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Articles

Statutory Inhibitions to the Application of Principles of Cost/Benefit Analysis in Administrative Decision Making

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I. INTRODUCTION

A. *The Purposes of the Study*

With increasing intensity and wider application the concept of cost/benefit analysis has been invoked in recent years as a relevant and necessary consideration in governmental decision making. This perhaps has been nowhere more evident than with regard to the activities of federal administrative agencies.

As the demand has increased for assuring that administrative agencies give due weight to the costs as well as the benefits which attend their decisions, advocates of cost/benefit analysis have recognized that there are sometimes obstacles to implementing the concept. On occasion this may have been attributable to agency intransigence. Unswerving devotion to perceived notions of the mission of an agency may be reflected in reluctance to engage in a studious balancing of costs and benefits.

Even when administrative officials concede or even embrace the desirability of cost/benefit analysis, there may be statutory barriers to the application of the principles. The nature of the congressional mandate under which an agency operates may be such that there is no opportunity or discretion for the invocation of principles of cost/benefit analysis without simultaneous conflict with leg-

islative intent.

The purpose of this study was to identify instances under federal law in which statutes constitute barriers to the application of the principles of cost/benefit analysis in administrative decision making, to examine some selected statutory barriers and to assess the need for and desirability of their retention or change. A further purpose was to consider the relationship between such statutory barriers and certain broader themes of administrative law. The ultimate objective was to provide a basis for reflection on the matter of whether or not statutory barriers are useful and desirable.

The stated purposes of the study at first glance seemed rather straightforward, and the study itself generally a matter of research and execution, albeit extensive. This apparent ease and simplicity proved deceptive as a consequence of several factors.

It is commonplace in the folklore of regulatory reform that cost/benefit analysis is synonymous with enlightened decision making. The thought is that better decisions will result if only sufficient effort is made to identify all pertinent costs and benefits of proposed governmental action and then to weigh them, each against the other. A suspicion which appears to underlie some of the ardent advocacy of cost/benefit analysis is that too often the desirability of administrative action has been measured only against perceived notions of public benefit with scant attention given to costs, public and private.

One difficulty this presented for purposes of the study was in discerning what the advocates of cost/benefit analysis really mean when they invoke the principle. Certainly there is no clear evidence of unanimity. At one level it may entail an intricately sophisticated process of factual inquiry and prediction concerning the probable consequences of proposed administrative action and the weighing of those consequences to determine the best course of action. At another level cost/benefit analysis may be little more than a rallying cry for less, or at least delayed administrative action. In this latter sense cost/benefit analysis carries with it the answer to the public policy questions to which it is directed—if only government would think about costs as well as benefits, as it had not in the past, it would regulate less intrusively or not at all.

Notwithstanding the reality that cost/benefit analysis may mean radically different things to different people for different purposes, it was essential for the study that some definition be adopted against which statutes could be measured to determine whether they did or did not present barriers to cost/benefit analysis. The

section which follows discusses the definition adopted for purposes of the study. Naturally a determination of the presence of a statutory barrier is a function of the definition employed.

The study was complicated as well by expectations. The expectations were that statutory barriers exist in significant numbers and certainly represent more than occasional and random aberrations. In the face of increasing advocacy of wider and more intense application of principles of cost/benefit analysis in administrative decision making, it seems that the movement encountered not unexpected opposition. And it appears that one manifestation of that opposition was the refrain that Congress often has precluded cost/benefit analysis in the basic statutes governing the actions of particular agencies. Apparently this was heard with sufficient frequency to raise interest in the extent and nature of such barriers.[1] The question was: did they exist on any widespread basis with the consequence of impeding application of principles of cost/benefit analysis? When the study failed to unearth statutory barriers in significant numbers, an inevitable process of reexamination and rethinking was the result. The fact is that what was expected, or at least suspected, was not found.

B. *The Concept of Cost/Benefit Analysis*

The search for a working definition of cost/benefit analysis for purposes of the study was aided by the high levels of interest in recent years at the highest levels of government in bringing about wide application of the principle in governmental decision making. In the process there emerged a general and prevailing definition which provided the benchmark against which statutes were measured to assess their status as statutory barriers.

