The webinar *Cost-Benefit Analysis After Trump, What Does the Future Hold?* was given by Michael Livermore, Edward F. Howrey Professor of Law at the University of Virginia School of Law on Thursday, February 25, 2021. It is part of the Regulatory Policy Program's weekly webinar series.

Joe Aldy:
So welcome to the Regulatory Policy seminar. I'm Joe Aldy, the faculty chair of the Regulatory Policy Program at the Mossavar-Rahmani Center for Business and Government here at the Kennedy School. Let me open with a few reminders regarding the logistics of our online seminar. We are recording this seminar and we'll post it online. So if you know of someone who's interested but could not attend the talk live... in fact, I know of a few students who've expressed interest but have a class right now, please let them know that they can access the seminar at the M-RCBG's YouTube channel. I'll put this in the chat for you to access as well.

Joe Aldy:
You can also remind your friends and colleagues to register for Zoom links for each seminar at the Regulatory Policy Program webpage. I'll also put that link into the chat in just a moment. We will take questions through the Q&A function in Zoom. Please click on Q&A at the bottom of your screen and type in your questions. At the end of our presentation, I will take your questions and pose them to our speaker. We're excited to have with us today Michael Livermore to present Cost-Benefit Analysis After Trump: What Does the Future Hold? Professor Livermore is the Edward F. Howrey professor of law at the University of Virginia.

Joe Aldy:
His research focuses on regulatory review, environmental law, cost-benefit analysis, and the application of data science techniques to legal texts. He frequently collaborates on interdisciplinary projects with researchers in other academic fields, including economics, computer science, neurology, and the humanities. Prior to joining the UVA law faculty, Livermore was the founding executive director of the Institute for Policy Integrity at New York University School of Law, a think tank dedicated to improving the quality of government decision making. He's also the co-author of the recently published book, *Reviving Rationality: Saving Cost-Benefit Analysis for the Sake of the Environment and Our Health*.

Joe Aldy:
Michael, welcome to the Regulatory Policy seminar.

Michael Livermore:
Thanks very much. It's a pleasure to be here. The topic of the conversation today is regulatory review and cost-benefit analysis after Trump. But to kind of tee up that conversation, I think it's useful to place the Trump administration and then ultimately how the Biden administration will respond to the Trump administration within a broader historical context of how cost-benefit analysis and how regulatory review have fit into the US administrative state over the last several decades.

Michael Livermore:
There's a long history of the use of cost-benefit analysis in policymaking very generally, but in the US, the current architecture of cost-benefit analysis and regulatory review conducted through the White
House and the Office of Information and Regulatory Affairs really got energized, got its real start with the Reagan administration. In 1981, President Reagan issued an executive order requiring that were engaged in rulemaking, that were promulgating major rulemakings, large economically significant rulemakings, to carry out cost-benefit analysis of those rulemakings and then submit those analyses to the White House, to the Office of Information and Regulatory Affairs for review.

Michael Livermore:
So 1981 is quite a while back now. Some of us feel that more keenly than others, but it's been 40 years since the Reagan executive order. So this is now a major, well-established part of the US administrative state. So one of the important political dynamics that kind of surrounds the use of cost-benefit analysis in regulatory decision-making is that in those early days when President Reagan first really got this structure in place, there was a great deal of opposition to the use of cost-benefit analysis and to White House regulatory review and that opposition essentially fell along largely partisan lines where protection-oriented groups, like environmental groups or labor unions, who were at the time mostly associated with the Democratic Party...

Michael Livermore:
Actually, back then, some of these partisan divisions were not as strong as they are today. So for example, the environmental community more spanned across parties. It was more inter-party agreement about environmental issues. Back in the 1980s, environmental issues had become much more polarized in the past several decades. But even back then, there was a rough overlay between the political parties and these various interest groups. So protection-oriented groups tended to view cost-benefit analysis as hostile to government regulation to promote values like environmental protection or public health or consumer safety or workplace safety. They were also extremely skeptical that the Reagan administration was going to use this tool in a neutral way.

Michael Livermore:
Congressional Democrats shared that skepticism with a kind of an additional concern about their position of influence over administrative agencies vis-a-vis the White House. So they were concerned the White House was going to impose its authority more firmly over administrative agencies. And they were certainly right about that. It was definitely part of what the Reagan administration was up to, and also, the Reagan administration was quite clear that it saw cost-benefit analysis and regulatory review as a tool to reign in the regulatory state which it viewed as overzealous in imposing costs that weren’t justified by benefits.

Michael Livermore:
So this was essentially the dynamic for the first 12 years of these institutions, of OIRA performing this regulatory review role, the Office of Information and Regulatory Affairs, henceforth IRA, which is the kind of lingo. And that's kind of the political dynamic. So when Bill Clinton came into office in 1993, there was some pressure on that administration to essentially undo the prior order that Reagan had put in place and take regulatory review away from OIRA or radically restructure it, de-emphasize the use of cost-benefit analysis. Certainly, there were constituencies within the Democratic Party who pushed along those lines.

Michael Livermore:
But ultimately, the Clinton administration resisted those pressures and instead largely kept in place the architecture that had been created by Reagan while at the same time implementing important reforms around transparency, around how cost-benefit analysis was carried out, and also using these institutions to promote its own regulatory agenda, which was much less deregulatory than the Reagan administration and in fact included important efforts to move regulations forward. This was a really crucial moment in the development of these institutions because it placed cost-benefit analysis and regulatory review within a broad bipartisan consensus about how regulatory decision-making ought to be done and was going to be done in terms of both institutions and substantive standards.

