with a misunderstanding of risks and trade offs. Individuals are subject to heuristics and biases that lead to informational cascades and widespread public support for measures that are not justified by sound analysis.¹¹¹

Sunstein goes on to argue that cost-benefit analysis is a necessary corrective for this problem. Sunstein's argument is not incompatible with the argument presented in this Arti-

101. See various scholars' literature *supra* note 10.

102. *Id.*

103. See SHAPIRO & GLICKSMAN, *supra* note 11.

104. For example, OMB Watch, a liberal watchdog group, said in one report: "The Bush administration is in the process of weakening or abandoning a number of protections, including forest protection, clean air and water standards, and wetlands protections." OMB Watch, *Safeguards in Limbo*, at <http://www.ombwatch.org/article/view/640/> (last visited Apr. 20, 2005).

105. Kagan, *supra* note 9.

106. Eric Posner, *Controlling Agencies With Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001).

107. In some circumstances, according to Posner, requiring the analysis leads to less efficient regulation because agencies will be able to use the analysis to convince the president to approve regulations about which he might otherwise be skeptical. *Id.*

108. Kagan, *supra* note 9.

109. Exec. Order No. 12866, *supra* note 7, §(2)(b).

110. See 2002 OMB REPORT, *supra* note 48.

111. SUNSTEIN, *supra* note 10.

cle, which provides further explanation as to why an executive responsive to the public or to interest groups will advocate policies that are not supported by cost-benefit analysis. By advocating for a greater role for cost-benefit analysis, Sunstein is implicitly arguing that the current regulatory process is overly responsive to political concerns and that analytical arguments should have greater weight.

Institutionally, however, Sunstein recommends a greater role for the OIRA, saying that “[the] OIRA should have and be known to have a degree of authority over priority setting and cost benefit balancing.”¹¹² As discussed above, an important part of the reason that analysis has not successfully triumphed over political concerns is that institutionally, cost-benefit analysis has never been separated from executive review. An executive who sees himself as accountable either to the general public or to specialized interests will always have analytical outcomes as a secondary goal.

C. Bureaucratic Agents Thwart Both Executive Review and Cost-Benefit Analysis

Much of the academic literature on political control of bureaucrats utilizes the lens of principal-agent theory.¹¹³ Executive review and cost-benefit analysis are both attempts by political principals (in this case the president) to control bureaucratic agents. Since monitoring is costly and the agents have superior information about the policy problem to be solved, principals put procedures in place that make it more likely that agencies will make decisions in the manner preferred by the principals. Executive review and analytical requirements are such procedures.

Elliott gives examples of how EPA bureaucrats successfully thwarted OMB review during the Bush I Administration.¹¹⁴ He argues that the rules produced were not improved nearly as much as they could have been by OMB review because review took place too late in the rulemaking process and because EPA staff successfully used congressional support to thwart the goals of OMB officials. It is possible that the reason that so many rules are not as cost effective as they could be is that despite presidents who wish to see cost-benefit analysis implemented as a key decision criterion, the means they have chosen are inherently incapable of achieving this goal.

In order to decide whether a cost-benefit analysis requirement would hamper rulemaking if it were designed differently, one would need to observe such a different design in practice. Looking only at the OIRA experience, we can see that over four presidential administrations, all of which have tweaked the review process, the results of the review have not changed much. It is possible that more wholesale changes involving the OIRA earlier in the decisionmaking

process would result in a different outcome.¹¹⁵ The failure of Executive Order No. 12498 under President Reagan to achieve this goal, however, provides evidence that such changes are extremely difficult to implement.¹¹⁶ Kagan discusses how executive review coupled with the issuance of directives and the use of public announcements were crucial in overcoming bureaucratic inertia and producing policies that the president desired.¹¹⁷ This suggests that the principal agent problem can be overcome to implement presidential preferences. If agencies can be made to follow presidential preferences, this suggests that agencies could also be forced to base their decisions on the results of cost-benefit analysis.

D. Legal Constraints Prohibit Full Consideration of Costs and Benefits

Several statutes, most notably the CAA, explicitly prohibit agencies from considering costs in setting certain regulatory standards. The U.S. Supreme Court upheld the prohibition in the CAA in 2001.¹¹⁸ The Court has interpreted OSHA’s statute to prohibit the agency from comparing costs and benefits in setting health standards.¹¹⁹ These are the most prominent examples of legal or statutory constraints apparently overriding analytical requirements that are in Executive Orders.

This argument would serve to explain why certain agencies have taken regulatory actions over the past two decades without regard for costs and benefits. However, it is, at best, an incomplete argument. Other regulatory agencies such as the National Highway Traffic and Safety Administration and other parts of EPA have no such statutory bar to considering costs and benefits. Yet no one who criticizes the lack of consideration given to costs and benefits restricts their criticisms to those agencies with these legal bars. Furthermore, Court decisions regarding OSHA and EPA preclude the agencies from relying upon analysis but do not preclude its consideration.¹²⁰

It is possible that while not all statutes prohibit reliance upon cost-benefit analysis, they generally require agencies either to regulate in particular areas¹²¹ or set up principles that agencies must follow that naturally lead to regulations

112. *Id.* at 117. Sunstein does note briefly that if the OIRA cannot fulfill this role, then perhaps another risk agency should be created, but he does not describe where in the government structure that agency may be located. *Id.* at 118.

