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COST-BENEFIT ANALYSIS AND THE SEPARATION OF POWERS*

Cass R. Sunstein**

The last two decades have been a period of extraordinary creativity on the part of the federal judiciary in controlling the exercise of regulatory authority by administrative agencies. The courts have developed a broad range of techniques for overseeing the exercise of agency discretion, techniques that have been invoked both by beneficiaries of regulatory programs and by members of regulated classes.[1] In developing and applying these techniques, the courts have sought to achieve a variety of goals, but in recent years it has become increasingly clear that judicial review may perform the critical function of safeguarding against costly regulatory intrusions into the private marketplace. In a variety of contexts, the courts have carefully scrutinized agency action in order to ensure that the expenditures will be devoted to a significant problem or that the costs of regulation will not exceed its benefits.[2] This development, an element of the now-familiar "hard

* This paper borrows several ideas developed originally and at much greater length in Stewart & Sunstein, *Public Programs and Private Rights* (forthcoming in 95 HARV. L. REV. (1982) (manuscript on file with *Arizona Law Review*) (hereinafter Stewart & Sunstein). I have referred to that paper in the footnotes to this essay where appropriate, but I should like to acknowledge a more general debt to Richard Stewart in developing a number of ideas used in Part I of this paper.

Douglas Baird, Gerhard Casper, Frank Easterbrook, Richard Epstein, Richard Posner, Antonin Scalia, Geoffrey Stone, and Hans Zeisel commented helpfully on an earlier draft.

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1. For examples, *see* notes 2 & 3 *infra*.

2. *See* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 640-52 (1980); American Paper Inst. v. EPA, 50 U.S.L.W. 2082, 2082 (4th Cir., July 28, 1981); Aqua Slide "N" Dive Corp. v. CPSC, 569 F.2d 831, 838-44 (5th Cir. 1978); National Tire Dealers & Retreaders Ass'n, Inc. v. Brinegar, 491 F.2d 31, 37-41 (D.C. Cir. 1974).

look" doctrine,[3] represents a judicial innovation one of whose purposes is to promote "efficiency," or in other terms, to maximize wealth.

Judicial innovations of this sort have long been justified on the ground that Congress and the Executive are unable to control the exercise of agency discretion in any meaningful fashion. Congress' attention to the day-to-day problems involved in regulatory administration is notoriously intermittent. The President, it is said, is simply too preoccupied with recurrent crises to exercise effective control over a massive, entrenched bureaucracy. The courts have stepped into this gap not only to compel agency conformity to statute, but also to supervise agency decisionmaking to ensure what they perceive as fair procedures and reasonable outcomes. These judicial innovations have been highly controversial.[4]

President Reagan's Executive Order No. 12,291[5] is an effort to ensure that the Presidency, through the Office of Management and Budget (OMB) and the Presidential Task Force on Regulatory Relief, will control the exercise of executive agency discretion under regulatory statutes. Although there are historical antecedents for the order,[6] no other President has gone nearly so far. In particular, no other President has provided that regulatory action may not be initiated unless the benefits exceed the costs, and none has accorded to officials close to the President such wide-ranging supervisory power over the basic decision whether regulatory action should be taken.

These developments represent a potentially revolutionary step in the control and supervision of agency action. At the same time, they raise significant and novel questions with respect to the proper role of the President in controlling the exercise of regulatory discretion.[7] In

3. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971); Ethyl Corp. v. EPA, 541 F.2d 1, 33-37 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); South Terminal Corp. v. EPA, 504 F.2d 646, 655-56, 680-81 (1st Cir. 1974). *See generally* Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974). The doctrine may be of questionable vitality after Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), and FCC v. WNCN, 101 S.Ct. 1266 (1981). *But see* Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 652-62 (1980).

4. *See generally* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978); Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978); Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978); Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1979 S. CT. REV. 345; Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978). For general discussion, *see* Stewart & Sunstein, note * *supra*.

5. *See* 46 Fed. Reg. 13,193 (1981).

6. Presidents Ford and Carter both issued executive orders requiring discussion of the economic consequences of regulation. *See* 39 Fed. Reg. 41,501 (1974); 42 Fed. Reg. 1,017 (1977); 43 Fed. Reg. 12,661 (1978).

7. I do not examine here the general issue of presidential power to control the decisions of subordinate officials in the executive branch or the so-called "independent" agencies. For discussion, *see generally* Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979).

