

ual employees may not always be perfectly aligned with those of the union.<sup>68</sup>

It is understandably difficult for courts to accommodate collective and individual interests simultaneously. But instead of giving up and allowing one set of rights and interests to trump the other, the Supreme Court should attempt to find a workable solution that will protect the policies embodied in both labor and employment statutes. In *Pyett*, this opportunity was available to the Court in the form of a more fine-grained analysis of the role of unions and employees in collective bargaining. Instead, the Court held that when it comes to bargaining, the union is a perfect stand-in for the employee. The Court failed to recognize the ways in which this holding would protect some individual interests while undermining others.

### G. Review of Administrative Action

1. *Clean Water Act — Judicial Review of Cost-Benefit Analysis.* — The controversy regarding whether and how administrative agencies should use cost-benefit analysis has long divided scholars, bureaucrats, and politicians. The Supreme Court's position in the battle, however, has remained uncertain. In 1981, when cost-benefit analysis was a relatively new tool of the administrative state, the Court refused to find that a statute *required* cost-benefit analysis in the absence of clear statutory text to that effect.<sup>1</sup> The Court did not address the issue again until twenty years later, in *Whitman v. American Trucking Ass'ns*,<sup>2</sup> when it "refused to find implicit in ambiguous sections of the [Clean Air Act] an authorization to consider costs."<sup>3</sup> Taken together, the Court's early decisions could be read to establish a presumption against cost-benefit analysis in the absence of clear congressional language to the contrary.<sup>4</sup> But proponents of cost-benefit analysis argue that these cases are not so definitive and advocate that the Court clarify its stance by adopting a general presumption in favor of cost-

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<sup>68</sup> Furthermore, engaging this issue would have, in conjunction with *Wright*, provided for a kind of clear statement rule: a CBA that sought to waive individual rights to a federal forum would not only have to mention explicitly the statutes at issue, but also would have to state that the term applied to individual employees. This rule would provide some extra protection for employees while still enabling unions to bargain over the waiver of federal forum rights.

<sup>1</sup> See *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510–12 (1981).

<sup>2</sup> 531 U.S. 457 (2001).

<sup>3</sup> *Id.* at 467.

<sup>4</sup> See, e.g., Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 428 (1981) (suggesting — although ultimately rejecting — that *Donovan* "may indicate a judicial presumption against requiring cost-benefit analysis"); Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENVTL. L. 191, 238 (2004) (arguing that the Court decided *American Trucking* in part on a presumption that "where the statutory language is ambiguous, the court should presume that Congress has *not* authorized the agency to consider costs").

benefit analysis.<sup>5</sup> Last Term, in *Entergy Corp. v. Riverkeeper, Inc.*,<sup>6</sup> the Supreme Court refused to embrace either position. The Court found that an ambiguous section of the Clean Water Act<sup>7</sup> (CWA) permitted the Environmental Protection Agency (EPA) to employ cost-benefit analysis in the creation of new standards for water intake technology in power plants. But the Court did not reject *American Trucking*'s holding that silence or ambiguity can sometimes be read to foreclose cost-benefit analysis, nor did it find that cost-benefit analysis was *required* by the ambiguous CWA provision. Instead, the Court found no evidence that Congress had clearly spoken regarding the use of cost-benefit analysis in enforcement of the CWA. In the face of this ambiguity, the Court applied the *Chevron*<sup>8</sup> doctrine, extending deference to the views of the agency responsible for the statute's implementation. In adopting this course of action, the Court reiterated a key *Chevron* principle: agencies, because they are more politically accountable and more flexible than courts, are the appropriate bodies to make potentially controversial determinations such as whether an ambiguous statute permits cost-benefit analysis.