Michael Livermore:

And so, Clinton with his Executive Order 12866, that executive order has really become an important foundational document in the administrative state in the US and it's been carried forward through all subsequent administrations of both political parties, so through the George W. Bush administration, through the Obama administration, and extensively through the Trump administration, although we'll talk about that, and then again President Biden has recently reaffirmed his administration's commitment to this structure. So, very broadly, you have this bipartisan consensus.

Michael Livermore:

Again, there's disagreements about how to do cost-benefit analysis in specific instances, particular methodologies, and the like, but there was still a certain consensus between the two parties although not every interest group was 100% thrilled with that particular consensus. One of the important kind of setups to the Trump administration, an important way to understand what happened with the Trump administration, which ends up, just to preview, departs radically from this consensus. Part of what sets that up occurred during the Obama administration.

Michael Livermore:

So basically, as I mentioned, protection-oriented groups had traditionally been skeptical about cost-benefit analysis and regulated industry and kind of aligned ideological groups were more favorably disposed to cost-benefit analysis given its origin in the Reagan administration. The Obama administration, like the Clint administration, faced to a certain extent pressures to get rid of cost-benefit analysis or radically change things around, but it made very clear very early in the administration that it was going to take a very specific path which was to merge a quite a high amount of respect for high integrity cost-benefit analysis with a aggressive regulatory agenda.

Michael Livermore:

A regulatory agenda that was going to carry much of the weight of the administration's policy goals, especially after the 2010 election, made legislation virtually impossible. So throughout the Obama administrations, throughout the President Obama's time in office, the basic playbook used by that administration was to promote strong protections for consumers, for the environment, for public health, while also subjecting those protections to stringent cost-benefit analysis; and it turns out those protections were often radically, strongly justified in cost-benefit terms and using that fact as part of the public case for these efforts.

Michael Livermore:

So when the administration was criticized for some regulatory proposal, part of how it responded to that criticism was, "Look, we crunched the numbers, we did the cost-benefit analysis, and it turns out
that this rulemaking has benefits that exceed the costs often by substantial margins." So the Obama administration synthesis, one the consequences of their synthesis was essentially a reaction by many in the Republican Party, in many Republican Party constituencies, many interest groups that represent regulated industry, was to reject or at least de-emphasize cost-benefit analysis and start to criticize the administration in kind of rhetorical terms to try to take the emphasis off of rational weighing of cost and benefits and place the emphasis elsewhere.

Michael Livermore:
So terms like the war on coal started to circulate, the administration was accused of engaging in job-killing regulation during a time of high unemployment, and various other kinds of rhetorical bombs were lobbed against the administration over and over and over again. Again, in part, this de-emphasizes rational weighing of cost and benefits in favor of some other set of norms. So this all contextualizes when the Trump administration comes into office even though that president departed in many ways from Republican orthodoxy. One way is that he really just followed through on broader trends within his party, was not holding particular high regard for cost-benefit analysis.

Michael Livermore:
So over the course of the Trump administration, we saw a wide range of different steps, and happy to talk more about these in Q&A, that really undermined the prestige of cost-benefit analysis, the centrality of cost-benefit analysis and regulatory decision-making, the role of OIRA in regulatory review, and so on. So along these lines, one move was an executive order that required agencies to rescind two rules for every one new rule that it adopted and that order didn't have any stipulation about kind of the rules that were rescinded, should have higher costs and benefits, so there wasn't language about balancing costs and benefits. It was just this kind of accounting exercise.

Michael Livermore:
Okay. So we're now in the post-Trump world, and the question for us is kind of what does the future hold in terms of moving forward. We've seen with the Biden administration really a return to the bipartisan consensus around the role of cost-benefit analysis in regulatory review. Of course, it's still early days, but the administration has made clear through an early a memorandum that it plans to continue to use the structure developed by President Clinton in Executive Order 12866. So this really reaffirms the longstanding structure that we've seen over the course of several decades.

Michael Livermore:
This administration has also kind of set out an agenda for continuing to improve the practice of cost-benefit analysis in regulatory review. And we can talk a little bit about what that agenda looks like. One of the key features of that agenda is that although it is an important reform agenda, it also derives from and is consistent with longstanding efforts to improve cost-benefit analysis in regulatory review. Just to give two examples, so the memo specifically states that part of what it's looking for in its efforts to reform these institutions is making OIRA more proactive. So OIRA is not merely reacting to what agencies are doing, but it's kind of proactively going out and looking for opportunities to improve the status quo.

Michael Livermore:
So this very much has its roots in a bipartisan tradition. In fact, the administration that took the most consistent efforts to give OIRA a proactive role was the George W. Bush administration. Under George
W. Bush, the Administrator John Graham, the OIRA Administrator John Graham, instituted a practice that is called Prompt Letters. So what prompt letters were is exactly kind of what it sounds like, it's basically OIRA having a proactive role identifying areas where agencies should consider regulating, or should consider acting I should say, where agency action will have substantial net benefits.

Michael Livermore:

In fact, the Administrator Graham sent out many of these prompt letters and some were acted on and important policies were implemented. So the Biden administration efforts as they unfold, as we see them unfold, to give OIRA a more proactive role really resonates with this practice that was developed under the George W. Bush administration, under a Republican administration. So that's one area that the Biden memorandum carved out for reform. Another area is in taking greater concern for distribution and equity. Again, this call for more careful attention to equity and distribution has been around for a number of years, a couple of decades, at least.