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particular, the order raises questions of institutional competence and authority: (1) whether those charged with administering the order are competent to apply cost-benefit principles to regulatory proposals; and (2) whether, in the absence of congressional authorization, the executive branch may properly make the outcome of regulatory decisions dependent on application of such principles. It is these questions, and their separation of powers implications, that I will discuss here.

INSTITUTIONAL PURPOSES AND EXECUTIVE BRANCH COMPETENCE

In recent years, the regulatory process has been faulted on a number of grounds. The criticisms are distinct and to a substantial degree irreconcilable, but each has force under particular regulatory regimes.[8] It is sometimes said that agencies become "captured" by the industries they are supposed to regulate, and thus sacrifice the interests of widely diffused beneficiary classes in favor of intense, politically effective regulated entities.[9] As a result, statutes are underenforced or perverted, and the implementation process yields to regulated industries a victory they failed to obtain in Congress. In sharp contrast, agencies have been portrayed as characteristically disregarding cost-effective methods of regulation because of an unduly adversarial approach to the regulated class.[10] The consequence is the adoption of punitive regulatory measures that do little to protect regulatory beneficiaries. Finally, agencies are sometimes criticized not for disregarding the interests of regulatory beneficiaries, nor for taking unduly harsh enforcement action against regulated class members, but for undertaking measures that are designed primarily to serve the interests of the bureaucrats themselves.[11] According to this theory, the remedy for the problem of agency discretion is to structure bureaucratic incentives so as to improve regulatory choices.

From this perspective, perhaps the most notable fact about Executive Order 12,291 is that it appears to accept a particular (though not necessarily exclusive) diagnosis of regulatory failure, and to accompany that diagnosis with a particular conception of the purpose of regu-

8. A general theory accounting for the contexts in which each critical theory has force has yet to be developed. For a useful effort, *see generally* Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211 (1976).

9. *See generally* Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969); *cf.* Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MANAGEMENT SCI. 3 (1971) (suggesting a more subtle approach that nonetheless links agency decisions to pressures imposed by regulated industries).

10. *See, e.g.*, M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE 179-216 (1979); I. KRISTOL, TWO CHEERS FOR CAPITALISM 38-49 (1978).

11. *See generally* W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211 (1976); Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305 (1972).

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latory institutions.[12] The diagnosis is that regulation has been unduly intrusive on the private sector and has imposed substantial costs without corresponding benefits.[13] The normative conception of institutional purpose is economic in character: the purpose of regulation—at least as a general rule—is to promote economic "efficiency," or to increase production, by compensating for free rider effects and transactions cost barriers to bargaining. Both the diagnosis and the underlying conception are far from uncontroversial. Under a different diagnosis of agency failure, or a different conception of institutional purpose, an executive order on federal regulation might have been designed to promote the openness and visibility of regulatory schemes, to guarantee public participation during regulatory decisionmaking, or to ensure protection of statutory "rights" by federal agencies rather than courts. It is not difficult to perceive some danger that such goals may be undermined rather than promoted by Executive order 12,291.[14] At the same time, however, I believe that the conception of the regulatory process reflected in the order is peculiarly well-suited to the institutional competence of the executive branch. In addition, it is desirable to authorize officials in particular agencies and in OMB to make a determination of the costs and benefits of regulatory proposals.

Resolution of issues of comparative institutional competence is of course notoriously difficult, and it is hazardous to reach general conclusions as to which branch is best at performing particular tasks. Nonetheless, it appears safe to say that executive officials are better equipped than the courts to assess and weigh the costs and benefits of regulatory proposals. For three basic reasons, the courts are ill-suited to perform that oversight role, especially in the context of appellate review of agency action. First, judges must respond to discrete, privately initiated controversies, and are thus unlikely either to acquire a sufficiently general overview of the regulatory system or to ensure consistency or

12. For discussion of several alternative conceptions of institutional purposes, and of their reflection in judicial remedies for administrative agency "failure," *see generally* Stewart & Sunstein, note * *supra*.

13. The order comes close to so stating in its preamble ("in order to reduce the burdens of existing and future regulations"). If there were any doubt, the rhetoric surrounding its adoption and implementation makes the point clear. *See generally* Office of the Vice President, Materials on President Reagan's Program of Regulatory Relief (1981).

14. A cost-benefit approach to regulation may "dwarf soft variables," such as life or health, *see* Tribe, *Ways Not to Think about Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1318-19 (1974), and thus work against recognition of entitlements to regulatory protection. (That observation is not necessarily an adverse criticism: conceptions of entitlement are undoubtedly ill-suited to many regulatory schemes.) The goals of openness and visibility tend to be subverted by the fact that the order authorizes OMB to review proposed regulations before they are submitted to the public. As a result, OMB may—after communicating with particular interest groups—effectively preclude adoption of regulatory proposals in advance of public scrutiny or review. Commendably, however, OMB has instituted procedures to guard against ex parte contacts. *Cf.* Sierra Club v. Costle, 657 F.2d 298, 400-08 (D.C. Cir. 1981) (discussing ex parte contacts by President in regulatory process).