In 1972, Congress amended the Clean Water Act to regulate the cooling water intake structures that constitute a key part of power plants.<sup>9</sup> These structures extract water from natural sources to keep the plants' systems from overheating.<sup>10</sup> Unfortunately, the extraction process often harms the organisms within the water sources, by "squashing [them] against intake screens (elegantly called 'impingement') or suc[king them] into the cooling system ('entrainment')." <sup>11</sup> Section 1326(b) of the CWA amendments mandated that the EPA standards for these cooling water intake structures "reflect the best technology available for minimizing adverse environmental impact."<sup>12</sup>

It took the EPA nearly thirty years to develop such standards,<sup>13</sup> but in 2001 the agency created a set of requirements for new cooling water intake structures,<sup>14</sup> commonly referred to as the "Phase I

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<sup>5</sup> See, e.g., Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1683–85 (2001) (advocating for a presumption that ambiguity should mean an agency is permitted to perform cost-benefit analysis); Michael Abramowicz, *Toward a Jurisprudence of Cost-Benefit Analysis*, 100 MICH. L. REV. 1708, 1730–32 (2002) (book review) (arguing for a stronger presumption in favor of requiring cost-benefit analysis in the face of ambiguity).

<sup>6</sup> 129 S. Ct. 1498 (2009).

<sup>7</sup> 33 U.S.C. §§ 1251–1387 (2006).

<sup>8</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>9</sup> Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 316(b), 86 Stat. 816, 876 (codified at 33 U.S.C. § 1326(b)).

<sup>10</sup> *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 90 (2d Cir. 2007).

<sup>11</sup> *Entergy*, 129 S. Ct. at 1502.

<sup>12</sup> 33 U.S.C. § 1326(b).

<sup>13</sup> *Entergy*, 129 S. Ct. at 1503.

<sup>14</sup> 40 C.F.R. § 125.84(b)(1) (2008).

rules.”<sup>15</sup> These rules mandated that new structures achieve equivalent levels of impingement and entrainment as those achieved by “closed-cycle cooling system[s],”<sup>16</sup> a technology known to be friendlier to aquatic life.<sup>17</sup> The EPA then adopted a set of regulations governing existing cooling water intake structures, the “Phase II rules.”<sup>18</sup> These rules did not mandate the same standards as those the EPA had applied to new cooling water structures. Instead, the EPA permitted lesser reductions in impingement and entrainment. In defense of this decision, it cited both the “generally high costs” of bringing existing structures into compliance and “the fact that other technologies approach the performance of [closed-cycle cooling systems].”<sup>19</sup> The Phase II rules also permitted site-specific variances for power plants that could prove that the costs of meeting the standards “would be significantly greater than the benefits of complying.”<sup>20</sup>

A number of environmental groups and states challenged these regulations, claiming the EPA was precluded from using cost-benefit analysis in developing its Phase II standards.<sup>21</sup> The Second Circuit granted review and remanded the regulations, determining that cost-benefit analysis was impermissible under § 1326(b) of the CWA.<sup>22</sup> Then-Judge Sotomayor, writing for the court, offered three main reasons why cost-benefit analysis was prohibited. First, she found that the language in the statutory provisions governing cooling water structures was “linguistically similar” to that in two other provisions of the CWA that she believed more explicitly prohibited cost-benefit analysis.<sup>23</sup> Second, Judge Sotomayor held that the language of § 1326(b) itself foreclosed cost-benefit analysis because it required the “*best* technology available.”<sup>24</sup> The use of the word “available” does mean the EPA may take cost into consideration in a “limited fashion” to determine whether the cost of a technology can be “reasonably borne by the

<sup>15</sup> *Entergy*, 129 S. Ct. at 1503.

<sup>16</sup> *Id.*

<sup>17</sup> See 40 C.F.R. § 125.80(a).

<sup>18</sup> *Id.* § 125.90.

<sup>19</sup> 69 Fed. Reg. 41,576, 41,605 (July 9, 2004).

<sup>20</sup> 40 C.F.R. § 125.94(a)(5)(ii).

<sup>21</sup> *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 97 (2d Cir. 2007). In the Second Circuit suit, petitioners also challenged several other provisions in the regulations, and a number of energy companies brought separate claims against the EPA. *Id.* at 96–97. The Supreme Court, however, only granted certiorari on the question of whether the Act permitted cost-benefit analysis. *Entergy*, 129 S. Ct. at 1505.

<sup>22</sup> *Riverkeeper*, 475 F.3d at 98–99. The court remanded the regulations to the EPA for further explanation because it found that the judicial record was unclear as to whether the EPA had actually engaged in cost-benefit analysis in crafting its Phase II standards. *Id.* at 103–04. The court also remanded the portion of the regulations that permitted granting variances for cost-benefit reasons. *Id.* at 115.