On February 17, 1981, President Reagan issued Executive Order 12291.[2] Its general purpose was "to reduce the burdens of existing

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1. Although the study was conducted at the request of and sponsored by the Office of the Chairman of the Administrative Conference of the United States, the views expressed are solely those of the author. Special thanks are due Jeffrey S. Lubbers, Esq., Research Director of the Administrative Conference, for his insights in reviewing drafts of the study and to Scott R. Devenney and Mark L. Dopp, research assistants while students at the University of Missouri-Columbia School of Law.

2. 3 C.F.R. 127 (1982). The Order is the most recent Presidential effort to require administrative decision making to take into account the broader economic consequences of proposed action. Under Executive Order 11821 President Ford required inflationary impact statements in connection with proposed rules. 3 C.F.R. 926 (1971-1975 Comp.). In Executive Order 12044 President Carter required economic impact analysis in the context of alternative courses of action. 3 C.F.R. 152 (1979). The latter was repealed by Executive Order

and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations . . . ."[3] Although the focus of the order was upon the rulemaking activities of federal administrative agencies,[4] its provisions concerning cost/benefit analysis in rulemaking provide a general definition of the current meaning of the concept for purposes of all administrative actions and this study.

Some basic precepts of the order are that:

> (a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
> (b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;
> (c) Regulatory objectives shall be chosen to maximize the net benefits to society;
> (d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen;
> (e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the conditions of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.[5]

These principles are developed further in the order's more explicit requirements for regulatory impact analysis and review for proposed major rules. These provide that in both the preliminary and final stages of rulemaking the following information must be presented:

> (1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to benefit;
> (2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;
> (3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms . . . .[6]

Under this approach cost/benefit analysis is an extraordinarily expansive concept. Neither costs nor benefits are confined to quantifiable economics. There is room for taking measure of more sub-

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12291.

3. Exec. Order No. 12291, 3 C.F.R. 127 (1982).
4. *Id.* § 1(a)(1) of the order excludes, for example, agency adjudication.
5. *Id.* at 128.
6. *Id.* at 129.

jective and intangible costs and benefits. This holds out the prospect of reducing the burdens of applying the concept in, for example, social welfare contexts. This approach also suggests that the application of principles of cost/benefit analysis is to be much more than casual. It is to be a thorough and searching effort to identify all pertinent costs and benefits and to measure them to the extent feasible. The objective is to assure that in selecting among alternative courses of governmental action an agency identifies and adopts that which produces the maximum net benefit to society.

The order does take into account the possibility that an agency may be limited in its ability to engage in and implement cost/benefit analysis. Consequently, its requirements are applicable only "to the extent permitted by law . . . ."[7] Other requirements for regulatory impact analysis and review also recognize the possibility of barriers to cost/benefit analysis. Thus, the order provides for inclusion of:

> (4) A description of the alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and
> (5) Unless covered by the description required under paragraph (4) . . ., an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 [the general requirements] of this Order.[8]

There is considerable similarity between the analysis which an agency would employ in complying with these particular requirements and the approach taken in this study. In both instances the common objective is a determination of when, in whole or in part, a statute bars application of principles of cost/benefit analysis of the wide-ranging variety specified under the order.

The principles reflected in Executive Order 12291 are grounded in the common sense of human behavior, history and modern economic theory. First, in its broadest sense, the concept of cost/benefit analysis is common in every day behavior. Weighing whether one will receive as much, or more, in exchange for what one relinquishes is one form of rational behavior which is hardly of recent origin, although anyone who has ever come away from a transaction with the sensation of having obtained the worst of the bargain will readily concede that the ideal of rational behavior is one for

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7. *Id.* at 128.
8. *Id.* at 129.

which one strives without readily and necessarily achieving it.

