Essay

Arbitrary and Capricious Cost-(Non)Consideration After *Michigan v. EPA*

*Karmina Caragan**

Abstract

Initially, Supreme Court decisions suggested a presumption that, absent affirmative congressional intent, agencies should not consider costs when deciding whether to regulate. In the last few years, however, the Supreme Court has departed from this perceived presumption, and instead held that absent clear statutory prohibition agencies may consider costs at their discretion. In Michigan v. EPA*, the Court went even further by holding that absent clear statutory prohibition agencies must consider costs. While the Court forewarned invalidation of agency action without reasonable cost-consideration at the first stage, it stopped short of prescribing a particular method sufficient to survive* Michigan*. This Essay proposes that, at a minimum, agencies should base their decision to regulate on a Regulatory Impact Analysis ("RIA"). While this will not necessarily guarantee survival of arbitrary and capricious review under* Motor Vehicle Manufacturers Ass'n v. State Farm Insurance Co.*, RIA-based agency action will likely survive* Michigan*'s mandate.*

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* J.D., 2017, The George Washington University Law School; B.A., Political Science, 2011, University of California, Berkeley. The Author would like to thank Professor Robert L. Glicksman for his invaluable guidance as faculty advisor. The Author would also like to extend her deepest gratitude to *The George Washington Law Review* staff for their hard work, and to her family and Bill Fefferman for their endless love and support.

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Introduction

Michigan v. EPA[1] has made one thing abundantly clear: agencies must be (extra) wary of their duty to consider costs lest the courts invalidate agency action on the ground that the agency's neglect of this duty rendered its action arbitrary and capricious.[2] The decision emphasizes what has always been common sense to the Court: a failure to consider costs *at all* will be considered arbitrary and capricious in the absence of clear congressional intent prohibiting such consideration. Importantly, however, *Michigan* requires that an agency not only consider costs *at some point*, but that it considers costs at the first stage, i.e., when it decides to regulate.[3] Nonetheless, *Michigan* stops short of prescribing a particular method of cost-consideration, leaving that decision to the agency's discretion.[4]

In light of *Michigan*, this Essay proposes that agencies, at a minimum, base their decision to regulate on a Regulatory Impact Analysis ("RIA"), where they must consider costs for major actions, e.g., promulgating regulations. Part I discusses *Michigan*'s predecessors, taking note of the presumption that may be gleaned from earlier cases, and the departure from that presumption in the Court's decisions just prior to *Michigan*. Part II discusses the Court's decision in *Michigan* and its impact on subsequent cases. Part III explains what principles from *Michigan* are likely to be reflected in future cases and proposes that agencies, at a minimum, base their decision to regulate on their RIA when congressional intent regarding cost-consideration is ambiguous. Part III concludes by noting that this proposal would

1 135 S. Ct. 2699 (2015).
2 *See id.* at 2711.
3 *See id.*
4 *See id.*

allow an agency's decision to regulate to survive *Michigan*, but notes that the agency action is still subject to review under *Motor Vehicle Manufacturers Ass'n v. State Farm Insurance Co*.[5]

I. Agency Cost-Consideration Before *Michigan v. EPA*

Prior to the Court's decision in *Michigan*, scholars noted that other cases involving an agency's decision to consider, or not consider, costs in deciding whether to regulate seemed to establish a rebuttable presumption that agencies should *not* consider costs absent affirmative congressional intent.[6] First, in *Union Electric Co. v. EPA*,[7] the petitioner challenged a state implementation plan that it alleged was economically or technologically infeasible.[8] By way of background, the Clean Air Act Amendments of 1970[9] made the states responsible for formulating and implementing pollution control plans.[10] The Act provided that the Environmental Protection Agency ("EPA") Administrator "shall approve" the state's proposed implementation plan so long as it: (1) was adopted after notice and hearing, and (2) met eight specified criteria listed in section 110(a)(2).[11] The Court concluded that the word "shall" mandated that the Administrator approve a state's implementation plan if both requirements were met.[12] Economic and technological infeasibility was not included in the eight criteria, thus, the Administrator could not consider it as a factor in determining whether to approve a state's implementation plan.[13] To support its conclusion that the EPA could not consider excessive compliance cost as a basis for rejecting a state implementation plan, the Court noted that other sections of the Act explicitly allowed the Administrator to consider economic and technological infeasibility.[14] Had Congress intended cost to be a relevant factor in the EPA's review of

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5 463 U.S. 29 (1983).