Michael Livermore:

Again, going back to Bill Clinton's executive order, there's language in that order that instructs agencies to take into consideration distributive effects. Now, agencies haven't necessarily done a wonderful job of carrying out that mandate and so there's plenty of room for the Biden administration to improve practices around accounting for distribution. Again, I'll expand on that a little bit and maybe we'll focus on some of that during the Q&A. But the part that I want to emphasize here is that even the administration's calls for reform in the areas of cost-benefit analysis in regulatory review are very much grounded in this bipartisan tradition that extends back many decades and which the Trump administration really radically departed from during its four years.

Michael Livermore:

One point that I think is kind of really fundamental to how these institutions are going to evolve in the coming years and potentially decades is how this partisan dynamic continues to change or if we get into a settled partisan dynamic. So there's a couple of different ways that one could imagine this unfolding. Prior to Joe Biden's nomination and his election, it wasn't necessarily clear where the Democratic Party was going to go after the Trump administration really brought cost-benefit analysis into disrepute and unsettled the settled dynamic, the settled bipartisan dynamic.

Michael Livermore:

The Biden administration is made clear, I think, at this point that it plans to return to the prior consensus and operate from there. There are though and will continue to be forces and constituencies within the Democratic Party that are skeptical about cost-benefit analysis and regulatory review and so we can anticipate that this administration and subsequent democratic administrations are going to face pressure to abandon these techniques or radically reform. Part of the argument that these constituencies will be able to make recourse to which wasn't available in the future... in the past rather, is that, "If the Republicans aren't going to play by the rules as evidenced by the Trump administration, why should we play by the rules?"

Michael Livermore:

Why should we hamper our ability to pursue our favorite policies through these analytic techniques that might tell us what we don't want to hear? Why should we impede our policymaking ability in that way when the counterparty here, when the Republicans aren't willing to bind themselves in the same way? It
was one thing when there was this bipartisan dynamic that we weren't going to depart from, we weren't going to be the first mover, but now that we have the experience with the Trump administration, why should we continue to act in this way?" So that's an argument that I think future democratic administrations are going to face and even this one has faced and will likely continue to face pressure in those ways.

Michael Livermore:
Very closely tied to and related to that dynamic within the Democratic Party is what does the future of the Republican Party hold on these issues? And this is just part and parcel of a much broader set of questions about where the Republican Party is going to go after the Trump administration. Obviously, there has been a huge amount of internal controversy and inter-party maneuvering to kind of figure out where that party is going to go and cost-benefit analysis is kind of one part of a much bigger story along those lines. But again, you can imagine two different paths.

Michael Livermore:
One path would be the kind of restoration path to look back to the earlier Republican administrations, including the Reagan administration, the George H. W. Bush administration, the George W. Bush administration, and to say, "Look, that's the Republican tradition, actually cost-benefit analysis is our methodology. The Democrats, they're using it these days, but it really came out of our tradition and we're going to reclaim that tradition and kind of return prestige to these institutions and again emphasize rationality in regulatory decision-making rather than kind of rhetoric." That's one possibility. The other possibility is that the Trump administration marked a irreversible departure on the part of the Republican Party from these norms.

Michael Livermore:
What we will see, there will be future Republican administrations, we have a two-party system and we can expect them to oscillate between the two, or institutions to oscillate between the two in the coming years. And it may well be that the Trump administration playbook is one that is seen as being successful. Clearly, the prior administration was not successful along many, many, many, many metrics. It was a one-term administration, it was not popular with the American public, the president lost two popular votes, there was two impeachments, this is like historically and very little in the way of policy. There's some judges that got appointed, but most of the major policy initiatives of the administration failed.

Michael Livermore:
They failed because they kind of never made it out of the administration, they failed in their implementation, and importantly, many of them failed in court. In the regulatory domain, part of the dynamic is that most major regulations are litigated, they're going to be brought before an Article III court, that our independent judiciary, that's going to take a look and there are various legal standards that are applied including arbitrary and capricious review under the Administrative Procedure Act. This administration, the prior administration, had an extraordinarily terrible record before US courts, losing something on the order of 80 to 90% of its administrative regulatory cases, which is just a staggeringly huge loss rate when a normal administration would be expected to win 70 to 80% of its cases.

Michael Livermore:
And so, the shoddy decision-making, the failure to adhere to appropriate procedures, the failure to carry out rigorous analysis really ended up hurting the Trump administration in courts. So it would be peculiar
in some ways if some constituencies within the Republican party or politicians within the Republican party saw that the Trump administration is a success, but one could imagine a shaped up version that didn't look to the kind of past of the party, didn't look to the traditions of the party, and instead... OIRA on cost-benefit analysis specifically, and instead decided moving to more rhetorical terrain, focusing on the reduction of cost, focusing on villainizing regulation or villainizing the federal bureaucracy ideas like the deep state and accusing agencies of job-killing regulations.

Michael Livermore:
But that ultimately could be seen as a successful political strategy and the the efforts could go into not rethinking from the ground up whether that's the right way to go, but rather in cleaning up the rhetoric, making a little bit more respectable, a little bit more defensible, kind of taking out some of the rough edges, but going with that same basic strategy. If that is the path taken by the Republican Party going forward, and I don't know that will be, no one knows that, but if it is, I think that will place an enormous amount of pressure on the Democratic Party, leaders in the Democratic Party, even those who are sympathetic to cost-benefit analysis, because it's just very hard to imagine how this will work as a one-party affair.