Notwithstanding the limitations inherent in this ideal, economics is founded upon a theory of rationality, and at the heart of that rationality is the idea that an individual does not give up a good without an expectation of receiving something of equal or greater value in return, either immediately or in the future. This concept, involving the weighing of costs against benefits with the objective of maximizing benefits, was one of the underpinnings in the development of early economic theory. For example, Jeremy Bentham, in referring to man's desire to avoid pain and achieve pleasure, wrote that these "masters govern us in all we do, in all we say, and all we think."[9] Whether one accepts this philosophy of the classical liberal, the concepts of pain and pleasure, cost and benefit, pervade economic thought.

As to history, some point to the year 1844 and the publication of an essay, "On the Measurement of the Utility of Public Works," by a French engineer, Jules Dupuit, as the beginning of modern cost/benefit analysis.[10] The use of cost/benefit analysis in the public sector in this country, however, appears to be of relatively recent origin, although examples can be found in the last century and at the turn of this century. For instance, the Navigation Improvement Act of 1824[11] and the Reclamation Act of 1902[12] allowed a primitive form of cost/benefit analysis in providing that economic evaluations be drawn from surveys and engineering reports in making decisions.[13] Yet it does not appear that these techniques were employed extensively until as recently as the 1930's when measurement of benefits, and the desire that these benefits should outweigh costs, became more prevalent. The Corps of Engineers began issuing directives to district offices emphasizing the use of cost/benefit analysis in water projects. The 1939 Reclamation Act,[14] for example, required the use of cost/benefit analysis to determine whether irrigation and improvement projects should be authorized.[15] Others have found the first modern application in the

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9. E. HUNT, PROPERTY AND PROPHETS: THE EVALUATION OF ECONOMIC INSTITUTIONS AND IDEOLOGIES 45 (2d ed. 1975).

10. P. SASSONE & W. SCHAFFER, COST-BENEFIT ANALYSIS 3-4 (1978). Dupuit suggested a means for assessing the net social benefit of a public works project, a concept which is integral to cost/benefit analysis principles.

11. Act of May 24, 1824, ch. 139, 4 Stat. 32, 32-33.

12. Reclamation Act of 1902, ch. 1093, 32 Stat. 388.

13. R. MCKEAN, EFFICIENCY IN GOVERNMENT THROUGH SYSTEMS ANALYSIS 18 (1958).

14. Reclamation Act of 1939, ch. 418, 53 Stat. 1198.

15. MCKEAN, *supra* note 13, at 19.

Flood Control Act of 1936[16] which provided that the benefits of projects "to whomsoever they may accrue" must exceed their costs.[17]

Indeed, one must look to even more recent decades for indications of more direct, widespread and intentional applications of the modern concept of cost/benefit analysis in governmental decision making. In the 1960's under then Secretary of Defense McNamara, the idea of cost/benefit analysis in the formulation of defense policy was implemented with enthusiasm and on a widespread scale. This represented an effort to employ systematic analysis measuring costs and benefits in the defense planning process. In 1965, with the inauguration of the Planning-Programing-Budgeting (PPB) System, the fundamental approach was made formal and folded into the Defense Department's basic decision-making process.[18] PPB involved the methodical and complex assessment of program objectives, "output," total costs, and alternatives with the objective of "execut[ing] our choices effectively and efficiently in order to free scarce resources for other good and useful things."[19]

At the other end of the governmental spectrum the use of cost/benefit analysis as a planning tool in social welfare agencies lagged substantially behind the defense and public works areas. This has been explained on the ground that projects in the latter areas lend themselves to more effective advance planning and analysis. Social programs do not fare as well in this respect on account of greater deficiencies in knowledge regarding the relationships between what must go into such programs and what is derived from them.[20]

The historical record affords ample evidence that the studious and intentional application of cost benefit analysis in governmental decision making is neither of recent origin nor a unique invention of Executive Order 12291.

Finally and similarly, Executive Order 12291 is well founded in modern economic theory. The Order addresses the matter of the consequences of administrative action in terms of costs and benefits without limiting these to what can be measured in quantitative

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16. Flood Control Act of 1936, ch. 688, 49 Stat. 1570-96.