<sup>23</sup> *Id.* at 98.

<sup>24</sup> *Id.*

industry.”<sup>25</sup> But the use of the word “best” means the EPA cannot engage in the “impermissibly cost-driven” process of cost-benefit analysis and instead must implement a “technology-driven” standard.<sup>26</sup> Finally, the Second Circuit concluded that Congress’s failure to explicitly permit cost-benefit analysis suggested such an analysis was prohibited because of the Supreme Court’s prior statement in *American Textile Manufacturers Institute, Inc. v. Donovan*<sup>27</sup> that “[w]hen Congress has intended . . . cost-benefit analysis, it has clearly indicated such intent on the face of the statute.”<sup>28</sup>

A group of power plant operators petitioned the Supreme Court for review and Justice Scalia,<sup>29</sup> writing for the majority, reversed. He first noted that, under *Chevron*, the EPA’s view that § 1326(b) permits cost-benefit analysis must be upheld as long as “it is a reasonable interpretation of the statute — not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts.”<sup>30</sup> While Justice Scalia acknowledged that the Second Circuit’s interpretation of “best technology available” was a reasonable one, he explained that it was also reasonable to interpret the “best technology” language as requiring “the technology that *most efficiently* produces some good.”<sup>31</sup> Further, respondents’ argument that the statute’s use of the modifying phrase “for minimizing adverse environmental effects” precluded cost-benefit analysis was rejected. “Minimize,” according to the majority, “is a term that admits of degree” and does not necessarily require the “greatest possible reduction” in environmental harms.<sup>32</sup> Other parts of the CWA, by contrast, explicitly require such a dramatic reduction.<sup>33</sup> Justice Scalia concluded that the failure to use such explicit language here suggests that the EPA “retains some discretion to determine the extent of reduction” and that its “determination could plausibly involve” cost-benefit analysis.<sup>34</sup>

The Court also rejected the respondents’ argument that the structure of the CWA forecloses cost-benefit analysis.<sup>35</sup> The claim rested on a comparison between § 1326(b) and four other provisions of the CWA concerning tests to be used by the EPA in establishing various envi-

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<sup>25</sup> *Id.* at 99.

<sup>26</sup> *Id.*

<sup>27</sup> 452 U.S. 490 (1981).

<sup>28</sup> *Riverkeeper*, 475 F.3d at 99 (quoting *Donovan*, 452 U.S. at 510).

<sup>29</sup> Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.

<sup>30</sup> *Entergy*, 129 S. Ct. at 1505.

<sup>31</sup> *Id.* at 1506.

<sup>32</sup> *Id.*

<sup>33</sup> *See, e.g.*, 33 U.S.C. § 1251(f) (2006).

<sup>34</sup> *Entergy*, 129 S. Ct. at 1506.

<sup>35</sup> *Id.* at 1508.

ronmental standards.<sup>36</sup> The Court was unconvinced by the Second Circuit's argument that cost-benefit analysis was prohibited for cooling structures because of similarities between § 1326(b) and two of these provisions in which cost-benefit analysis was more explicitly barred.<sup>37</sup> The Court was unsure that the two provisions in question actually prohibited cost-benefit analysis.<sup>38</sup> Even if they did, though, the Court found no necessity to interpret § 1326 in light of these provisions as the language was not identical, the other tests' goals were more dramatic,<sup>39</sup> and § 1326 was "unencumbered by specified statutory factors" present in the other tests.<sup>40</sup> The Court was also unpersuaded by respondents' argument that the remaining two provisions, which specifically authorized cost-benefit analysis, implied its prohibition in § 1326(b), where cost-benefit analysis was not mentioned at all.<sup>41</sup> Following that logic, § 1326(b) would require *no* consideration of cost, because each of the other four test provisions in the CWA mention cost as a relevant factor, but § 1326(b) is silent as to economic considerations.<sup>42</sup> Indeed, unlike the other test provisions, § 1326(b) does not mention *any* factors that should be assessed in establishing standards.<sup>43</sup> The Court noted that it is much more reasonable to assume that silence implies agency discretion than that silence dictates that the agency may consider *nothing* in developing its standards.<sup>44</sup>

