

As environmentalists search for weapons to use against the Trump Administration, one place to turn could be an important opinion by Justice Scalia – one that many of us criticized sharply at the time.

The case in question, [\*Michigan v. EPA\*](#), involved mercury emissions from power plants, in which the Supreme Court instructed EPA to consider regulatory costs in applying a statutory mandate for “necessary and appropriate” regulation. Justice Scalia’s opinion for the Court found it clear that the phrase “appropriate and necessary” requires at least some attention to cost. “One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. Justice Scalia also made it clear that the agency was obligated to consider all costs, not just financial impacts on industry. “In addition,” Justice Scalia wrote, “‘cost’ includes more than the expense of complying with regulations.” Rather, he said, “any disadvantage could be termed a cost.” He complained that “EPA’s interpretation precludes the Agency from considering any type of cost— including, for instance, harms that regulation might do to human health or the environment.” And here’s the kicker: “No regulation is ‘appropriate’ if it does significantly more harm than good.”

In other words, the agency should consider both sides of the balance. “Consideration of cost,” as Justice Scalia put it, “reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.”

Nearly everyone would agree with the general principles that Scalia invokes. He doesn’t say that the agency has to engage in a formal cost-benefit analysis, but it’s hard to quarrel with the general principle that costs and benefits are generally relevant to regulation. To my mind, EPA and the dissenters had convincing arguments against the outcome in that particular case, but Scalia seems right about the default rule.

This commonsense principle could be very useful in combatting a Trump Administration that seems oblivious to rational decision making. For instance, an effort to eliminate consideration of the social cost of carbon would violate Scalia’s insistence that all costs, including environmental harms, must be considered.

Another example could be Trump’s anti-regulation [Executive Order](#). Under this order, in order to issue a new regulation, an agency will have to repeal two old regulations – the so-called “two for one” requirement. In addition, Trump has capped the total costs of all regulations that an agency enacts in a year. The initial cap is zero. For instance, if an agency wants to issue a regulation that will cost \$500 million, it must kill two existing

regulations whose costs add up to \$500 million. Unless it can find two such regulations, it can't move ahead on the new one, even if that regulation would produce twice as many benefits as costs.

In fact, a new OMB [guidance document](#) says that if you have to pay money but get even more money back, your initial outlay is considered a cost and the later profit is ignored. It also says that the agency should select old rules to eliminate based on the benefit of repealing the rule, but again without considering the environmental impact of repeal. This violates Scalia's injunction to pay "attention to both the advantages *and* the disadvantages of agency decisions." In short, although agency's have huge discretion over setting their regulatory priorities and deciding what to regulate, doing so solely on the basis of one side of the cost-benefit balance is arguably not "even rational, never mind 'appropriate'."

Eric Posner, a conservative law-and-economics scholar, has made a [similar argument](#) that Trump's proposed wall on the U.S./Mexico border violates *Michigan v. EPA*. Perhaps its no coincidence that he's quite [dubious](#) of Trump's anti-regulatory executive order. In any event, this kind of argument might be deployed against a number of Trump Administration decisions.

Agencies generally do cost-benefit analysis along with regulatory decisions, and in many cases they can probably find ways to make the analysis support Administration policy. But that won't always be true. In particular, the Trump White House seems prone to impulsive action, so agencies may be pushed into acting precipitously and without doing their homework. Those decisions may be especially vulnerable to attack as "arbitrary and capricious" if the agency doesn't provide an adequate explanation of costs and benefits.

There's admittedly a certain irony in turning Justice Scalia's opinion to environmentalist ends. I'd say we should revel in that irony.