17. SASSONE & SCHAFFER, *supra* note 10, at 4.

18. R. HAVERMAN, THE ECONOMIC PERFORMANCE OF PUBLIC INVESTMENTS: AN EX POST FACTO EVALUATION OF WATER RESOURCES INVESTMENTS 3 (1972). See generally H. HINRICHS & G. TAYLOR, PROGRAM BUDGETING AND BENEFIT-COST ANALYSIS 212-336 (1969), for a discussion of various cost/benefit techniques employed by a variety of federal agencies in the evaluation of programs during the 1960's.

19. HAVERMAN, *supra* note 18, at 4-5.

20. *Id.* at 1-3, 23-32.

terms alone; consequently it is illustrative of what is one formulation of the basic principle of cost/benefit analysis. It must be noted, however, that there are alternative formulations which generally deal with the same fundamental issues. In some degree the distinctions between cost/benefit analysis and these other formulations may be little more than semantic, but in some the distinctions are intended to reflect often subtle shifts in emphasis, and in others the differences may be intended to provide basic substantive limitations on the nature of an agency's inquiry.

This phenomenon of gradation and variation in concepts is an apparently intractable part of the cost/benefit analysis landscape. As one observer has noted:

> One of the more confusing aspects of incorporating cost analysis into evaluation and decision making is that a number of different, but related, concepts and terms are often used interchangeably in referring to such approaches. Among these are cost-effectiveness, cost-benefit, cost-utility, and cost-feasibility. Although each is related to and can be considered to be a member in good standing of the cost-analysis family, each is characterized by important differences that make it appropriate to specific applications . . . .[21]

A sampling of some of the variations on the theme illustrates that there really is no necessarily common and accepted definition of the concept, at least as reflected in common usage.

Typically cost/benefit analysis represents the technique for "evaluation of alternatives according to a comparison of both . . . costs and benefits when each is measured in monetary terms."[22] This analytical approach might be employed to measure the availability of a single alternative in light of a requirement that it can be adopted only if there is a net benefit-to-cost, or it might be employed to select from among competing alternatives with the object of singling out that with the highest benefit to cost ratio.[23]

Cost-effectiveness analysis, in contrast, "refers to the evaluation of alternatives according to both their costs and their effects with regard to producing some outcome or set of outcomes."[24] This method does not require that benefits be reduced to monetary terms. Under it one assesses the relative cost of achieving a common objective by various means for the purpose of selecting that which provides "the maximum effectiveness per level of cost or

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21. H. LEVIN, COST-EFFECTIVENESS: A PRIMER 17 (1983).
22. *Id.* at 21.
23. *See generally* COST-BENEFIT ANALYSIS 9-65 (B. McCormick ed. 1972).
24. LEVIN, *supra* note 21, at 21.

which require[s] the least cost per level of effectiveness."[25]

And another, cost-utility analysis, affords yet another method which is even further removed from the necessity for quantitative information. Under it costs are measured against "the estimated value or utility of their outcomes."[26] Cost-feasibility analysis introduces another dimension in which one examines alternatives only in terms of their costs to ascertain whether they are possible in light of available budgetary resources.[27]

These various approaches have much in common, in objective and approach, with the principal differences in the method and level of specificity of measuring benefit, effectiveness and utility. The shared desire is the selection of the alternative with "the lowest cost for any particular result or the best result for any particular cost."[28] Yet it is apparent that the economists employ much more precise and refined categorizations than those in the non-professional and governmental arenas. Indeed, there are even subtler gradations. For example, Lester B. Lave has prepared an analysis of the various frameworks for regulation which provides, in varying degree, an opportunity for the weighing of benefits against risks.[29] Consequently, a statute might provide for comparison of direct risks against direct risks with the focus upon adverse and beneficial effects: for example, of a particular food upon health. In this context one risk might be mitigated while another is created; the respective risks would be weighed. An expansion upon this concept might allow inclusion of indirect risks in the analysis.[30] In this context not only persons consuming a food in question would be taken into account, but also those producing and distributing the food. Nevertheless, in either case one would not be entitled to take into account effects unrelated to the health of affected persons. In another formulation, risk-benefit, Lave notes that one would be entitled to take into account general benefits as well as general risks of nonhealth as well as health consequences.[31]