Justice Scalia then distinguished the relevant precedent. While in *American Trucking* the Court had found that silence as to cost-benefit analysis in a provision of the Clean Air Act (CAA) did "unambiguously bar[] cost considerations," Justice Scalia noted that it did so in light of the Act's particular "statutory and historical context."<sup>45</sup> Similarly, in *Donovan*, the Court found that while silence could not be interpreted to require an agency to use cost-benefit analysis, it did not follow, in light of the Court's superseding decision in *Chevron*, that specific authorization is necessary to permit an agency to perform such analysis.<sup>46</sup>

The Court therefore concluded that § 1326(b) did not prohibit cost-benefit analysis.<sup>47</sup> The majority admitted the possibility that the provision might foreclose certain "rigorous" forms of cost-benefit analysis,

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<sup>36</sup> *Id.* at 1507.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1508.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

but refused to consider that question because in the case at hand the EPA “sought only to avoid extreme disparities between costs and benefits.”<sup>48</sup> Further, the Court held that while the longstanding nature of the EPA’s interpretation was “not conclusive,” it “tends to show that the EPA’s current practice is a reasonable and hence legitimate exercise of its discretion to weigh benefits against costs.”<sup>49</sup>

Justice Breyer concurred in part and dissented in part. After an inquiry into the legislative history of the CWA (which Justice Scalia had left untouched), Justice Breyer concluded that one may read that history to permit cost-benefit analysis.<sup>50</sup> That the agency had interpreted § 1326(b) to permit cost-benefit analysis for thirty years “without suggesting that in doing so it was ignoring or thwarting the intent of the Congress that wrote the statute” bolstered his conclusion.<sup>51</sup> Therefore, because the EPA policy rested on a “‘reasonable interpretation’ of the statute — legislative history included,” Justice Breyer joined the majority in finding that cost-benefit analysis was permissible.<sup>52</sup> He noted, though, his belief that the particular approach to cost-benefit analysis adopted by the EPA in the Phase II rules represented a departure from the agency’s past practices. While previously the EPA had found costs unworkable only when they were “wholly disproportionate” to benefits, the Phase II rules permitted granting variances to any power plant that could prove that the costs of complying with standards were “significantly greater” than the benefits.<sup>53</sup> He found this change insufficiently explained in the administrative record and would have remanded to the EPA for further elucidation.<sup>54</sup>

Justice Stevens dissented,<sup>55</sup> asserting that § 1326(b) prohibits cost-benefit analysis. He argued that the difficulties of accurately monetizing benefits, particularly in the environmental context, meant that “Congress typically decides whether it is appropriate for an agency to use cost-benefit analysis in crafting regulations.”<sup>56</sup> It was therefore inappropriate for the Court to read silence as authorization. He further claimed that the Court erred in failing to follow *American Trucking*.<sup>57</sup> According to Justice Stevens, *American Trucking* taught that where, as in the CWA, Congress specifically authorized cost-benefit analysis in

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<sup>48</sup> *Id.* at 1508–09.

<sup>49</sup> *Id.* at 1509.

<sup>50</sup> *Id.* at 1512–15 (Breyer, J., concurring in part and dissenting in part).

<sup>51</sup> *Id.* at 1515.

<sup>52</sup> *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

<sup>53</sup> *Id.* (internal quotation marks omitted); see 40 C.F.R. § 125.94(a)(5)(ii) (2008).

<sup>54</sup> *Entergy*, 129 S. Ct. at 1516 (Breyer, J., concurring in part and dissenting in part).

<sup>55</sup> Justice Stevens was joined by Justices Souter and Ginsburg.

<sup>56</sup> *Entergy*, 129 S. Ct. at 1517 (Stevens, J., dissenting).

<sup>57</sup> *Id.* at 1518.

some provisions of a statute, it implied its rejection in provisions that were silent as to cost considerations.<sup>58</sup> Further, while acknowledging that *Chevron* applied, Justice Stevens found that an analysis of the structure and legislative history of the Act revealed that despite Congress's silence, it had in fact "directly foreclosed" reliance on cost-benefit analysis.<sup>59</sup> Therefore, he concluded, the Second Circuit's decision should have been upheld.