Michael Livermore:
If the Democrats are seeing at least within the party as constraining themselves in ways that their political opponents are not, it's just very hard to see clearly how that's going to remain a dynamic that is sustainable over time. So I think what I will be looking for in thinking about the long-term future of cost-benefit analysis in the coming years is I think we know more or less where the Biden administration is going to go, but the really open question is where the Republican party is going to go, and that's going to affect the dynamics, I think, in a very deep way.

Michael Livermore:
All right. So just in a few final minutes, maybe I'll unpack a little bit what I think are the kind of major areas that this administration is going to pursue and that we can kind of be looking at in the next two to four years. So one, and I think this is the emphasis right now, is undoing much of the bad stuff that the Trump administration had done. And this means undoing bad methodological decisions, it means undoing bad regulatory decisions, and that's very time consuming, that can be a lot of work, and it's unfortunate that the administration is kind of moving in with that essentially a backlog of must do's in its early days.

Michael Livermore:
And of course, this is on top of a raging pandemic and a very serious economic crisis, so there's just an enormous amount on this administration's plate, there's only so many hours in the day. So undoing the regulatory harms from the Trump administration, undoing the executive orders, that was easy, that was kind of a day one action. But unwinding regulations adopted by the Trump administration, that can be a much lengthier process, and it just depends on whether the rules were finalized or whether Congress is going to get involved. It can be a very time time-consuming thing.

Michael Livermore:
So there's going to some of that in the next year to 18 months, but more proactively or more kind of positive, the more positive agenda, what I anticipate or what I would hope this administration will pursue again around ideas of equity, efforts to quantify costs and benefits that have resisted
quantification in the past or that have been unquantified, I think this is an important area where progress can be made. Another area where there's kind of longstanding bipartisan consensus and improvements can be made in is what's sometimes referred to as retrospective review, which is essentially evaluating the efficacy of regulatory decisions.

Michael Livermore:
I have some thoughts on how that process can be improved and maybe some of the limitations of prior efforts, so maybe that's something that we can that we can return to in the Q&A. And just to set up perhaps a discussion about equity and distribution, one of the things that I think is important to consider in this area is how multifaceted that set of issues are. I think from an economics background, for folks who are trained in economics, trained in public policy, when folks talk about cost-benefit analysis and distribution, the mind almost immediately goes to concepts like equity weighting and cost-benefit analysis.

Michael Livermore:
Those types of issues are important, and those are worthy conversations, but it's also important to remember again that this is a really multi-dimensional issue. So just to put some of the dimensions on the table, well, we can think of equity and distribution in different ways. There might be different fundamental concerns that we're addressing ourselves too. So we might be concerned about inequality simpliciter, right? So just from a welfare economics perspective, a more egalitarian distribution of wealth is going to lead to higher wellbeing under most most assumptions in a welfare economics calculus.

Michael Livermore:
We might be specifically concerned with poverty and the role of the regulatory system in either enhancing or the potential role of regulatory system in intervening in cycles of poverty and the like, or the role of environmental health in poverty and even potentially multi-generational poverty. So that's somewhat related to inequality obviously, but not exactly the same thing, a concern for the least well-off in society. We might be worried about specifically group subjugation, in particular around issues of race. All these ways of thinking about equity intersect with each other, but they're not exactly the same thing and it's important to attend to some of these differences.

Michael Livermore:
There's also different ways that we can think about incorporating concerns about all of these factors and features of equity into regulatory decision-making. So, again, from a regulatory economist or an environmental economist or a welfare economics person might immediately think of equity weighting and cost-benefit analysis as a way of incorporating concerns about distribution into an analytic framework. And again, that's worthy conversation and worth considering, but there's other ways to think about this as well, so for example, agenda-setting. We don't necessarily need to change rules about how we weigh cost and benefits.

Michael Livermore:
There's a vast landscape of potential efficient regulations, movements from the status quo that will lead to an increase in efficiency using standard Kaldor-Hicks efficiency criteria, just meaning not weighted according to distributional effects, which is done on the basis of economic efficiency. There are many moots an administration could take and a part of what it would be a very sensible way of choosing
between those different... This is only limited time, that's another important point, is that administration can only pursue so many regulatory actions. There's only so many hours in the day and agency resources to devote and so on.

Michael Livermore:
And so, using considerations of equity to help select between which efficient policy moots an administration might devote its resources to is a sensible way to integrate equity concerns into regulatory decision-making. That's another. So we don't just need to think about equity weighting or distributional weights, we can also think about the role of equity in agenda setting, or we can think about the role of equity in a decision-making process in terms of who's participating in regulatory decision making, who's at the table, what are the groups that are represented? These types of process concerns are often at the heart of many critiques of regulatory decision-making, especially coming out of the environmental justice movement.

Michael Livermore:
So it's not just about outcomes, it's also about how we arrive at our decisions. There are empirical questions. There's been longstanding concerns again that some of the ways that we do risk assessment is inadequately attentive to communities that are subject to multiple risks. It's not even really a normative matter in some ways, it's just... if we want to do our empirics rights, part of what we should do is take into consideration multiple risk populations. That's just an empirical matter, but an attention to equity, being mindful of equity and injustice helps us target our attentions in ways that it can actually just improve our empirical analysis. So there's all kinds of different ways that we can imagine equity and concerns about distribution, concerns about socio-economic injustice, racial injustice.