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coordination in the enforcement process. Second, measurement of social preferences for collective goods, such as clean air, is beyond the competence of courts, which are comparatively unaccountable and unaware of public preferences. For example, courts are ill-equipped to measure the intensity of public preferences for clean air in a particular geographic region. Finally, and perhaps most fundamentally, the courts have no authority to intervene into the regulatory process on the ground that agencies have failed to promote the efficient allocation of resources. The Supreme Court has frequently observed that questions of resource allocation are for the representative branches of government, not for the courts.[15]

By contrast, the executive branch—in filling out the often gaping "interstices" in regulatory statutes— has a distinctive ability to assess and weigh the costs and benefits of regulatory activity. The executive power is centralized, or at least capable of centralization, in the President. As a result, the Executive may be able to coordinate the regulatory initiatives of various agencies into a relatively workable and coherent whole. Moreover, both the particular agencies which must analyze and weigh costs and benefits under the order and the Office of Management and Budget—which is closely accountable to the President—are capable of assembling an array of policy analysts to make the kind of case-by-case assessments of technical regulatory issues that cost-benefit analysis requires. In addition, because of its comparative political accountability, the Executive is probably in a better position than the courts to make cost-benefit assessments that reflect the preferences of the public.[16] There is no question that, if it is acting consistently with statute, the Executive may properly base its decisions on issues of resource allocation.[17] And whatever the defects in an approach that makes the outcome of cost-benefit analysis dispositive in regulation,[18] it will surely be useful to know what the costs and benefits are before proceeding.

I do not mean to suggest that those who are charged with administering Executive Order No. 12,291 may not be susceptible to the distorting pressures that result from the disproportionate influence of well-organized regulated entities with substantial stakes in the outcome. If

15. *See* Harris v. McRae, 448 U.S. 297, 312-18, 326 (1980); TVA v. Hill, 437 U.S. 153, 194-95 (1978).

16. *But see*, for the argument that the democratic process in the United States is so skewed that no electorally accountable body is likely to be truly representative, M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 32 (1966); Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

17. *See, e.g.*, WWHT, Inc. v. FCC, 656 F.2d 807, 816-20 (D.C. Cir. 1981); Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1045-57 (D.C. Cir. 1979).

18. *See* notes 26 & 27 *infra*.

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so, such pressures may produce major defects in the operation of the program instituted under the order. And I recognize the possibility that a politically independent judiciary, responding purely to the facts put before it, may be particularly capable of assessing and weighing costs and benefits—precisely because of its comparative independence. Nonetheless, it is an accepted part of our political traditions that issues of resource allocation are best decided by the political branches of government.[19] It would probably be necessary to reject that fundamental premise in order to conclude that executive agencies are less competent than the courts to assess and weigh the costs and benefits of regulatory initiatives.

If, then, the pressures imposed by regulated entities are resisted, the various agencies and OMB are apt to be especially able to determine and weigh the economic consequences of regulation. In this respect, presidential coordination of the administrative process is a necessary supplement to judicial mechanisms of oversight. Such mechanisms may sometimes prove counterproductive[20] and are at best incomplete correctives for inadequate agency performance. In these circumstances, Executive Order 12,291 is likely to be a useful addition to the regulatory process.

WEALTH MAXIMIZATION IN THE EXECUTIVE BRANCH

Although the executive branch has distinct competence in developing and applying principles of cost-benefit analysis, Executive Order 12,291 raises troubling questions of institutional authority. To what extent is it appropriate for the executive branch—which is charged with implementing regulatory programs designed at least in general terms by Congress—to declare cost-benefit analysis the decisive factor in making regulatory decisions? May the Executive properly decline to enforce a statute—and thus effectively nullify it—when the statute does not promote economic "efficiency"? Under the order, cost-benefit analysis operates as a "trump."[21] Regulatory action is barred if it redistributes social wealth without affecting its total amount. Such regulatory action is not allowed unless it is shown that its benefits outweigh its costs,[22] despite any other consequences the action may have, and de-

19. *See generally* Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons From the Clean Air Act*, 62 IOWA L. REV. 713 (1977). An important qualification is the significant resource allocation role of the common law courts. *See generally* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977); R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977).