Justice Stevens is correct that the *Entergy* decision parts company with the *American Trucking* Court's interpretation of statutory silence with regard to cost-benefit analysis. In 2001, the *American Trucking* Court "refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere . . . been expressly granted."<sup>60</sup> In *Entergy*, the Court rejected this principle with regard to the CWA. But Justice Stevens's assertion that "*American Trucking*'s approach should have guided the Court's reading of § 1326(b)"<sup>61</sup> is less convincing. While the *American Trucking* Court found evidence that the CAA "unambiguously bar[red] cost considerations,"<sup>62</sup> no such evidence was present in *Entergy*. Instead, the silence in the CWA created only ambiguity as to the factors Congress wished the EPA to consider. When faced with this ambiguity, the Court eschewed the adoption of a presumption for or against cost-benefit analysis, instead applying the *Chevron* doctrine. By deferring to the agency interpretation, the Court clarified that the controversial decision as to whether to use cost-benefit analysis must be made by Congress or, if no such decision is made, by the agencies, which also can be held politically accountable. Thus, *Entergy* reaffirmed a key *Chevron* principle: courts are not the appropriate decisionmakers in such political battles.

As the *Entergy* majority noted, the *American Trucking* Court grounded its interpretation in the "statutory and historical context" of the CAA provision under consideration.<sup>63</sup> This "statutory and historical context" was very different from that of the CWA provision at stake in *Entergy*, which justified the *Entergy* majority's different outcome. First (and rather obviously), the language of the provisions differ. The CAA provision at issue in *American Trucking* mandated setting the ambient air quality standards at the level "requisite to protect

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<sup>58</sup> See *id.* at 1517–18.

<sup>59</sup> *Id.* at 1521.

<sup>60</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001).

<sup>61</sup> *Entergy*, 129 S. Ct. at 1517–18 (Stevens, J., dissenting).

<sup>62</sup> *American Trucking*, 531 U.S. at 471.

<sup>63</sup> *Entergy*, 129 S. Ct. at 1508 (quoting *American Trucking*, 531 U.S. at 471). This narrow reading of the *American Trucking* opinion, confining its application to the unique legislative and statutory context of the CAA, found support in some of the initial scholarly interpretations of the decision. See, e.g., Sunstein, *supra* note 5, at 1683–85.

the public health,”<sup>64</sup> language which could be considered more absolute than the CWA requirement, which does not mandate the “best technology,” but only the “best technology *available*.” At a minimum, this language is not similar enough to suggest Congress would have assumed, or logic would dictate, that courts would interpret the provisions in the same way. Second, the CAA provision included specific criteria on which the EPA was to base its standards,<sup>65</sup> so it was not true — as it was in *Entergy*<sup>66</sup> — that reading silence as a prohibition would prevent the agency from considering *any* factors in formulating regulations. Finally, the *American Trucking* Court’s decision to bar cost-benefit analysis merely confirmed the reading of the CAA that the D.C. Circuit had been applying for twenty years without any congressional indication of dissatisfaction,<sup>67</sup> despite intervening CAA amendments.<sup>68</sup> The *Entergy* Court confronted the opposite situation because the EPA had consistently interpreted the CWA to *permit* cost-benefit analysis in the cooling water intake structure context for over thirty years.<sup>69</sup>

In light of these significant differences, Justice Stevens’s claim that the *Entergy* Court should have been guided by *American Trucking* seems based not on a desire to interpret similar statutes similarly, but rather on the sense that the Court should adopt a consistent approach to the interpretation of silence or ambiguity in the cost-benefit context. Effectively, Justice Stevens advocated for a presumption against cost-benefit analysis when the text is silent. The justification for such a presumption, though, is unclear. Justice Stevens acknowledged that the use of cost-benefit analysis is “controversial.”<sup>70</sup> But for this reason, his subsequent assertion that the process “often, if not always, yields a result that does not maximize environmental protection”<sup>71</sup> must be taken with a grain of salt. A fierce battle continues to rage as to the efficacy and desirability of cost-benefit analysis. In fact, some scholars have argued that cost-benefit analysis is particularly effective in the environmental context.<sup>72</sup>

<sup>64</sup> 42 U.S.C. § 7409(b)(1) (2006).