Michael Livermore:
We can integrate that into regulatory decision-making in lots of different ways. I think that part of the challenge for this administration, and it's a good challenge in a lot of ways, there's much good that can be done, is in thinking carefully about all the different ways that these normative concerns can improve regulatory decision-making and pursuing them along parallel paths. Okay, good. I think we've covered a lot of terrain and I suspect that there was some open questions on the table, so I look forward to the rest of our conversation.

Joe Aldy:
Great. Thank you, Michael. That was fantastic. Let me remind the audience that you may submit questions via the Zoom Q&A link at the bottom of your screen. We already have a few questions there. I also have a few questions for Michael, so why don't we go ahead and get started. I want to get to this idea about how to be proactive. You mentioned that this is something that in the presidential memorandum on modernizing regulatory review, the White House has solicited recommendations from agencies on how to go about doing this. And for those who are interested, I've posted the federal register link to that presidential memorandum, if you want to check it out.

Joe Aldy:
But I'm curious to hear your take on how we can think about building on that experience from the George W. Bush administration on prompt letters. And the thing that comes to mind is that, of course, what's I think in this administration going to be a key part of how they move forward on mandatory policy is thinking about how that's going to help deliver on their climate change agenda. Are there
opportunities to think about, whether it's prompt letters or some other way where it can be proactive in which it can try to promote a more coordinated approach to regulating greenhouse gas emissions across multiple agencies? When we think about EPA can take actions, and energy through appliance efficiency standards can take actions, and transportation on vehicle can take actions.

Joe Aldy:
We know that there's going to be some potential interactions across different sectors that are regulated by different agencies. Could we use this proactive approach in a way to ensure that there's a more coordinated and more systematic effort to use regulatory tools as part of the climate change policy toolkit in the Biden administration?

Michael Livermore:
Great. Yeah, and I think that's a great question. So, one of the background facts that is useful to keep in mind is that, especially in Democratic administration, there are various actors out there promoting the government to do stuff. This can be a little bit different than in a Republican administration. So there's going to be voices, maybe even a cacophony of voices, trying to move the administration along and move it forward in various ways. And then there's going to be a need to coordinate, as you mentioned, those efforts, and those various White House offices that are going to be involved in the coordination process as well.

Michael Livermore:
OIRA plays a very specific and formal coordinating role. Once there's been a regulatory proposal by an agency, OIRA helps convene, or has traditionally helped to convene the inner agency review process, where the regulation gets circulated and say an EPA regulation is being contemplated, the energy department or the agriculture department can weigh in and OIRA is the clearing house for that. That's likely to be an important role, but it's a little bit sitting back and coordinating a process and then being proactive. When I think about OIRA's proactive role, what I try to keep my mind on is OIRA's special expertise.

Michael Livermore:
What does OIRA bring to the table that other actors don't necessarily bring to the table? One is, that it shares with some of the other White House offices, is this more general administration wide view. So individual agencies have deep expertise in their particular areas, but they're not necessarily thinking about what's going on across the administration. OIRA assures that with some other White House offices, but it's an important component of what OIRA brings to the table. But of course, the other piece that OIRA brings to this table is the specific knowledge about cost-benefit analysis, regulatory economics, and the like.

Michael Livermore:
So that's, I think, how OIRA should focus its proactive role, should be around that kind of special expertise. The prompt letter approach, at least when it was operating at its best, John Graham was thinking, where are the most beneficial regulations? That was the idea. I think that's what OIRA should do again, where are other areas where there's net benefits? On the coordinating with respect to coordination, you might think of opportunity costs. If we do this one way rather than another way, if we take a path A rather than path B, part of the cost of path B is that we're not taking path A anymore. So OIRA is going to very naturally think in terms of those kinds of opportunity costs.
Michael Livermore:
So being the person at the table who’s raising those issues and opportunity cost to say, look, energy, you’re thinking about doing this, but actually EPA could accomplish some of the same things. That brings its 30,000 foot perspective with a specific eye towards opportunity costs. Then there are tools like the social cost of carbon, which are essentially ways of doing exactly that, of asking, what are the most effective ways across the administration? Obviously having a harmonized social cost of carbon, that’s something that the Obama administration has promoted. Ensuring that we’re using the social cost of carbon consistently across the administrative state is another very important coordinating device, operates like a price, works in the same way that price works in markets.

Michael Livermore:
Ricky Revesz is my co-author on Reviving Rationality, and I have promoted another work, is that OIRA might play a role in overseeing the petitioning process. So one of the ways that agencies actually do, decide what to do is responding to petitions for rule makings or petitions from actions from the public. Right now that's an entirely internal process at agencies, but you can imagine OIRA playing a role where basically they sit along the lines of, look, if you have a petition before an agency and you think that there are really large net benefits that an agency is leaving on the table, let us know. Part of what we’re going to do is highlight those areas back to agencies to make sure they’re giving them enough attention.

Joe Aldy:
Great. So you, of course, talked about some of what the Biden administration is doing and looking back at what they may want to undo from the Trump administration. You also talked a little bit about the bipartisan consensus and the legacy beginning from Reagan. And there’s one thing in the Reagan approach in 1981, I think repeated in also a 1985 Executive Order, that was not included in the Clinton EO, Executive Order 12866, but resurrected in the Trump administration. And that’s the idea of a regulatory cost budget. Wondering if you have anything you’d like to say about the efforts in the Trump administration to try to use a regulatory cost budget, whether or not you thought that actually helped promote cost effective regulations, or if you have other thoughts about this as a tool?