20. For discussion, *see generally* Breyer, note 4 *supra*.

21. "Regulatory action shall not be undertaken unless the potential benefits to society . . . outweigh the potential costs to society." Exec. Order 12,291 § 2(b), 46 Fed. Reg. 13,193 (1981).

22. The order has a number of requirements beyond the strict cost-benefit rule. For example,

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spite the fact that those consequences may have been desired by Congress.

I do not suggest that Executive Order 12,291 is unlawful. The order expressly provides that the cost-benefit requirement is to apply only "to the extent permitted by law." In light of this proviso, it is difficult, if not impossible, to make a plausible argument that the order is unlawful on its face. Indeed, if the Executive did not have authority to interpret most statutes so as to maximize wealth, the cost-benefit requirements of the order would by the order's own terms be applicable to very few statutes, even in light of the principle that deference must be given to an agency's interpretations of a statute it is charged with administering.[23] The critical question, then, is one of scope: How broadly may Executive Order 12,291 be applied if it is not to be inconsistent with law?

In examining this question, it is important to note that, as a general rule, an approach that justifies regulation on grounds of economic "efficiency" does not conform to any realistic description of the legislative process. To be sure, there are plausible normative theories of government that rest on a production rationale,[24] and regulatory proposals are sometimes designed to promote economic "efficiency" by remedying "market failure." Air or water pollution regulations are obvious examples. But the occasions on which this rationale accounts for legislative initiatives are comparatively rare. In an electoral democracy, statutes may be a response to the claims of competing interest groups for scarce social resources, or they may reflect community values developed in the regulatory process rather than purely private desires. But no plausible theory of legislation treats congressional enactments as intended to promote efficiency, save in unusual circumstances. Some commentators have portrayed the legislative process as a distributional struggle in which different social and economic groups do battle for scarce resources.[25] This description may be too Hobbesian for others,[26] but it is surely more accurate than one that would describe the legislative process as some purportedly "objective" effort to maximize social

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it also requires that least costly alternatives be chosen, *see id.* § 2(d), and that regulatory decisions be made so as to maximize net benefits, *see id.* § 2(e).

23. *See, e.g.*, Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980).

It is sometimes suggested that regulation is, or should be, designed to maximize wealth, and that the tax system is the appropriate mechanism to use in reflecting social conceptions of distributional equity. Whatever may be the desirability of such an approach, it is surely unrealistic as a description of the legislative process. For better or for worse, numerous statutes other than the tax laws have the intended effect of redistributing wealth.

24. *See generally* A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

25. *See, e.g.*, R. POSNER, *supra* note 19, at 495-96.

26. *See generally* Michelman, *Politics and Values or What's Really Wrong with Rationality Review*, 13 CREIGHTON L. REV. 487 (1979).

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wealth.[27]

In short, the questions faced by Congress—if those questions are to be described in terms of the allocation and transfer of resources—are predominantly distributional. When Congress decides to regulate private conduct that causes racial discrimination or dissemination of misleading information to consumers, it is faced with pressures from competing interest groups having substantial stakes in the outcome. Its choice among the relevant groups and values will, at least for the most part, have the design and effect not of maximizing wealth, but of redistributing it.

If this conclusion is correct—if regulatory statutes are generally not animated by a desire to promote efficiency—is it legitimate for the Executive to conclude that it will implement them only when implementation will maximize wealth? If it were, and if statutes are not generally designed to promote efficiency, executive pursuit of efficiency goals would, as a practical matter, result in the nullification or amendment of numerous statutes.[28]

For purposes of analysis, it may be useful to suggest that regulatory statutes fall into three very general categories from the standpoint of the cost-benefit requirement of the order. The first category comprises statutes that are intended, or that are reasonably understood as intended, to promote efficiency. Certain antitrust statutes[29] fall into this category. Also in this category may be statutes protecting against

27. I put to one side Professor Becker's recent efforts. *See* G. Becker, A Theory of Political Behavior (Working Paper No. 006-1, Center for the Study of the Economy and the State, the University of Chicago) (revised preliminary draft, September 1981) (suggesting that even apparently inefficient redistributive legislation may nonetheless be efficient, in part because of political power of competing interest groups).

On the purported objectivity of the efficiency criterion, *see* R. DWORKIN, TAKING RIGHTS SERIOUSLY 97-98 (1977). *See generally* Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1980), and sources cited therein.