It is apparent that Executive Order 12291 draws extensively on this economic literature. It is equally apparent that it does not fall

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25. *Id.* at 18.
26. *Id.* at 26.
27. *Id.* at 30.
28. *Id. See also* COST-EFFECTIVENESS ANALYSIS (T. Goldman ed. 1967); E. MISHAN, COST-BENEFIT ANALYSIS (3d ed. 1976); E. MISHAN, ECONOMIC EFFICIENCY AND SOCIAL WELFARE (1981).
29. *See generally* L. LAVE, QUANTITATIVE RISK ASSESSMENT IN REGULATION 8-28 (1982).
30. *Id.* at 15-18.
31. *Id.* at 17-19.

neatly within the traditional quantitative approach to cost/benefit analysis. In allowing identification of those costs and benefits which do not reduce to monetary terms, it allows a higher degree of subjectivity in weighing alternatives. It is unlikely the economists would view the approach in Executive Order 12291 as true cost/benefit analysis. Nonetheless, the Executive Order was selected for purposes of the study in light of its recent origins, widespread recognition in governmental circles and ties to the common sense, historic and economic underpinnings of cost/benefit analysis. It seemed to present as good a working definition as any available for identifying statutes which preclude cost/benefit analysis.

C. *The Scope and Methodology of the Study*

With only a few exceptions, the study was rather comprehensive. The objective was to identify statutory barriers to cost/benefit analysis wherever they might be found in federal law. Consequently, the definitions of agency and administrative decision making applied in the search for statutory barriers also were comprehensive.

For purposes of the study the definition of administrative agency was not confined to traditional conceptions of agencies primarily regulatory in nature. Had that approach been adopted, the focus might have been limited to agencies whose activities concern the imposition of "government standards and significant economic responsibilities on individuals or organizations outside the federal establishment."[32] Rather the study looked to broader definitions such as those provided in the Administrative Procedure Act[33] (APA) and Executive Order 12291. The former provides that "agency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . .;"[34] the latter provides that " 'agency' means any authority of the United States that is an 'agency' under 44 U.S.C. § 3502(1) . . . ."[35] The effect was to include most arms of the federal

32. DOMESTIC COUNCIL REFORM GROUP ON REGULATORY REFORM, THE CHALLENGE OF REGULATORY REFORM-A REPORT TO THE PRESIDENT 47 (Jan. 1977).

33. 5 U.S.C. §§ 551-76 (1982).

34. 5 U.S.C. § 551(1) (1982).

35. Exec. Order No. 12291, 3 C.F.R. 127, 128, § 1(d) (1982). Section 3502(1) of Title 44 defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency . . . ." 44 U.S.C. § 3502(1) (1982).

establishment which would customarily be recognized as and considered government agencies.

However, the exceptions to these definitions were taken into account. Thus, Congress, the judiciary, territorial governments and other governmental entities and activities excluded under the APA definition were not considered.[36] Generally, agencies excluded from the reach of Executive Order 12291 were treated similarly.[37]

One important consequence of this approach was the inclusion of governmental activities pertaining to eligibility for federal grants, assistance and contracts. Matters of this nature might be considered by some officials as suitable candidates for application of principles of cost/benefit analysis, and statutory barriers might inhibit their ability to do so.

Furthermore, no effort was made to limit the kinds of agency decision making for purposes of the study. Thus, "minor" as well as "major" rulemaking authority was considered relevant.[38] Actually, any form of agency action was considered within its scope,[39] and as a result statutory barriers were sought in all facets of administrative decisional authority, including the traditional categories of formal and informal rulemaking, formal and informal adjudication, and all other forms of a less traditionally determinate nature.