6 *See, e.g.*, Andrew M. Grossman, Michigan v. EPA*: A Mandate for Agencies to Consider Costs*, 2014–2015 Cato Sup. Ct. Rev. 281, 285; *The Supreme Court 2014 Term: Leading Cases: Clean Air Act—Cost-Benefit Analysis*—Michigan v. EPA, 129 Harv. L. Rev. 311, 317, 318 n.81 (2015) [hereinafter *Cost-Benefit Analysis*].

7 427 U.S. 246 (1976).

8 *Id.* at 253.

9 Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

10 *Union Electric*, 427 U.S. at 249.

11 *Id.* at 257.

12 *Id.*

13 *Id.*

14 *Id.* at 257 n.5 ("Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided. Thus, §§ 110(e), 110(f), 111(a)(1), 202(a), 211(c)(2)(A), and 231(b) of the Amendments all expressly permit consideration, *e.g.*, 'of the requisite technology, giving appropriate consideration to the cost of compli-

state implementation plans, it likewise would have said so in section 110(a)(2).[15] This case suggests that absent express congressional authorization to consider cost in the statutory language in question, an agency lacks the authority to consider costs at all.

Twenty-five years later, the Court decided *Whitman v. American Trucking Ass'ns, Inc.*,[16] which involved the question of whether the EPA could consider costs when promulgating standards pursuant to section 109(b)(1) of the Clean Air Act ("CAA").[17] The statute required the EPA to promulgate National Ambient Air Quality Standards ("NAAQS") "to protect the public health" with "an adequate margin of safety."[18] The Court concluded that a "most natural" reading of this language and consideration of the overall regulatory scheme clearly barred the EPA from considering implementation costs in setting NAAQS.[19] Significantly, the Court explained that other provisions of the CAA explicitly directed the EPA to consider costs, and the Court refused to infer the same congressional intent in section 109(a)'s ambiguous terms.[20] Thus, consistent with *Union Electric*, the Court again suggested a presumption that agencies were barred from considering costs in the absence of explicit language authorizing them to do so.[21] The presumption was rebuttable upon a showing of a "textual commitment" in the statutory language that Congress intended the agency to consider cost.[22]

Eight years later, the Court's decision in *Entergy Corp. v. Riverkeeper, Inc.*,[23] departed from what had appeared to be a presumption that agencies should not consider cost absent clear congressional intent.[24] *Entergy* involved a statute that directed the EPA to set standards requiring certain structures to "reflect the best technology

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ance.' . . . Section 110(a)(2) contains no such language." (quoting Clean Air Amendments of 1970 § 231(b))).

15 *See id.*

16 531 U.S. 457 (2001).

17 Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671 (2012); *Whitman*, 531 U.S. at 462.

18 42 U.S.C. § 7409(b)(1).

19 *Whitman*, 531 U.S. at 465, 471.

20 *Id.* at 467–68 ("Subsequent amendments to the CAA have added many more provisions directing, in explicit language, that the Administrator consider costs in performing various duties. We have therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted. Accordingly, to prevail in their present challenge, respondents must show a textual commitment of authority to the EPA to consider costs in setting NAAQS under § 109(b)(1)." (citations omitted)).

21 *See id.* at 467; Union Elec. Co. v. EPA, 427 U.S. 246, 257 n.5 (1976).

22 *Whitman*, 531 U.S. at 468.

23 556 U.S. 208 (2009).