28. The cost-benefit requirement of the order covers "regulatory action," a term that is broader than "enforcement" as that concept is used here. "Enforcement" would include a decision whether to enforce a statute against conduct covered by that statute—by, for example, bringing civil or criminal actions on the basis of conduct that is made unlawful by the terms of statute, or by promulgating the necessary implementing regulation. "Regulatory action" might include both these decisions and decisions to go beyond the statutory requirements—by, for example, regulating conduct that the statute does not by its terms cover, but that the agency may regulate within its discretion. The discussion in the text is applicable to decisions of the first sort. By basing such decisions on cost-benefit principles as I describe them, the executive branch exceeds its limitations. *See* text & notes 38-43 *infra*.

I do not discuss the more difficult issue of whether the Executive may use cost-benefit analysis in regulating conduct that is not necessarily covered by the relevant statutory provisions. The analysis *infra* is directed to executive default in enforcement, default that results from use of efficiency criteria in making regulatory choices. There is no such default when the executive merely fails to regulate conduct that it may, but need not, proscribe. The analysis *infra* does, however, suggest skepticism with respect to any effort by the executive to use economic efficiency as the criterion for implementing statutes that the legislature passed on grounds having no relation to efficiency.

29. *See* 15 U.S.C. §§ 1, 2 (1976).

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an "unreasonable risk" to health or safety.[30] There is no question that Executive Order 12,291 may be applied to such statutes.

The second category consists of statutes that are not plausibly regarded as maximizing or as having been designed to maximize wealth. Various civil rights statutes[31] and certain laws protecting the environment notwithstanding the cost[32] probably fall within this category. Although such statutes might be justified under a utilitarian approach to legislation, they do not promote "efficiency" in the economic sense, and thus cannot be regarded as conforming to an economic approach to regulation as I have defined it.[33]

The third category comprises statutes that have some effects which maximize wealth, and some that do not. Many antipollution statutes fall in this category.[34] Pollution is a classic context for government intervention because of "market failure," but there can be no doubt that anti-pollution laws often have intended effects that do not promote efficiency. With respect to statutes in this category, Executive Order 12,291 enjoins regulators to enforce the law when, and only when, a cost-benefit test is satisfied—unless use of that test is prohibited by law. The problem of determining the scope of the order becomes critical with respect to statutes of the second and third types.

It might be responded that the question of scope is in actual practice irrelevant, because the order should not be taken seriously as an effort to promote "efficiency" in the economic sense. The efficiency criterion, in that sense, counts as costs and benefits goods that are not conventionally understood in monetary terms,[35] but only when and to the extent that private persons are willing to pay for those goods. In this respect, the economic notion of efficiency is distinct from utilitarianism, which does not take into account willingness to pay.[36] For example, it is possible that in some contexts a health regulation that maximizes utility will be inefficient, because the amount that the beneficiaries of the regulation are willing to pay for it (affected as "willingness to pay" necessarily is by their relative wealth) is less than the total social cost of the regulation.

30. Although the term "unreasonable" need not connote a cost-benefit approach, the legislative history of several such statutes suggests that that approach is sometimes intended. *See* Consumer Product Safety Act, 15 U.S.C. § 2058(C)(2)(A) (1976); Child Protection and Toy Act, *id.* § 1261(s).

31. *See* 42 U.S.C. § 2000(d) to (d) 4 (1976) (title VI of Civil Rights Act of 1964); *id.* § 2000(e) *et seq.* (title VII of Civil Rights Act).

32. *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531-43 (1976).

33. *See* text & notes 34 & 36 *infra*.

34. *See* Clean Air Act, 42 U.S.C. § 4701 *et. seq.* (1976); Clean Water Act, *id.* § 1251 *et seq.*

35. Life and health are obvious examples.

36. For a more detailed discussion, *see generally* Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

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Thus far, I have treated Executive Order 12,291 as if it adopted the efficiency criterion. The rhetoric of costs and benefits, however, might be understood as something very different: a convenient and workable means of assuring that regulatory decisions are controlled by the President or by officials who are more likely to share his views than the career bureaucrats in the various federal agencies. The very indeterminacy of the order tends to support this view. The order defines neither benefits or costs. If the order intends to include all costs and benefits in some felicific calculus, the analysis it mandates will be absurdly open-ended. Under a utilitarian approach to regulation, nearly any result can be justified regardless of whether it maximizes wealth. For example, is it a "benefit" of a health regulation that the regulation tends to provide beneficiaries and regulated class members with the psychic benefits of increasing relative equality of wealth?[37] If so, any regulation can be supported—tautologically—as satisfying a cost-benefit test. Moreover, because the order contains no answers to such questions, it might be understood not to contain a conventional economic approach to regulatory decisions, but simply as an injunction that administrators do the right thing.