In light of the objective of determining the existence and nature of statutory barriers to the application of principles of cost/benefit analysis by federal agencies, the initial step in the study was to examine most titles of the United States Code in their entirety. Some titles, however, were not examined on the basis of a determination of improbable relevance. Thus, Titles 18 (Crimes and Criminal Procedure), 26 (Internal Revenue Code), 28 (Judiciary and Ju-

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36. See 5 U.S.C. § 551(1) (1982), which excludes various governmental activities from the definition of agency, including "(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; [and] (D) the government of the District of Columbia." *Id.*

37. See 4 U.S.C. § 3502(1) (1982), which excludes from the definition of agency "the Federal Election Commission, the government of the District of Columbia and of the territories and possessions of the United States and their various subdivisions, or government owned contractor operated facilities including laboratories engaged in national defense research and production activities . . . ." *Id.*

38. Executive Order 12291 draws a distinction between major and minor rules. The former, for example, are those with probable annual effect on the economy of $100 million or more.

39. See 5 U.S.C. § 551(13) (1982), which defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . ." *Id.*

dicial Procedure), and 48 (Territories and Insular Possessions) were excluded at the outset. Following review of the code the potential statutory barriers identified were categorized to the extent possible. These results and findings are presented in Part II. Several selected statutes were analyzed in greater detail and are presented in the case studies in Part III.[40]

In assessing the existence and nature of a statutory barrier the working definition provided by Executive Order 12291 was measured against the statutes examined. The question asked in each instance was whether the terms of the statute would preclude carrying out the directives of the Order. It was taken into account that a statutory barrier to application of the principles of cost/benefit analysis need not be total. A barrier might be partial in that, for example, it precludes consideration of nonhealth benefits. The attempt was made in this study to identify barriers of this nature as well; any inhibition of an agency's ability to employ the wide-ranging balancing of pluses and minuses of Executive Order 12291 would, in some measure, constitute a statutory barrier. The effect was that, for purposes of this study, the concept of cost/benefit analysis was treated expansively.

This approach was consistent with the economists' perceptions of legal constraints on the application of cost/benefit analysis principles. For example, Sassone and Schaffer have identified a variety of constraints in cost/benefit analysis, including budgetary, social, political, institutional and legal. As to the latter they use the example of pollution which would result from a project which cannot be considered in terms of costs and benefits because some legal standard places a standard or limit on the permissible amount of pollution.[41] This constrains the analysis because some alternatives which the analyst might otherwise consider are precluded by the legal constraint and leave the analyst to address only those which

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40. One caveat concerning the methodology is in order. The methodology employed required the reviewers of the Code to go beyond the immediate areas of personal expertise. This was to be expected because of the comprehensive nature of the study, and the phenomenon was even more pronounced because the principal reviewers were second and third year law students. Consequently, there may be statutory provisions which deserve to be included as examples of statutory barriers which are not. This is not meant as a criticism; rather it is to explain why readers might wonder why particular statutes which they consider barriers to cost/benefit analysis have not been included in the study. Although it may be that a statute was considered and consciously excluded, it may also be that an inexperienced reviewer, unfamiliar with the applicable substantive law, passed over it. There was really no way of avoiding this, absent a team of experienced experts reviewing statutes within their respective areas of competence. This was beyond the reach of the methods employed in this study.

41. SASSONE & SCHAFFER, *supra* note 10, at 160.

are within the legal limits.[42]

II. Illustrative Varieties of Statutory Inhibitions to the Application of Principles of Cost/Benefit Analysis

The following section of this article presents the results of the basic survey of the United States Code, with the exception of certain titles as noted above.

A. *A Preliminary Note—The Absence of Statutory Barriers in a Significant Number of U.S. Code Titles*

Any expectation of widespread existence of statutory barriers to the application of principles of cost/benefit analysis is diminished to a degree by the fact that numerous titles of the United States Code revealed no such barriers. None was identified in Titles 1 (General Provisions), 2 (The Congress), 3 (The President), 4 (Flag and Seal, Seat of Government and the States), 5 (Government Organization and Employees), 6 (Official and Penal Bonds), 9 (Arbitration), 11 (Bankruptcy), 13 (Census), 14 (Coast Guard), 17 (Copyrights), 20 (Education), 24 (Hospitals, Asylums and Cemeteries), 27 (Intoxicating Liquors), 32 (National Guard), 35 (Patents), 37 (Pay and Allowances of the Uniformed Services), 41 (Public Contracts), and 44 (Public Printing and Documents).