24 *See* Grossman, *supra* note 6, at 286–87.

available for minimizing adverse environmental impact" when impinging and capturing aquatic organisms.[25] The EPA used a cost-benefit analysis in setting the required standards.[26] In concluding that the EPA *could* consider costs, the Court explained that agencies have *discretion* to consider costs when not clearly precluded by Congress.[27] This decision departed from the presumption against cost-consideration suggested by *Union Electric* and *Whitman* by instead holding that an agency *may* use its discretionary power to consider costs so long as Congress did not expressly bar it.

Three years later, in *EPA v. EME Homer City Generation, L.P.*,[28] the Court again departed from the presumption in *Union Electric*.[29] At issue in *EME Homer* was the EPA's Cross-State Air Pollution Rule, which implemented the CAA's Good Neighbor Provision, prohibiting "in-state sources 'from emitting any air pollutant in amounts which will . . . contribute significantly' to downwind States' 'nonattainment' . . . of any EPA-promulgated national air quality standard."[30] The EPA's rule focused on reducing compliance costs.[31] The Court concluded that the EPA's interpretation of the word "amounts" to support its cost-centric approach to implementing the Good Neighbor Provision was reasonable in light of the circumstances.[32] Notably, however, Justice Scalia's dissent argued that *Whitman* was not distinguishable, and that the presumption against cost-consideration absent textual commitment to the contrary should hold.[33] Nevertheless, *Entergy* and *EME Homer* suggested that the Court did not intend to create a presumption against cost-consideration that may have been present in *Union Electric* and *Whitman*, but instead wanted to leave cost-consideration to the discretion of the agency.

II. THE *MICHIGAN V. EPA* DECISION AND ITS IMPACT ON AGENCY COST-CONSIDERATION

A year after *EME Homer*, the Court issued its decision in *Michigan v. EPA*. The decision's impact on the issue of whether an agency

25 *Entergy*, 556 U.S. at 213 (quoting 33 U.S.C. § 1326(b) (2006)).

26 *See id.* at 216.

27 *See id.* at 219–20.

28 134 S. Ct. 1584 (2014).

29 *See* Grossman, *supra* note 6, at 285, 287.

30 *EME Homer*, 134 S. Ct. at 1593 (quoting 42 U.S.C. § 7410(a)(2)(D)(i) (2012)).

31 *See id.* at 1597; Grossman, *supra* note 6, at 287.

32 *See EME Homer*, 134 S. Ct. at 1603–04, 1607; Grossman, *supra* note 6, at 287.

33 *EME Homer*, 134 S. Ct. at 1616 (Scalia, J., dissenting); *see also* Grossman, *supra* note 6, at 288.

must consider costs before it regulates has been described by scholars on one hand as "marginal"[34] and on the other as potentially "set[ting] in motion doctrinal and practical changes that will hinder agencies' efforts to aggressively regulate public-health hazards."[35] Nevertheless, *Michigan* appears to at least go further than its predecessors by outright mandating that agencies consider costs at the first stage when deciding to regulate—absent, of course, clear congressional intent to the contrary.[36] Section II.A discusses the Court's decision in *Michigan v. EPA*. Section II.B discusses how it has been applied to cases that followed.

A. Michigan v. EPA

Michigan v. EPA involved the EPA's refusal to consider costs when it decided to regulate power plant emissions of hazardous air pollutants.[37] The statutory language at issue was from § 7412(n)(1)(A) of the CAA, which aimed to reduce emissions from power plants.[38] The statute required that the EPA "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants] of [hazardous air pollutants] after imposition of the requirements of this chapter."[39] After conducting the study, Congress directed the EPA to regulate power plants under § 7412 if it found that regulation was "appropriate and necessary."[40]

The EPA completed the required study and concluded that regulation was "'appropriate' because: (1) power plants' emission of mercury and other hazardous air pollutants posed risks to human health and the environment and (2) controls were available to reduce [those] emissions."[41] Additionally, the EPA found that regulation was "necessary" because other requirements of the CAA did not already eliminate the identified risks.[42] While the agency issued an RIA with its regulation pursuant to President Reagan's Executive Order 12,291

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34 Grossman, *supra* note 6, at 300.