In this respect, the order accords enormous discretion to those who are charged with interpreting it. Cost and benefits, of course, cannot be weighed without some method of determining how they should be valued. An Administration determined to impose harsh regulatory provisions would hardly be prevented from doing so by Executive Order 12,291. It would be sufficient for it to conclude that health or life has exceptionally high value, and that an exceptionally high price is justified in order to preserve it. An Administration intending to weaken or remove regulatory protections could simply undertake different calculations. Wholly subjective judgments of value are thus unavoidable in the implementation of the order; and there is no guarantee that these judgments will conform to the views expressed in the governing statute. To make the point differently, cost-benefit analysis of the sort required by Executive Order No. 12,291 requires no particular outcomes. The analysis, even if made decisive, is entirely indeterminate in the absence of some comparatively specific guidelines with which to apply it. For this reason, the order might be understood not as an effort to adopt an economic conception of the regulatory process, but as a convenient method of ensuring that regulatory choices—however they are made—reflect the preferences of high-level executive officials.

This characterization has considerable descriptive power, and it would be unrealistic to pretend that the order is an inflexible, single-

37. For discussion, *see generally* Kennedy, note 27 *supra*.

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minded effort to ensure that only efficiency-promoting statutes are enforced by the Executive. Moreover, if the order is intended to ensure merely that regulatory action is not taken when the disadvantages outweigh the advantages, the separation of powers issues become much less troubling. In that event, the primary questions are whether the executive branch is including as advantages and disadvantages those factors that Congress intended it to consider, and whether the valuation of those factors by the executive branch conforms to any valuation in the governing statute. Although it will be critical to ensure that these questions are answered affirmatively, there is little reason, under this approach, to fear that the order will result in usurpation of legislative prerogatives.

Although realism thus requires an acknowledgement that Executive Order 12,291 does not necessarily allow enforcement only when enforcement is "efficient" in an economic sense, the very terms of the order suggest that it might usefully be examined as an attempt to adopt an economist's approach to enforcement issues. For Executive Order 12,291 does not simply give OMB the authority to oversee regulatory decisions to ensure compliance with statute, or to prevent general arbitrariness. It purports instead to ensure that those decisions will be guided by a particular set of considerations, and that those considerations will bind the officials in the relevant agencies as well as those in OMB. As I have suggested, the language of the order, as well as the rhetoric used during its implementation, indicates that it is intended to ensure that regulatory decisions will promote economic "efficiency." The order does not refer to advantages and disadvantages, but to benefits and costs. In this respect, the cost-benefit requirement might well be taken seriously as an effort to guarantee that, "to the extent permitted by law," a wide variety of statutes will not be implemented if the result is not justified under at least some form of an economic approach to regulation.

Even if Executive Order 12,291 is treated as a genuine effort to implement a cost-benefit approach in the economic sense, it might be argued that its scope is nearly universal. Statutes generally are not intended to promote efficiency. Nonetheless, the executive branch, in coordinating the numerous statutes Congress has entrusted to it, may have discretion to implement those statutes only when the benefits outweigh the costs. Traditions of prosecutorial discretion are themselves sufficient to reveal that Congress does not intend to require the Executive to enforce regulatory statutes fully or mechanically: the Executive has considerable discretion to determine the timing, circumstances, and

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even the ultimate desirability of enforcement.[38] It might thus be argued that the Executive should not be precluded from adopting a cost-benefit approach simply because Congress did not, in enacting the statute in question, explicitly provide that enforcement is authorized only when a cost-benefit test is satisfied.

This argument is unpersuasive. To be sure, the Executive is permitted broad latitude in setting priorities for enforcement action, and there is nothing to prevent an executive agency from devoting scarce prosecutorial resources to those violations that seem most egregious. But it is a long step from this proposition to the claim that the Executive has a general power to enforce only those statutes which conform to its view of what the law should be. The President's constitutional obligation is to "take Care that the Laws be faithfully executed."[39] Nothing in the Constitution authorizes the President to decide, contrary to an instruction from Congress, that a particular statute should not be enforced. When Congress passes a statute which does not promote "efficiency," the President has no authority to refuse to enforce it on the ground that a standard based on efficiency would be preferable.[40] For example, the Executive may not decline to enforce laws prohibiting discrimination in education on the ground that such laws redistribute wealth instead of maximizing it.