113. See, e.g., Matthew McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); and Matthew McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and Political Control*, 75 VA. L. REV. 431 (1989).

114. Donald Elliott, *QMing OMB: Or Why Executive Review Under Executive Order 12291 Works Poorly and What President Clinton Should Do About It*, 57 LAW & CONTEMP. PROBS. 167 (1994).

115. Graham has made earlier OIRA involvement in agency decision-making a key goal. In a speech on July 17, 2002, before the American Hospital Association, Graham said: “[E]arly OMB involvement is underway to increase the impact of OMB’s analytical perspective.” Graham has also pioneered the use of “prompt letters” to give agencies suggestions about areas of regulation that they should pursue. Previous administrators have also taken steps to attempt to involve the OIRA at an earlier stage.

116. Executive Order No. 12498 directed agencies to submit their regulatory agendas to the OIRA for review and gave the OIRA the authority to suggest changes. In practice, these agendas were very vague and did not provide sufficient information upon which to argue over specific directions that the agency should pursue. Elliott, *supra* note 114.

117. See Kagan, *supra* note 9.

118. See *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 31 ELR 20512 (2001).

119. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 11 ELR 20736 (1981).

120. See McGARITY, *supra* note 16.

121. One example would be the food security regulations in the Bioterrorism Preparedness and Control Act of 2002, Pub. L. No. 107-188.

that do not maximize net benefits.¹²² This latter possibility has been the subject of many court cases¹²³ and will not be discussed at length here other than to note that if indeed this is the case, then any attempt to design a requirement for agencies to make consideration of costs and benefits a part of their regulatory decisionmaking is futile without the amendment of many regulatory statutes.¹²⁴

VI. Conclusion

But is such an effort futile? It is difficult to generalize from the federal experience because there is only one example of such requirements. While Executive Order Nos. 12291 and 12866 differ, they both house responsibility for review of agency analyses within the Executive Office of the President, coupling these requirements with the function of facilitating presidential oversight of the rulemaking process. As this Article has argued, this results in the subversion of cost-benefit analysis to the political considerations of the president and his advisers. Little work has been done evaluating analytical requirements that are not attached to executive review.¹²⁵

Would analytical requirements designed any other way have more of an effect than those in Executive Order Nos. 12291 or 12866? Theoretically, the legislative branch could enforce analytical requirements on executive agencies,¹²⁶ but a legislative agency might be subject to political pres-

ures placed upon Congress just as political pressures on the president likely affect the OIRA.¹²⁷ One could imagine an independent agency created with the purpose of analyzing regulations from executive branch agencies, but this would likely raise constitutional questions if such an independent agency were given any real power. Even if these political and legal obstacles could be overcome, there is still the question of whether statutes that explicitly and implicitly reject cost-benefit analysis would predominate in agency decisionmaking.

In the 2000 Truth in Regulating Act, Congress created a pilot program within the U.S. General Accounting Office to allow that office to review agency regulatory impact analyses.¹²⁸ This would be an ideal way to study the impact of locating analytical requirements within the legislative branch, but Congress has not yet funded the office so the pilot program has not gotten off the ground. However, various state governments have implemented analytical requirements in a variety of ways. It is to these states that researchers should look in order to better understand the degree to which analytical requirements affect agency regulatory policy.

It is also possible, given the concerns many have raised about cost-benefit analysis, that making it subservient to executive review is a reasonable compromise between the extremes of the debate over the wisdom of cost-benefit analysis. Making cost-benefit analysis preeminent in regulatory decisionmaking might very well result in the subversion of statutory goals to protect the environment and public health as feared by critics of analysis.¹²⁹ Eliminating analysis would deprive both the public and political officials of a valuable source of information about the impact of regulatory decisions.

As it stands, agencies must conduct analyses and these analyses give decisionmakers in the executive branch information that might not otherwise be readily available to them. By placing enforcement of these analytical requirements within the OIRA, which is also responsible for assisting the president in overseeing executive agencies, the role of cost-benefit analysis is necessarily restricted to that of decisionmaking tool rather than decisionmaking rule. This may be its most appropriate use.

122. Shapiro and Glicksman describe some of these principles as a "Risk or Ambient Quality Standard," "Phaseouts," "Constrained Balancing Standards," and "Open-Ended Balancing Standards," and classify a number of regulatory statutes in each category. SHAPIRO & GLICKSMAN, *supra* note 11, at 32.

123. See, e.g., *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 13 ELR 20672 (1983); and *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 10 ELR 20489 (1980).

124. Farrow and Michael Toman suggest that modifying environmental statutes to include cost-benefit criteria is the best way to ensure that analysis plays the role it is intended to in regulatory decisionmaking. SCOTT FARROW & MICHAEL TOMAN, *USING ENVIRONMENTAL BENEFIT COST ANALYSIS TO IMPROVE GOVERNMENT PERFORMANCE* (Resources for the Future Paper No. 99-11, 1999).

125. This statement applies to requirements for cost-benefit analysis, not other types of analysis such as environmental impact statements required under the National Environmental Protection Act.

126. This has been recommended by Randall Lutter, *Head in the Clouds Decisionmaking: EPA's Air Quality Standards for Ozone*, in *PAINTING THE WHITE HOUSE GREEN*, *supra* note 73.

127. Farrow and Toman also suggest this reform; see *supra* note 124.

128. Pub. L. No. 106-312.

129. See various scholars' literature *supra* note 11.