The absence of statutory barriers in this number of titles of the Code has independent significance; the scope of the statutory barrier "problem" does not appear to be quite as extensive as some might have expected.

B. *Illustrative Varieties*

Most statutory barriers to the application of principles of cost/benefit analysis were found in areas in which the government regulates or controls the conduct of private business enterprise. This was not unexpected in light of the pervasiveness of government regulation of business, notwithstanding recent initiatives toward deregulation. They arise in various forms and are ostensibly justified on the basis of varying rationales ranging from economic regulation to protection of the public health, safety and welfare. What these statutory barriers represent are instances where Congress has made rather precise judgments concerning the controls to be imposed and limited the discretion of federal agencies to relax or al-

42. *Id.*

ter them. The effect is to preclude the application of principles of cost/benefit analysis. It is clear that the economist would view such limitations as legal constraints on the ability of the analyst to employ cost/benefit analysis within the zone of preclusion. In contrast, the lawyer is likely to consider this simply a customary and even necessary constraint on administrative discretion, inherent in any statute which delegates decision-making power to an agency with any measure of specificity. As will be seen, this divergence presents special problems in determining what should be considered a true statutory barrier to cost/benefit analysis.

Many of these barriers take the form of mandatory statutory standards. Thus, under the Cotton Standards Act[43] most transactions in cotton must be in the terms of the official cotton standards' names and descriptions used in the Act. Generally, it is unlawful for either private parties or the Secretary of Agriculture to evade the statutory standards for cotton.[44] Similarly, there are statutory standards for gauges for sheet and plate iron steel,[45] electrical and photometric measurement,[46] barrels for apples[47] and barrels for limes.[48] Standards of this variety are intended primarily to achieve objectives of uniformity. In this sense they represent congressional rejection of flexibility, but to the extent that agencies are deprived of opportunities for cost/benefit analysis in such matters, the congressional determination is not likely to prove controversial.

Other mandatory statutory standards involve more fundamental policy choices, including matters of public health and safety. For example, there are standards for occupant restraint systems in automobiles,[49] regrooved tires,[50] and fuel economy in passenger cars,[51] which constrict administrative discretion to engage in cost/benefit analysis. Others include mandatory performance standards under the Surface Mining Control and Reclamation Act,[52]

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43. 7 U.S.C. §§ 51-65 (1982).
44. *Id.* § 52.
45. 15 U.S.C. § 206 (1982).
46. *Id.* § 223.
47. *Id.* § 231.
48. *Id.* § 237.
49. *Id.* §§ 1410, 1412. See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 103 S. Ct. 2856 (1983), in which the Supreme Court found that the Secretary of Transportation acted arbitrarily and capriciously in rescinding a standard concerning passive restraints in automobiles.
50. 15 U.S.C. § 1424 (1982).
51. *Id.* § 2002.
52. 30 U.S.C. § 1265 (1982).

mandatory requirements for adaptive equipment for automobiles for disabled veterans,[53] standards for safety equipment on railroad engines and cars,[54] standards for goods of its own manufacture which a railroad may transport,[55] and standards for transport of hazardous materials on passenger aircraft.[56]

Mandatory statutory standards concerning employee health and safety under the Occupational Safety and Health Act[57] and carriage of explosives on vessels have been selected for more extensive analysis in this study. They are considered in Part III below.[58]

Statutory prescriptions which restrict the application of principles of cost/benefit analysis often apply to product composition and labeling. Thus, there are instances where Congress has provided for mandatory nutritional enrichment of certain grain flours within the jurisdiction of the Department of Agriculture,[59] and mandatory fuel economy labels for automobiles.[60] Various provisions of the Federal Food, Drug, and Cosmetic Act prescribe mandatory product labeling, including matters such as saccharin labeling,[61] margarine labeling,[62] drug labeling,[63] and flavor, color, and preservative labeling.[64] As a general matter the Commissioner of Food and Drugs has no authority to alleviate these requirements.