Michael Livermore:
Yeah. I’m pretty down on regulatory budgeting as a concept, especially when you compare it to cost-benefit analysis. It’s useful to think about them in relationship to each other. And the way I think about this is, what kinds of information would you need to be able to do a good cost-benefit analysis that leads to good decision-making versus what kinds of information do you need to do a regulatory budget? Basically, I think in part, the regulatory budget is intended to say essentially, “Look, we want to actually reduce the amount of information that agencies have to process.” So just to explain, what is a regulatory budget?

Michael Livermore:
You basically go to EPA and say, "Look, you can impose a... I don't know, whatever it is, $10 billion worth of cost in regulated industry every year, you go get the most environmental benefit out of that budget." The idea is that it poses some discipline on agencies. If they’re going to spend money out of the fisc, they have to go through the budget process, and this is essentially a similar idea. Under cost-benefit analysis, what you do is you look at each specific regulatory action and you ask, what are the benefits of this action? What are the costs of the action? What are the alternatives?
Michael Livermore:
And you try to maximize the net benefits on the margin between the different alternatives and maximize the total net benefits. I think the problem with regulatory budgets is setting the budgets. It's like this utterly arbitrary exercise, and it could lead to all kinds of inefficient outcomes, both over or under regulation. So this is the problem. And then the problem is especially severe under the Trump administration, because they set the regulatory budget at zero essentially, or the status quo, I guess-
[crosstalk 00:41:53].

Joe Aldy:
There's an incremental cost.

Michael Livermore:
Yeah, no more. No more. So whatever the status quo is. Well, who knows whether that's a good idea? Maybe we have way too many regulatory costs we're imposing on industry and we're not getting enough benefits out of it, or we're imposing not nearly enough regulatory costs. It's just, who knows? And subjecting an individual rulemaking, so then an agency comes along and says, "Okay, I've got this rulemaking that generates a good jillion dollars worth of benefits, but it's got some additional costs. I mean, just clearly we should just do this." It's a good idea, but now the agency can't just do it. It has to go out and has to find some other area where it can reduce work and reduce costs.

Michael Livermore:
The analogy of the federal budget is like a paradigm for the rational decision making, I don't know, I don't get that either. So in any case, I don't think it's a great paradigm. It came out of the same movement that promoted cost-benefit analysis and the regulatory state, concerns about overregulation and subjecting agencies to discipline the like, and I just think cost-benefit analysis is such a superior tool, which is why it's really been used and has worked its way into practice in a way that the regulatory budget really hasn't.

Joe Aldy:
Great. I'd like to address the issue you raised about how we evaluate regulations, but let's start one level higher up. what do you see as the pros and cons of using benefit cost analysis? Or how do we, put another way, how do we evaluate the performance of requiring regulatory review and regulatory impact analysis in our development and promulgation of regulations?

Michael Livermore:
Yeah, it's a hard question like many evaluative questions because there's not a clear counterfactual. Essentially, we want to ask, what would our regulatory decision-making look like if we didn't have cost-benefit analysis? I'm going to compare the two. There are some specific cases where we know that cost-benefit analysis, or there are good reasons to believe that cost-benefit analysis in the past seemed to have led to good decisions. So there's a very classic example during the Reagan administration when US was in the process of getting the lead out of gasoline and phasing out the use of leaded gasoline, and the Reagan administration wasn't sure whether we wanted to continue with the policy.
There were forces within the White House who were pretty hostile towards the policy, and it was ultimately, at least as the story goes, it was ultimately the cost-benefit analysis that was done by the agency that worked its way up into the senior levels of the White House that convinced the president and the senior advisors to the president to move forward with the phase out of leaded gasoline. And that of course, has led to tremendous benefits. So there's a way in which we could almost just say, it's paid for itself. The leaded gasoline thing almost pays for itself. I think that the use of cost-benefit analysis has also really helped EPA. The need to respond to OMB and OIRA has led EPA to build its economic analysis workforce.

Michael Livermore:
We now have many, over 100, I think, still these days, economists of EPA. Part of what they do is regulatory impact assessment, and part of what they do is just think generally about how to design regulations. So would we have moved as far in the direction of market based mechanisms? Now, I don't think we've moved nearly far enough in the direction of market-based mechanisms, and I'm sad that we seem to be on a bit of a, maybe it's a little stochastic, I hope. It's just a little stochastic and we're just out of the... It looks like a really steep decline, but it's just a little noise around a general trend line.

Michael Livermore:
But efforts at EPA, the culture at EPA, almost of acknowledging the value of market-based mechanisms, cap and trade, and tradable permits, and the like, as a way of achieving environmental progress at lower costs. I don't know that we get there without the cadre of economists working in EPA, which I'm not sure we would have had that without the cost-benefit analysis requirement. John Graham has written about, during the George W. Bush administration, various rulemakings including reducing or improving fuel economy for automobiles, where he faced a lot of head... the EPA and NITSA, I guess it was NITSA in that rulemaking, the Department of Transportation, faced headwinds within the administration.

Michael Livermore:
It was pretty committed to the free market principles and the like, skeptical of regulation, and that the cost-benefit analysis helped him make the case that these were good interventions. So I do think there are specific cases, of course, but it's very hard to say globally across the all decision-making ultimately that the benefits outweigh the costs. One other just slight caveat that I will say is, sometimes people complain about the actual costs of doing a cost-benefit analysis, like the analyst and stuff, and I just think that's hilarious because you have a $10 billion rule or whatever, a billion dollar rule, and if you can eke out a percentage or a 0.01% improvement in the performance of that rule, you've paid for the analysis.