<sup>65</sup> See *American Trucking*, 531 U.S. at 469.

<sup>66</sup> See *Entergy*, 129 S. Ct. at 1508.

<sup>67</sup> See *American Trucking*, 531 U.S. at 464 (citing *Am. Lung Ass’n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998); *Natural Res. Def. Council, Inc. v. Adm’r, EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990) (per curiam), *vacated in part on other grounds*, 921 F.2d 326 (D.C. Cir. 1991) (per curiam); *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980)).

<sup>68</sup> See *id.* at 467.

<sup>69</sup> *Entergy*, 129 S. Ct. at 1509.

<sup>70</sup> *Id.* at 1516 (Stevens, J., dissenting).

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR*



This controversy does not, of course, mean that an ambiguous statute must be read to permit cost-benefit analysis, but it does mean that there is not the sort of widespread consensus as to the inefficacy of cost-benefit analysis that might justify the creation of a presumption against allowing agencies to use the tool. Rather, the lack of consensus suggests that this is exactly the sort of policy issue that should be decided by the politically accountable legislative branch, rather than the judiciary. Justice Stevens appeared to recognize this when he noted that “[b]ecause benefits can be more accurately monetized in some industries than in others, Congress typically decides whether it is appropriate for an agency to use cost-benefit analysis in crafting regulations.”<sup>73</sup> The problem, though, is that sometimes Congress does *not* decide; the CWA provision represents just such an instance. Indeed, even after a thorough evaluation of the legislative history,<sup>74</sup> Justice Stevens was unable to present a single unambiguous statement reflecting a congressional desire to prohibit cost-benefit analysis under § 1326 of the CWA. In these circumstances, unlike those in *American Trucking*, a finding that cost-benefit analysis was barred could not represent a simple acquiescence to the will of Congress.

One might argue, though, that adopting a presumption now would mean that congressional intent with respect to cost-benefit analysis could be better honored in the future. Once a presumption is adopted, future Congresses would act with the knowledge of its existence and could conform their legislation accordingly. Presumably, if the *Entergy* Court had found that silence barred cost-benefit analysis, subsequent legislators would have taken care to make an explicit statutory provision for cost-benefit analysis when they desired it. But the same can be said of the *Entergy* majority opinion: because the Court established that in the absence of clear language it would defer to the agency, legislators on both sides of the cost-benefit debate are now on notice that they must clearly state their cost-benefit preferences to ensure that they are honored. Further, applying *Chevron* — rather than adopting a presumption — ensured that the Court’s weight was not unnecessarily thrown behind either side of the debate. Indeed, the Court emphasized its neutrality by refusing to disturb the essential findings of *American Trucking*, showing that it would not presume that silence

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HEALTH (2008). Indeed, the use of cost-benefit analysis in the creation of the regulations at issue in *Entergy* permitted the EPA to weigh the fact that higher technology standards might necessitate creating additional power plants (and additional pollution) because of the reduction in power output that the new technology would cause. *Entergy*, 129 S. Ct. at 1504. Considering such a “cost” might well have been a boon to the environment in general even if it spelled doom for some fish.

<sup>73</sup> *Entergy*, 129 S. Ct. at 1517 (Stevens, J., dissenting).

<sup>74</sup> See *id.* at 1518–21.

with regard to cost-benefit analysis always means authorization. The Court will still look to the “best interpretation” of a statute to determine if cost-benefit analysis is permitted; but sometimes, as in *Entergy*, the best interpretation is that the statute is ambiguous.<sup>75</sup>

The *Entergy* Court’s decision not to take sides in the cost-benefit debate and instead to apply *Chevron* deference preserved important values articulated by the *Chevron* Court itself. When Congress does not speak clearly, controversial cost-benefit decisions will be made by agencies, which are more politically accountable than courts. As the *Chevron* Court observed, “[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices — resolving the competing interests which Congress itself . . . did not resolve.”<sup>76</sup> The desirability of cost-benefit analysis is exactly the sort of “policy choice” involving “competing interests” that makes resolution by an (at least somewhat) accountable agency the preferred choice.