35 *Cost-Benefit Analysis*, *supra* note 6, at 316.

36 *Id.* at 317.

37 Michigan v. EPA, 135 S. Ct. 2699, 2704 (2015).

38 *Id.* at 2704–05.

39 *Id.* at 2705 (alteration in original) (quoting 42 U.S.C. § 7412(n)(1)(A) (2012)).

40 *Id.*

41 *Id.*; *see also* National Emission Standards for Hazardous Air Pollutants, 40 C.F.R. pts. 60, 63.

42 *Michigan*, 135 S. Ct. at 2705; National Emission Standards for Hazardous Air Pollutants, 40 C.F.R. pts. 60, 63.

("Executive Order"),[43] it did not base its decision to regulate power plant emissions on the RIA's cost-considerations.[44]

The Executive Order requires that executive agencies cannot act unless, inter alia, the "potential benefits to society for the regulation outweigh the potential costs to society."[45] To that end, executive agencies, like the EPA, must generate RIAs for any major actions that have an "annual effect on the economy of $100 million or more."[46] In its RIA, an executive agency generally conducts cost-benefit analyses and considers alternatives.[47] The Office of Information and Regulatory Affairs then reviews the RIA and either recommends that the agency reassess its action, e.g., its decision to regulate in a certain manner, or completely abandon the action.[48] In *Michigan*, the EPA's RIA estimated that power plants would bear about $9.6 billion per year in costs and that estimated benefits would amount to about $4 to $6 million per year.[49] Once ancillary benefits were accounted for, however, the RIA estimated that benefits of its regulation would instead total $37 to $90 billion per year, thereby resulting in benefits of regulation outweighing the costs.[50] Ultimately, the EPA did not base its decision to regulate on its RIA or the ancillary benefits mentioned therein.[51] Instead, it based its decision solely on its interpretation of "appropriate and necessary," which it interpreted as leaving it to the agency's discretion whether to consider costs.[52] A number of states challenged the EPA's decision to regulate power plant emissions with-

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43 *See* Grossman, *supra* note 6, at 297 (noting that "Executive Order 12,291 was affirmed by President Clinton in Executive Order 12,866 and has been retained through subsequent administrations"). This Essay refers collectively to all Executive Orders pertaining to the Regulatory Impact Analysis ("RIA") as the "Executive Order."

44 *Michigan*, 135 S. Ct. at 2706.

45 Exec. Order No. 12,291, § 2(b), 3 C.F.R. 127 (1981); *see also* Grossman, *supra* note 6, at 297–98 (explaining that the Executive Order does not generally apply to independent agencies, but that they are "encouraged to give consideration" to the Executive Order nonetheless).

46 Exec. Order No. 12,291, § 1(b)(1), 3 C.F.R. 127 (1981).

47 Grossman, *supra* note 6, at 297.

48 *Id.*

49 *Michigan*, 135 S. Ct. at 2706.

50 *Id.* at 2706, 2711 (indicating that ancillary benefits included cutting power plants' emissions of particulate matter and sulfur dioxide, which were not included in the statutory objective of § 7412, but declining to address whether consideration of such ancillary benefits would have been proper in the EPA's decision as to whether regulation was "appropriate and necessary").

51 *Id.* at 2706, 2711 (showing that the EPA conceded that its RIA "played no role" in its decision to regulate, and that the "administrative record 'utterly refutes [the] assertion that [ancillary benefits] form the basis for [its] appropriate and necessary finding'").

