A Paradigm Shift in the Cost-Benefit State

John D. Graham and Paul R. Noe | Apr 26, 2016 | Opinion

While this is a time of great political uncertainty in the United States, the next President has a promising opportunity to advance dramatically what has been called the cost-benefit state. A little more than five years ago, in a case called *Entergy Corp. v. Riverkeeper*, the Supreme Court embraced as "eminently reasonable" the principles for cost-benefit balancing advanced by every president since at least Ronald Reagan to Barack Obama. Against the backdrop of this established administrative practice, the Court reversed a longstanding presumption *against* cost-benefit balancing, unless it was clearly permitted in the statute, to reading statutory silences or ambiguities as *allowing* this type of rational regulation.

For over 35 years, Presidents have ordered regulatory agencies—"to the extent permitted by law"—to implement regulatory standards based on cost-benefit balancing. However, only a small minority of statutes explicitly mandate cost-benefit analysis, while a small minority prohibit it. The challenge has been what agencies should do when implementing the large majority of regulatory statutes that are silent or ambiguous on cost-benefit balancing. On the heels of President Reagan's groundbreaking Executive Order 12291 imposing a cost-benefit test on regulations — and three years before the Court's famous *Chevron v NRDC* decision deferring to the interpretation of an ambiguous statute by the U.S. Environmental Protection Agency (EPA) — the Supreme Court held, in *American Textile Manufacturers Institute v. Donovan*, that the Occupational Safety and Health Administration was not *required* to engage in cost-benefit analysis in setting "feasible" public health and safety standards. But the Court also asserted in dicta that "when Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."

Twenty years later, in *Whitman v. American Trucking Associations*, an unanimous Supreme Court found it "implausible" that the modest standard to set national ambient air quality standards at a level "requisite to protect public health with an adequate margin of safety" gave the EPA the discretion to determine whether costs should moderate the health standards. The Court said that, to prevail in their quest to have the EPA take costs into account, the industry respondents would have to show a "textual commitment" of authority for the EPA to consider costs in standard setting, and "*that textual commitment must be a clear one*." Yet, in a prescient concurring opinion, Justice Stephen Breyer warned that the Court should resist

> a *presumption, such as the Court's presumption that any authority the* [Clean Air] *Act grants the EPA to consider costs must flow from a "textual commitment" that is "clear*." . . . In order better to achieve regulatory goals—for example, to allocate resources so that they save more lives or produce a cleaner environment—regulators must often take account of all of a proposed regulation's adverse effects, at least where those adverse effects clearly threaten serious and disproportionate public harm. Hence, I believe that, other things being equal, *we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation*.

Ultimately, the ostensible presumption against cost-benefit balancing was nullified in *Riverkeeper*.

Riverkeeper involved a challenge to an EPA regulation under section 316(b) of the Clean Water Act, which required that the EPA adopt a standard to "reflect the best technology available for minimizing adverse environmental impact." The EPA, with the strong encouragement of the White House Office of Management and Budget (OMB), based its standard on cost-benefit analysis. Although the statutory provision was silent on the use of cost-benefit analysis, the Supreme Court applied *Chevron* deference to hold that "it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden." Aligning the issue of agency authority to use cost-benefit analysis with *Chevron*, the Court reasoned that "it is eminently reasonable to conclude that" the Clean Water Act's "silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree." In so doing, the Court jettisoned the dicta against cost-benefit analysis embodied in *American Textile* and limited *American Trucking* to "the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion." The Court concluded that the Clean Water Act's silence "cannot bear that interpretation."

Riverkeeper raised the ante for agencies that ignore cost-benefit analysis. Although *Riverkeeper* did not *require* the agency to use cost-benefit analysis, its corollary is that an agency must now provide a reasoned explanation if it should choose to regulate in a way that would do more harm than good, or provide a reasoned explanation why the agency is indifferent to that outcome. That became quite clear last term in *Michigan v. EPA*, which involved a challenge to the EPA's decision to regulate hazardous air pollutants, such as mercury, from power plants. Section 112(n) of the Clean Air Act authorizes the EPA to regulate hazardous air pollutants from power plants only if it concludes that regulation is "appropriate and necessary." In reaching that conclusion, the EPA had said that cost was irrelevant. The Court held that the EPA strayed beyond the bounds of reasonable interpretation in concluding that cost is not a relevant factor in determining whether to regulate under the "capacious" phrase, "appropriate and necessary."

Writing for a 5-4 majority in *Michigan*, Justice Antonin Scalia bluntly stated, "no regulation is 'appropriate' if it does significantly more harm than good." Quoting Justice Breyer's concurring opinion in *Riverkeeper*, Justice Scalia further reasoned that:

> Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions. It also reflects the reality that "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." Against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether "regulation is appropriate and necessary" as an invitation to ignore cost.

Notably, although the dissenters argued that the EPA could (and did) consider cost at the later stage in developing its regulation, they agreed with the majority on the principle that, unless Congress states otherwise, "an agency must take costs into account in some manner before imposing significant regulatory burdens."

The wisdom in Justice Breyer's *American Trucking* concurrence supporting cost-benefit balancing has prevailed. The Supreme Court now applies *Chevron* deference to agency interpretations of "silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation." The importance of clarifying agency authority to use cost-benefit balancing should not be underestimated. The majority of environmental statutes—and, to our knowledge, the majority of all regulatory statutes—are silent or ambiguous on cost-benefit analysis. And agencies too often interpret such statutes as only allowing limited consideration of costs and benefits. The

next President should take a major step to enhance societal wellbeing by directing agencies, including independent agencies, to reexamine their statutory interpretations in light of *Riverkeeper* and its progeny and, "unless prohibited by law," implement those statutes through cost-benefit balancing. As the Supreme Court has concluded, it is "eminently reasonable" to ensure that regulations do more good than harm.

This post is part of RegBlog's *sixteen-part series,* RegBlog@5.

John D. Graham

John D. Graham is Dean of the School of Public and Environmental Affairs at Indiana University Bloomington. A foremost authority on risk analysis, he served as the Administrator of the Office of Information and Regulatory Affairs in the White House Office of Management and Budget from 2001 to 2006.

Paul R. Noe

Paul R. Noe is Vice President, Public Policy, for the American Forest & Paper Association (AF&PA). Currently a Policy Fellow at Penn Law, he served from 2001 to 2006 as Counselor to the Administrator of the Office of Information and Regulatory Affairs in the White House Office of Management and Budget. The views expressed in this essay are Mr. Noe's own and do not represent the views of AF&PA or its member companies.

Editor's Note: While they were at OMB, both authors worked on the EPA standard at issue in *Entergy v. Riverkeeper*.

https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/