Michael Livermore:
So you don't need even radically changed things. You're like, "Oh, actually it turns out on the margins, we can change the enforcement period, or we can do a little something, and that ekes us out a half a percent of improvement." You've paid for the analysis.

Joe Aldy:
We've heard some concerns and reservations about benefit-cost analysis from the progressive left. There's a sense in which some members among the progressives want to push forward more substantial changes to how we think about evaluating regulations. Do you think there's any alternative reliable way
of doing that? And do you think there's going to be success among the progressive left in trying to meaningfully change that in the Biden administration or in future administrations?

Michael Livermore:
Yeah. Within cost-benefit analysis, there's all kinds of choices that are made, and that's kind of in part what we've been talking about at, those choices. Some of those are controversial and I don't agree with all of them and we course we can make reforms. So then the question would become, if we're going to not do cost-benefit analysis at all, what's the idea? Various alternatives have been proposed, so I'll just maybe mention two. So one is just do what the law sets or do what science says. I almost feel bad arguing because it's so obviously not adequate decision-making tool because the law is unclear and science doesn't tell us what to do without a normative framework to use to put that scientific information to use.

Michael Livermore:
And so, just saying like, "Oh, the law requires the application of the best available technology," well, what is best? Is it available? There's so much open texture in legal standards that the law just doesn't ultimately give us conclusions. Agencies have discretion, and given that agencies have discretion, we need to have some way of informing that discretion. And of course, science is a very useful input into the regulatory process, but ultimately, it doesn't give us final answers. So I think very broadly something like cost-benefit analysis is something where you balance the goods and bads, is going to be part regulatory decision-making.

Michael Livermore:
As you can imagine, different alternatives, like something that was more specifically welfare just in orientation, didn't use preferences, wasn't based on willingness, this would be quite radical changes, but I think frankly would still be something like cost-benefit analysis and probably wouldn't actually change the outcomes of many regulatory decisions. Now, is it possible that a future democratic administration will kind of pay heed to some of these concerns? By the way, the other real alternative is just political balancing. What's going to help us in our constituents, right? And that's probably what would end up happening.

Michael Livermore:
And that happens anyway with cost-benefit analysis. Hopefully, cost-benefit analysis provides some discipline to that. But really, if you just get rid of that technique, it becomes a political balancing test. Now, I think the answer to your second question on the politics is, it's actually up to the Republicans, right? The Republicans get to decide whether the left wins on this or not. What do I mean by that? If the forces within the Republican Party that are kind of the Trump wing of the party are ultimately successful... And that is successful electorally. I have no idea whether that's going to be the case or not.

Michael Livermore:
I don't predict the outcomes of elections anymore. I was pretty unsuccessful in one specific election. So who knows? It doesn't seem like it should be appealing, but again, who knows? And if that has a lot of electoral appeal and the kind of old wing of the Republican Party, then neither Trump or rear guard is just washed away and it just becomes this kind of neo-Trumpian party, I think that the folks who are going to... critical of any kind of moderation, technocratic, things that could be labeled as technocratic, expert, insider, if that becomes kind of the... these are just dirty words and that no one wants to be
associated with them, then a technique that is frankly a professional technique that requires some technical expertise in order to do properly, that's associated with expertise, and so on is just going to have a hard time surviving.

Joe Aldy:
So we have about a little more than five minutes left, and I want to ask two more questions; one about distribution, it's clearly going to get more attention, and we have had a few questions from our attendees on that. But before I do that, I want to take the opportunity to hear that since we have an expert in administrative law. I have to talk about Chevron. And especially given what you just said in your last response about just interpret the law the way it's written, we've had since the mid '80s the Chevron principle where the courts sort of recognize the expertise of the agencies and there are some deference, there are some standards, where there's been deference to agencies in how they interpret the law.

Joe Aldy:
One may argue the most persistent impact on regulations and regulatory policy from the Trump administration may be in those court appointments, the appointments of judges on the federal bench and how that may influence the interpretation or changes to the interpretation of this Chevron doctrine. Doing a bit of a cost analysis rigorously applied by agencies, especially in those contexts where their statute has some discussion about the need to weigh benefits and costs one way or another, and so, in this sort of energy and environment space that we've been talking about, the fuel economy standards come to mind, appliance efficiency standards of the Department of Energy come to mind, do you think that benefit and cost analysis can help these agencies defend potential challenges to their rulemaking on what may be modifications to the Chevron principle down the line?

Michael Livermore:
Yep. Great. I think there's two answers to your question in a sense. One is, doctrinally, I don't think that any of this necessarily fits together because Chevron has doctrine around deference and there's cost-benefit... cost-benefit analysis is often kind of worked into the judicial review process through arbitrary and capricious review. There are some statutory standards and I think agencies trying to get out of doing cost-benefit analysis are going to have a more difficult time. But more broadly though, if we take a step back from the kind of very specific doctrinal kind of levers that are moving around, I do think that... And this is very important, is that lawyers can justify, we focus on these doctrines and trying to make them all work together.