52 *See* Grossman, *supra* note 6, at 291 (noting that EPA conceded it could have interpreted the statute to mean cost was relevant to its decision to regulate, but that it was not required to interpret "appropriate" to require such cost-consideration).

out considering costs, but the D.C. Circuit upheld the agency's decision.[53]

In its opinion, the Court reviewed the EPA's interpretation of "appropriate and necessary" under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[54] *Chevron* requires courts to first determine whether a statute is ambiguous using canons and other traditional tools of statutory interpretation; if the statute is not ambiguous, courts are to follow its meaning without regard to the agency's interpretation.[55] If it is ambiguous, courts are directed to defer to an agency's interpretation of the ambiguity so long as the interpretation is reasonable.[56] The Court in *Michigan* also reviewed the EPA's interpretation under the test set forth in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, which states that an agency's action is arbitrary and capricious under the Administrative Procedure Act[57] if it: (1) "has relied on factors which Congress has not intended it to consider," (2) "entirely failed to consider an important aspect of the problem," (3) "offered an explanation for its decision that runs counter to the evidence before the agency," or (4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[58] The Court reviewed the EPA's "appropriate and necessary" interpretation and decision to regulate under the second *State Farm* factor.[59]

Ultimately, the Court concluded that "some attention to cost" was an important aspect in deciding to regulate power plant emissions in this case.[60] Indeed, "[r]ead naturally" in the context of the case, "appropriate and necessary" required such consideration of costs at least to some degree.[61] While the majority and dissent agreed that cost-consideration is required for any agency action, they differed as to *when* costs needed to be considered by the agency.[62] The majority requires cost-consideration at the first stage when the agency decides

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53 White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1229 (D.C. Cir. 2014) (per curiam); *see also Michigan*, 135 S. Ct. at 2701.

54 467 U.S. 837 (1984).

55 *Id.* at 842–43.

56 *Id.*

57 5 U.S.C. § 706 (2012).

58 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

59 Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015).

60 *Id.*

61 *Id.*

62 *See id.* at 2718 (Kagan, J., dissenting).

whether to regulate.[63] The dissent, on the other hand, argued that it is important to take into account the entire regulatory process.[64] Considering the entire process, the dissent found it sufficient for the agency to promise, at the time it decides to take action, to consider costs at a later stage—a promise which the EPA in this instance fulfilled a few years after it decided that regulation of power plant emissions was "appropriate and necessary."[65] Nevertheless, the majority's decision holds, and cost-consideration must occur at the first stage. The Court declined to address whether the RIA or ancillary benefits would have been enough to uphold the EPA's decision to regulate, because the EPA did not base its decision to regulate on those grounds.[66]

Through *Michigan*, the Court effectively removed any presumption against cost-consideration that could be gleaned from *Union Electric* and *Whitman*, and instead made it clear that absent a statutory prohibition, reasonableness requires agencies to consider the costs of their actions. Failure to consider costs is likely to be considered arbitrary and capricious after *Michigan* because it reflects a failure to consider an important aspect of the problem under *State Farm*. The Court's decision in this regard, however, is not novel. Rather, it is a reaffirmation of what the legal community has long recognized: cost is relevant in determining whether an agency should act. In his dissent in *Mingo Logan Coal Co. v. EPA*,[67] Judge Kavanaugh of the D.C. Circuit listed various instances in which cost-consideration has been "an essential component of reasoned decisionmaking under the Administrative Procedure Act."[68]

One instance noted by Judge Kavanaugh can be found in the transcript of the oral argument in *EME Homer*, where Justice Kagan asked: "[W]hat does it take in a statute to make us say, look, Congress has demanded that the regulation here occur without any attention to costs? In other words, essentially Congress has demanded that the regulation has occurred in a fundamentally silly way."[69] Another in-

63 *Id.* at 2707 (majority opinion) ("Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate.").

64 *Id.* at 2718 (Kagan, J., dissenting).

65 *Id.*

66 *Id.* at 2711 (majority opinion) ("[W]e may uphold agency action only upon the grounds on which the agency acted. Even if the Agency *could* have considered ancillary benefits when deciding whether regulation is appropriate and necessary—a point we need not address—it plainly did not do so here.").

67 829 F.3d 710 (D.C. Cir. 2016).

68 *Id.* at 733 (Kavanaugh, J., dissenting); *see also infra* Section II.B.