The President's authority to decline enforcement is greatest when he is required to decide how to allocate a general appropriation covering multiple statutes. Both the broad discretion of the criminal prosecutor and the Attorney General's historical reluctance to enforce the Robinson-Patman Act[41] can be justified on this ground. No particular funds are devoted to enforcement of particular criminal statutes or the Act, and in choosing which violations to redress, the prosecutor and the Attorney General must select those which they believe to be the most egregious. It is a fair inference from historical practice that Congress shares this understanding, particularly in light of the Attorney Gen-

38. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 248-49 (1980), *citing* Vaca v. Sipes, 386 U.S. 171, 182 (1967). *See generally* FTC v. Klesner, 280 U.S. 19 (1929). The conclusion that the Executive is permitted to enforce statutes only when the benefits outweigh the costs would of course be inappropriate if the language of the statute or its history expressly precluded a cost-benefit approach, but that would be a rare case. An example is the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* (1976). *See* American Textile Mfrs. Institute Inc. v. Donovan, 101 S.Ct. 2478, 2489-2504 (1981); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 717-19 (1980) (Marshall, J., dissenting).

39. U.S. CONST. art. II, § 3, cl. 4.

40. This conclusion is supported by the outcome of the impoundment controversy. *See generally* Train v. City of New York, 420 U.S. 35 (1975); Comment, *Presidential Impounding of Funds: The Judicial Response*, 40 U. CHI. L. REV. 328 (1973). The impoundment context is distinguishable, however, because Congress may have greater power over appropriations than over statutory provisions generally. *See* U.S. CONST. art. I, § 9, cl. 7.

41. 15 U.S.C. § 13 (1976) (prohibition on certain price differences).

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eral's traditional immunity from judicial or legislative supervision. But it is difficult to maintain that Congress always has similar understandings—for example, with respect to title VI of the Civil Rights Act of 1964, the courts have held that enforcement is mandatory.[42]

Admittedly, the Constitution imposes limits on Congress' power to interfere with the exercise of the executive functions by determining whether prosecution is justified in particular cases and on particular facts. No such limits, however, bar Congress from ordering certain statutes to be enforced rather than ignored by the Executive. The veto provisions of article I[43] provide the primary mechanism by which the President can guard against the passage of undesirable legislation. If Congress could not require enforcement of statutory provisions, the Executive would be authorized effectively to nullify or amend statutes, and have unreviewable discretion in doing so. Such a rule, which would make Congress wholly dependent on the good will of the Executive, is inconsistent with any plausible view of the proper function of the legislature in a separation of powers scheme.

To say that the Executive may not refuse to enforce statutes that fail a cost-benefit test is not to say that he is barred from taking into account costs and benefits at all. For instance, he may choose cost-effective approaches to regulation, identify the costs and benefits of regulatory proposals with a view to statutory reform or ordering priorities, or decline to act in exceptional cases of de minimis benefits and high costs. There is no reason to believe that Congress wishes the Executive to accomplish legislative goals in other than the least expensive manner, and every reason to believe otherwise. Those portions of Executive Order 12,291 that do not impose a cost-benefit requirement stand on firm ground in these respects.

Indeed, even the cost-benefit requirement of Executive Order 12,291 may be defensible with respect to statutes falling within the third category described above: those that have some applications that tend to promote efficiency and some applications that do not. Ordinary principles permitting the Executive to set priorities can be extended to allow him to enforce a statute when he believes enforcement is most desirable. There are two difficulties, however, with this conclusion as applied to Executive Order 12,291. First, enforcement of only the efficiency-promoting applications of a particular statute may use a very small fraction of the resources that Congress intended to be made available for enforcement of that statute. If so, failure to bring enforcement action in cases in which a cost-benefit test is not met will raise

42. *See* Adams v. Richardson, 480 F.2d 1159, 1163-66 (D.C. Cir. 1973).
43. *See* U.S. CONST. art. 1, § 7, cl. 2.

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serious separation of powers questions, for it will result in nullification of large portions of the statute. Second, Congress—which, it bears repeating, generally does not pass statutes in order to promote efficiency—may have believed that the most egregious violations are not those whose prosecution would promote efficiency. In these circumstances, enforcement of a statute only in efficiency-promoting applications could be tantamount to a complete default in the enforcement process.

These considerations suggest that the scope of the cost-benefit requirement of the order is narrower than has generally been supposed, and that the requirement cannot be applied to many regulatory statutes. While the Executive often has discretion to enforce statutes selectively, he has no power to adopt a unitary conception of regulation that accords with no plausible theory of legislation. The general conclusion is that the cost-benefit requirement of Executive Order 12,291 is applicable only to those statutes, discussed above, that are designed to remedy "market failure" in the economic sense[44] or that otherwise have efficiency-promoting applications whose exclusive implementation would not fundamentally conflict with legislative purposes.