Michael Livermore:
But an agency that goes into court that has done a serious analysis that a court can look at that makes sense, that uses standard methodologies, is going to have a better opportunity to have its arguments heard on say questions of statutory interpretation than an agency that goes into court with a slipshod analysis or refuses to do analysis and whatever. It's just a way of essentially putting the agency's best foot forward and really just taking advantage of the fact that the agencies... just very naturally, courts are inclined to be deferential to agencies. Put aside doctrine, put aside these good questions, that the government comes to court with an assumption of regularity and assumption that it's doing the right thing.

Michael Livermore:
And agencies can, the keynote, they can tread on that assumption, they can override that if they act badly enough. But there is just general upholster in our constitutional system that the... it’s a kind of a inter-branched comedy and agencies that do appropriate, sophisticated, technically sound, expert-based analysis are going to be able to get that comedy. And however the doctrine, what that exactly looks like, is it Chevron deference, is it Skidmore deference, is it lighter arbitrary and capricious review versus heavier... Courts will figure out the language to use, but ultimately, the underlying principle is, if agencies are doing their job competently, courts are going to be inclined to give them more respect. Now, whether they call it deference or not, I guess that would be a different question.

Joe Aldy:
Thanks, Michael. So the final question. Clearly there's a growing increase in the interest in thinking about the distributional consequences of regulations as you noted in your talk. Our colleague, Lisa Robinson, when she was a senior fellow at the Mossavar-Rahmani Center for Business and Government did some work looking at the practice by agencies, or maybe I should say the lack of practice by agencies, and conducting rigorous distributional analysis, even though there is guidance from OMB agencies for doing this.

Joe Aldy:
So one, I'd like you to sort of speak a little bit looking forward about what distribution and analysis could look like and what are some of the challenges in thinking through... You alluded a little bit to how we might think about some of the challenges in the distribution of the benefits, thinking about risk assessment, and et cetera. But also, what are some of the challenges when we think about the distribution of the costs of our regulations and how might new methods or new approaches help us shed more light on that to inform regulatory review?

Michael Livermore:
Great question. And I actually assigned some of the work that came out of that research that done that Lisa did in my regulatory law and policy class. So it's very, very useful work there. Yeah. There's so much to go into. Really, I think that if the agencies are going to do this in a really serious way, there's ultimately going to have to be guidance, there's going to have to be... Potentially propagated by OIRA, that seems like a very sensible start, but every agency is going to have to have their own guidance, the same way that EPA has its guidelines on conducting economic analysis, at least a chapter, if not a whole other book on how to do this resource. It's very complicated.

Michael Livermore:
So I think that the biggest challenge in many respects is... I don't know if it's easy to focus on the conceptual questions because some of those are quite thorny, but there are just hard, empirical quest, it is a hard empirical task. So, just to give a flavor for the listeners of the difficulty of this task, when you just look at regulatory costs and you're not worried about how they're distributed, you could say there's a... Oh, it's just your generator. I mean, that's particularly difficult [inaudible 00:57:56] electricity generator, and you're going to require a pollution control technology provided the electricity generator.

Michael Livermore:
Okay, great. How much does it cost? Great, we can go look up the price now. Maybe the price will come down and there's some complexities about estimating that cost, but that's it, you just look at the price tag essentially. If you're going to look at distribution, you're going to be worried about how that... Now
what you have to do is you have to have a very sophisticated understanding of the rest of the economy, right? Because what's going to happen is, that device is going to get bought, well, who benefits from that device being bought? That's a part of the distributional consequence, right? Some engineers are going to get jobs and whatever else, right?

Michael Livermore:
And then, is there going to be a ding to shareholder value? Is there going to be a ding to... Is our electricity prices going to go up? How might electricity prices increasing affect production or the regional distribution or sectorial distribution of jobs? What's going to happen when consumers have to spend more money for electricity and then they're not spending money at restaurants or whatever else? What happens when shareholder value in these particular sectors goes down? We might think about, well, wait a second, actually it turns out that shareholders of the US economy aren't just US citizens. So there's going to be mutual funds that are going to take a hit.

Michael Livermore:
There's also like the sovereign wealth fund, Abu Dhabi is going to take a hit. How do we account for that? So just the mere question of empirically tracing this stuff. And of course, there's very sophisticated models that people can build, but do these models actually have anything to do with reality? That's I think a tough question. And so, just in a way building defaults, building simplifying assumptions, building just tractable ways of understanding how these flows happen is... Oh, there's also things like for example inflation can be automatically indexed into certain government programs, and so you got to take that stuff into consideration. Then it's going to affect taxes. So there's just a lot of moving parts.

Michael Livermore:
Now, that having been said, I do think it's important... That's not to say that this isn't important, just to clarify the scope of the test. So I would say that probably the most important at least kind of beginning steps is going to be just trying to think through the empirical question of how we even understand just right-down what the consequences are in terms of how they're being distributed across the economy and across society, and that's kind of prior to us figuring out what to do with that information.

Joe Aldy:
Great. Thank you, Michael. So before we wrap up, let me remind everybody that we'll meet again next week, Thursday, March 4th, at 12 noon for a presentation on bespoke regulatory review by Bridget Dooling at George Washington University. So she's going to take a lot of these concepts of regulatory review that Professor Livermore talked about and think about how they could be applied to independent regulatory commissions in the federal government. Finally, please join me in thanking Professor Livermore for his presentation and discussion today. It was a great way to kick off the spring seminar series. Thank you, Michael.

Michael Livermore:
Great pleasure. It's fun to be here.

Joe Aldy:
I hope everybody enjoys the rest of the day. Take care. Goodbye.