69 Transcript of Oral Argument at 13, EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2013) (No. 12-1182), *quoted in Mingo Logan*, 829 F.3d at 733.

stance is found in Justice Breyer's concurrence in *Entergy*, where he opined that "it would make no sense to require [power] plants to 'spend billions to save one more fish or plankton.' That is so even if the industry might somehow afford those billions."[70] Later in the opinion, Justice Breyer explained that "every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs."[71]

Legal scholars have also echoed that the reasonableness of an agency action requires cost-consideration. For instance, Professor Richard J. Pierce, Jr. argues that "[a]ll individuals and institutions naturally and instinctively consider costs in making any important decision. . . . [I]t is often impossible for a regulatory agency to make a rational decision without considering costs in some way."[72] Indeed, absent clear congressional intent not to consider costs, it is "common sense" to consider costs of any proposed agency action.[73] The suggested presumption against agency cost-consideration from *Union Electric* and *Whitman* does not say that cost is not a relevant factor at all, rather, these cases hold that the statutory text at issue was clear in barring agency cost-consideration.[74] *Michigan* upholds this longstanding recognition in the legal community, but it goes further by suggesting that consideration of costs is built into the arbitrary and capricious standard and that failure to consider such costs in the first instance, i.e., when deciding to regulate, may result in invalidation of the regulatory action.[75] Thus, the decision in *Michigan* is novel not because it requires cost-consideration for agency action, rather, it is novel because it requires cost-consideration at the *first stage* when an agency is deciding whether to act at all.

While some consideration of costs is necessary, however, the Court left it to the agencies to determine "*how* to account for cost."[76] One method of agency cost-consideration is a cost-benefit analysis, but statutory directives may dictate other methods of cost-consideration. When Congress intends for an agency to use a specific method of

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70 Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 232–33 (2009) (Breyer, J., concurring in part and dissenting in part) (citation omitted) (quoting Brief for Respondents at 29, *Entergy*, 556 U.S. 208 (No. 07-588)), *quoted in Mingo Logan*, 829 F.3d at 733.

71 *Entergy*, 556 U.S. at 232 (Breyer, J., concurring in part and dissenting in part).

72 Richard J. Pierce, Jr., *The Appropriate Role of Costs in Environmental Regulation*, 54 ADMIN. L. REV. 1237, 1247 (2002), *quoted in Mingo Logan*, 829 F.3d at 733.

73 *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2707–08 (2015); *Mingo Logan*, 829 F.3d at 733; Grossman, *supra* note 6, at 296.

74 *See supra* notes 7–22 and accompanying text.

75 *See* Grossman, *supra* note 6, at 298–99; *Cost-Benefit Analysis*, *supra* note 6, at 318.

76 *Michigan*, 135 S. Ct. at 2711 (emphasis added).

cost-consideration, the Court requires Congress to clearly set out that method in the statutory directive.[77] For example, in *American Textile Manufacturers Institute, Inc. v. Donovan*,[78] the Court held that the Occupational Safety and Health Administration ("OSHA") was not required to conduct a cost-benefit analysis because Congress's intent for the agency to do so would have been clear from the legislative text.[79] The petitioner challenged OSHA's refusal to balance costs and benefits in promulgating a standard that limited occupational exposure to cotton dust.[80] The statutory language at issue provided:

> The Secretary [of Labor], in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.[81]

The Court upheld OSHA's interpretation of this language as requiring the agency to adopt "the most stringent standard" rather than petitioner's proposed, more lenient standard.[82] It explained that the word "feasible" indicated Congress' intent to place worker health above all other considerations, including cost, and that OSHA's standard should only be limited by feasibility, i.e., that which is "capable of being done."[83] The Court also noted that OSHA was not required to engage in a cost-benefit analysis in this instance because "Congress uses specific language when intending that an agency engage in cost-benefit analysis."[84] Since that "specific language" was absent in the statutory language at issue in the case, the Court concluded that OSHA was not required to balance costs and benefits before setting the cotton dust exposure standard.[85] *Michigan* does not overturn this. *American Textile* still requires that agencies abide by specific statutory language mandating a particular cost-consideration method.[86] *Michigan*, on the other hand, dictates that agencies *must* consider costs in

77 *See, e.g.*, Am. Textile Mfg. Inst., Inc. v. Donovan, 452 U.S. 490, 509–10 (1981).