An ad-hoc catalogue of particular provisions to which the cost-benefit requirement may not be applied would probably be unprofitable. For purposes of illustration, however, it may be suggested that the requirement is not properly applicable to "substantive" aspects of welfare programs, such as those involving food stamps, the national school lunch program, and Medicaid; civil rights provisions, such as bilingual education rules; certain kinds of environmental statutes akin to the Endangered Species Act; provisions protecting the handicapped; statutes governing elections for Indian tribes; and provisions protecting cultural resources and historic sites. None of these statutes is plausibly regarded as intended to promote efficiency. To say that the cost-benefit requirement is not properly applied to such regulations is not, of course, to say that any particular kind of regulation need be promulgated. It is, however, to say that in deciding whether to adopt a certain regulation, the proper inquiry is not whether the regulation satisfies a cost-benefit test, but whether the regulation promotes statutory goals in a desirable manner.

If the cost-benefit requirement of Executive Order 12,291 is inapplicable to so many statutes, a final question is whether it would be proper for the courts so to rule. Some (though increasingly few) continue to believe that the exercise of Executive authority under the "take

44. All statutes, of course, are designed to remedy "market failure" in one sense or another. I mean to use the phrase in the sense of the market's failure in achieving economic "efficiency."

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Care" clause is not subject to judicial control.[45] This view is unpersuasive. The courts supervise the Executive's enforcement authority in almost every administrative law case that is the subject of a judicial decision. No one suggests that judicial review of enforcement initiatives is a violation of separation of powers. The same conclusion will often be appropriate in the context of judicial review of executive failure to enforce statutes, as the courts have increasingly made clear.[46]

In short, application of the cost-benefit requirement of Executive Order 12,291 in an across-the-board fashion would raise serious questions of separation of powers, and the "to the extent permitted by law" proviso operates severely to restrict the scope of that aspect of the order. The Executive may formulate enforcement priorities, and—at least with congressional approval or acquiescence—may decide to devote scarce enforcement resources to particular statutory provisions rather than others. The difference between this authority and the power to nullify statutes is in part one of degree rather than kind, but it is nonetheless a critical one, as the courts have recognized.[47] If the Executive possessed the authority to disregard provisions of which he disapproved, legislation would be a mere invitation, and not an instruction, to executive officials.

What implications do these considerations have for the administration and enforcement of Executive Order 12,291? Most significantly, they suggest that the requirement that regulatory action be taken only if the benefits exceed the costs—if that requirement is to be taken seriously as adopting an approach to regulation based on economic efficiency—should be applied selectively and with care. Many statutes require regulatory action even when, under an economist's approach, the "costs" exceed the "benefits," and it would be an abuse of normal conceptions of separation of powers if the Executive could nullify those statutes by deciding not to implement them.

I have noted that in order to reach this conclusion, one need not argue that the Executive is prohibited from choosing cost-effective approaches to regulation. But in a government that is both democratic

45. *See* Note, *Dunlop v. Bachowski and the Limits of Judicial Review under Title IV of the LMRDA: A Proposal for Administrative Reform*, 86 YALE L.J. 885, 901-02n.62 (1977).

46. *See* Marshall v. Jerrico, 446 U.S. 238, 249-50 (1980); Dunlop v. Bachowski, 421 U.S. 560, 567n.7, 568-76 (1975); NRDC v. SEC, 606 F.2d 1031, 1044-47 (D.C. Cir. 1979); Nader v. Saxbe, 497 F.2d 676, 679 & n.18 (D.C. Cir. 1974). A different conclusion would of course be appropriate in the context of agency action or inaction when the political question doctrine is applicable or when the exception of the Administrative Procedure Act for decisions "committed to agency discretion" applies. Both exceptions govern—to speak in rough and general terms—in cases in which there are no judicially cognizable standards for determining whether agency action was lawful. For discussion of the problem of judicial review of agency inaction, *see* Stewart & Sunstein, note * *supra*, at II-6-10, VII-1-56.

47. *See* note 46 *supra*.

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and dedicated to the principle of separation of powers, cost-effectiveness—and not economic "efficiency"—is probably the most that can be expected from an executive order on federal regulation.[48]

48. That is, an executive order intended to improve economic "efficiency." Such an order might, of course, serve other goals instead. *See* text & notes 13-14 *supra*.

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