Moreover, as the *Chevron* Court also recognized, agencies — unlike courts — are not bound to prior interpretations of statutes.<sup>77</sup> They are therefore more capable of shifting policies in accord with the shifting desires of the polis.<sup>78</sup> The benefits of this flexibility are particularly visible in the cost-benefit context. The *Entergy* decision means that as the debate over the desirability of cost-benefit analysis develops, agencies can fine-tune their use of the technique in response to these developments, as long as their statutory interpretations remain reasonable. By contrast, a presumption for or against cost-benefit analysis would have effectively frozen the debate. Agencies would have been able to respond to new developments only in the wake of a new statute, amendment, or Supreme Court opinion.

The *Entergy* Court’s opinion may not delight either critics or advocates of cost-benefit analysis. It does not permit either camp to claim that the powerful force of the Supreme Court is on its side. But the opinion should delight proponents of the *Chevron* doctrine. In recent

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<sup>75</sup> Justice Stevens accused the majority of shirking its duty to determine whether the statute was indeed ambiguous. Justice Scalia phrased the *Chevron* analysis as a single-step inquiry into the reasonableness of the agency interpretation, instead of a two-step inquiry that first investigates whether Congress has spoken clearly on the issue. *See id.* at 1518 n.5. However, the majority explicitly rejected Justice Stevens’s accusation, noting that “surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.” *Id.* at 1505 n.4 (majority opinion); *cf.* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009).

<sup>76</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

<sup>77</sup> *See id.* at 863–64.

<sup>78</sup> *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 98 (1985).

years — in cases like *FDA v. Brown & Williamson Tobacco Corp.*<sup>79</sup> — the Court has sometimes hinted that it will not extend *Chevron* deference to interpretations that permit agencies to decide politically controversial questions such as whether to use cost-benefit analysis.<sup>80</sup> But restricting *Chevron* in this way ignores an important rationale of the original *Chevron* opinion: because the executive branch is more politically accountable and more flexible than the judiciary, agencies — and not courts — are the proper bodies to make the policy decisions that Congress has not addressed. The *Entergy* decision reiterates the Court's commitment to this rationale and suggests the Court's renewed commitment to a stronger *Chevron* doctrine.

2. *Communications Act — Scope of Arbitrary and Capricious Review.* — The Federal Communications Commission's (FCC) jurisdiction over the content of television and radio programs highlights a significant tension between the Supreme Court's expansive interpretation of the FCC's statutorily granted administrative authority and the First Amendment's principled protection of free speech. In the 1978 case *FCC v. Pacifica Foundation*,<sup>1</sup> the Supreme Court upheld the FCC's authority to penalize a radio station for airing a twelve minute-long monologue that expressed and repeated certain indecent or profane words,<sup>2</sup> but declined to articulate any generally applicable boundary between the FCC's regulatory authority and constitutionally protected speech.<sup>3</sup> Last Term, in *FCC v. Fox Television Stations, Inc.*,<sup>4</sup> the Court again avoided delineating the constitutionally permissible scope of the FCC's authority over broadcast content but upheld its authority to regulate even "fleeting expletives" against a challenge that the policy was arbitrary and capricious. Although "arbitrary and capricious" review does not usually entail review of an agency's determination that its policy is constitutionally permissible, the Court should have concluded that such constitutional review is appropriate in the context of broadcast regulation. Because the FCC is statutorily required to consider the constitutionality of its policies, its determination that it could sanction fleeting expletives without running afoul of the First

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<sup>79</sup> 529 U.S. 120 (2000). In that decision, the Court rejected an agency interpretation of the Food, Drug, and Cosmetic Act that would have permitted the FDA to regulate cigarettes. The Court explained that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

<sup>80</sup> Professor Cass Sunstein suggests that the Court actually has a whole set of "nondelegation canons" that it uses to avoid applying *Chevron* in cases involving significant policy issues that the Court believes are best resolved by Congress. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

<sup>1</sup> 438 U.S. 726 (1978).

<sup>2</sup> *Id.* at 751.

<sup>3</sup> *Id.* at 742 ("[O]ur review is limited to the question whether the [FCC] has the authority to proscribe this particular broadcast.").

<sup>4</sup> 129 S. Ct. 1800 (2009).