78 452 U.S. 490 (1981).

79 *Id.* at 510–11.

80 *Id.* at 506.

81 29 U.S.C. § 655(b)(5) (1976) (emphasis added).

82 *American Textile*, 452 U.S. at 503.

83 *Id.* at 508–09.

84 *Id.* at 510–11.

85 *Id.* at 511–12.

86 *See id.* at 513.

some reasonable way at the first stage, regardless of what method is used.[87] It does not mandate that agencies use any particular cost-consideration method so long as the chosen method is reasonable.[88]

B. Impact of Michigan v. EPA

Since the *Michigan* decision is relatively recent, it is still too soon to fully understand its effects on administrative law in the long-run. Nevertheless, scholars have presented differing opinions as to the immediate impact of the case. Andrew Grossman explains that *Michigan*'s impact is "likely to be marginal."[89] Because the Court did not decide *how* agencies should consider costs, Grossman argues that subsequent courts will be "unlikely to reverse" an agency's decision based on "flaws in consideration of costs."[90] Indeed, Grossman rightly points out that *Michigan* requires only a "rational" consideration of costs in order to survive arbitrary and capricious review, and that "a court is not to substitute its judgment for that of the agency."[91] Courts may even be more likely to defer to an agency's chosen approach to cost-consideration in "technical matters and matters within an agency's area of expertise."[92] Consequently, although *Michigan* requires a reasonable consideration of cost, it does not seem to require, for example, a formal cost-benefit analysis. This might create a "modest anti-regulatory effect" that merely forces agencies to consider costs even though they may prefer to ignore them.[93]

Other legal scholars have reached a different conclusion from the *Michigan* decision. For example, the *Harvard Law Review* has explained that *Michigan* can be read broadly to mean that in order to survive "reasonableness" review under step two of *Chevron*, an agency must consider cost whenever it interprets an "ambiguous statutory mandate."[94] Under this reading, *Michigan* would have a much stronger impact on administrative law, triggering cost-consideration by the agency whenever a statutory mandate could be construed as ambiguous.

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87 *See* Michigan v. EPA, 135 S. Ct. 2699, 2711 (2015).

88 *See id.*

89 Grossman, *supra* note 6, at 300.

90 *Id.* at 301.

91 *Id.* (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983)).

92 *Id.* (citing Troy Corp. v. Browner, 120 F.3d 277, 283 (D.C. Cir. 1997)).

93 *Id.* at 303.

94 *Cost-Benefit Analysis*, *supra* note 6, at 317.

Cases decided after *Michigan* lend support to both predictions. For instance, in *Kentucky Coal Ass'n v. Tennessee Valley Authority*,[95] the court held that, because the Tennessee Valley Authority considered all costs when making its decision and reasonably concluded that the benefits of its decision to switch from coal to natural gas generation at a power plant in Kentucky outweighed the costs, it did not act arbitrarily and capriciously under *Michigan*.[96] In *Metlife, Inc. v. Financial Stability Oversight Council*,[97] the court held that the Financial Stability Oversight Council acted arbitrarily and capriciously by refusing to consider the costs of regulation to Metlife when the Council designated Metlife as a nonbank financial company, which consequently subjected it to enhanced supervision under the Dodd-Frank Act.[98] In *Markle Interests, LLC v. United States Fish & Wildlife Service*,[99] however, the Fifth Circuit distinguished *Michigan* by recognizing that the Court's decision did not require formal cost-benefit analysis and left it to the agency to decide how to reasonably account for cost.[100] The *Mingo Logan* case reflected the *Michigan* mandate that agencies consider costs in some fashion.[101] These decisions suggest that courts have consistently applied *Michigan* to require cost-consideration at the first stage but that it does not require a particular method of cost-consideration.

III. Proposal for Agency Cost-Consideration Post-*Michigan*

A number of relevant principles from *Michigan* and post-*Michigan* decisions will likely continue to be reflected in cases that consider whether an agency's decision to regulate or not regulate is arbitrary and capricious. As a threshold question, courts will ask whether the statutory directive for agency action is ambiguous as to whether the agency should consider costs. Like the cases discussed in Part I, such ambiguity cannot exist if: (1) Congress expressly bars cost-consideration, e.g., through listing various factors that necessarily require action

95 804 F.3d 799 (6th Cir. 2015).

96 *Id.* at 803.

97 177 F. Supp. 3d 219 (D.D.C. 2016).

98 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *Metlife*, 177 F. Supp. 3d. at 241–42.

99 827 F.3d 452 (5th Cir. 2016).

100 *Id.* at 474.

101 Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 723 (D.C. Cir. 2016). The dissent, however, indicates that *Michigan* requires a cost-benefit analysis, which, for the reasons outlined above, it does not. *See id.* at 730 (Kavanaugh, J., dissenting); *supra* Section II.A.

if such factors are satisfied,[102] or (2) Congress has expressly provided for cost-consideration in other parts of the statute but is silent in the provision in question.[103] If neither (1) nor (2) exist in the statutory directive, then it is likely ambiguous.

Once the court determines that an ambiguity exists, it will decide if the agency reasonably considered costs in support of its decision to regulate. This is required by *Michigan*.[104] *How* an agency considers cost (e.g., cost-benefit analysis or some other method), however, is left to agency discretion absent explicit direction to use a particular method.

To avoid confusion and further litigation regarding an agency's duty to consider costs at the first stage, Congress should set out explicitly in statutory directives for agency action whether the agency should consider costs. Absent that, agencies should assume that some consideration of costs is required,[105] and should, at a minimum, base their decision to regulate on their RIA. The EPA failed to do this in *Michigan*, but basing the agency's decision to regulate on its RIA likely could have helped such decision survive the Court's arbitrary and capricious review.[106] All that *Michigan* requires is that agencies consider costs at the first stage when deciding whether to regulate.[107] Since the EPA in *Michigan* had already issued an RIA with its regulation, which considered both the *costs* and benefits of regulation,[108] the EPA would have satisfied *Michigan* had it based its decision to regulate on the RIA. Still, this recommendation would not immunize the EPA or any other agency from *State Farm*, which holds that an agency's action is unreasonable and thus arbitrary and capricious if it is inconsistent with the evidence, considers irrelevant factors, or is implausible.[109] Nevertheless, at least relying on its RIA would help an agency's decision to regulate or not regulate to survive *Michigan*'s mandate, which requires only that cost be considered in some way at the first stage and

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102 Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 467 (2001).

103 *See, e.g.*, *id.* at 467–68; Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 511–12 (1981); Union Electric Co. v. EPA, 427 U.S. 246, 256 (1976).

104 *See* Michigan v. EPA, 135 S. Ct. 2699, 2711 (2015); EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1603–04 (2014); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 219–20 (2009).

105 *See* Daniel A. Farber, *Taking Costs into Account: Mapping the Boundaries of Judicial and Agency Discretion*, 40 HARV. ENVTL. L. REV. 87, 108 (2016).

106 *See Michigan*, 135 S. Ct. at 2706–07.

107 *See supra* Section II.A.

108 *Id.*

109 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

invalidates at the outset any agency decision to regulate if it fails to consider costs at all.[110]

Conclusion

Michigan v. EPA has the potential to impact administrative law and policy in a major way, whether it is read broadly or not. While it may leave some questions unanswered, such as the role of ancillary benefits in cost-consideration and what constitutes a "reasonable" consideration of costs, *Michigan* makes clear that an agency must consider costs before it decides to regulate or else its decision will be deemed arbitrary and capricious. One way to survive *Michigan* is to simply rely on the agency's RIA because the RIA already considers cost. Thus, if the agency decides to regulate based on the cost-considerations in the RIA, courts will likely hold that the regulation survives *Michigan*.

110 *See Michigan*, 135 S. Ct. at 2711–12.