Perhaps the most celebrated example of a statutory barrier to the application of principles of cost/benefit analysis is the Delaney Clause in the food and drug law which precludes the use of food additives which induce cancer in humans or animals.[65] This barrier is discussed in detail in Part III.[66]

A variety of limitations on cost/benefit analysis have been included in statutory provisions providing for mandatory requirements for registration, permits and licenses. These take the form of either requirements before certain activities may lawfully be

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53. 38 U.S.C. ch. 39 (1982).
54. 45 U.S.C. § 1 (1982).
55. 49 U.S.C. § 10746 (1982).
56. *Id.* § 1807(a).
57. *See, e.g.*, 29 U.S.C. §§ 651, 655 (1982).
58. *See generally infra* Parts III.A & G.
59. 7 U.S.C. § 1431c (1982).
60. 15 U.S.C. § 2006 (1982).
61. 21 U.S.C. §§ 343(o)-(p) (1982).
62. *Id.* § 347(b)-(c).
63. *Id.* § 352.
64. *Id.* § 343(k).
65. *Id.* § 409. *See also* new animal drug provisions in *id.* § 360(d).
66. *See infra* part III.B.

conducted or conditions on activities, once registered or licensed. There are several examples in statutes pertaining to the Department of Agriculture, including provisions for pesticide registration,[67] permits for importation of nursery stock,[68] licensing of commission merchants, dealers, and brokers,[69] certification of shipments of apples and pears,[70] and certification of grapes and plums for export.[71] Under the Food, Drug, and Cosmetic Act there are statutory requirements for certification of drugs containing insulin,[72] establishment registration,[73] and prescription requirements for dispensation of controlled substances.[74] These are illustrative of the variety of statutory barriers of this nature. Indeed, more were identified in this area than perhaps in any other,[75] although this should not be taken as a special indicator of congressional behavior. It may simply reflect the widespread application of registration, permits and licenses as techniques of regulatory control.

Another manifestation of the statutory barrier is found in the area of governmental inspections. Thus, mines must be closed if certain specified dangers are discovered in the course of inspection,[76] the Coast Guard must inspect the crew's quarters on American vessels with the prescribed frequency,[77] and distilled spirits must first be placed in a public store or bonded warehouse and cannot be removed until inspected and stamped.[78] In these instances the breadth of discretion typical of regulatory inspections

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67. 7 U.S.C. §§ 136(a), (d), (e) (1982).
68. *Id.* § 154.
69. *Id.* §§ 499(c), (d).
70. *Id.* § 581.
71. *Id.* §§ 591, 594.
72. 21 U.S.C. § 356(b) (1982).
73. *Id.* § 360(b).
74. *Id.* § 829.
75. *See, e.g.*, 29 U.S.C. § 1242 (1982) (enrollment of actuaries under ERISA); 29 U.S.C. § 187 (1982) (certain conditions in leases and prospecting permits); 30 U.S.C. § 201(b) (1982) (prospecting permits or exploratory permits for coal deposits); 30 U.S.C. § 241(a) (1982) (prospecting permits for oil shale leases); 30 U.S.C. § 261 (1982) (prospecting permits for sodium deposits); 30 U.S.C. § 1266(b) (1982) (lead and zinc stabilization program); 33 U.S.C. § 1311 (1982) (EPA effluent limitations); 33 U.S.C. § 1326 (1982) (EPA thermal discharge permits); 47 U.S.C. § 222 (1982) (limitations on certain mergers of domestic and international telegraph carriers); 47 U.S.C. § 310 (1982) (limitations on grants of FCC licenses); 47 U.S.C. § 734(d) (1982) (limitations on foreign ownership of communication satellites); 49 U.S.C. § 5(f) (1982) (protection of employees in ICC approval of railroad mergers); 49 U.S.C. § 10705(a)(3) (1982) (limitation on ICC establishment of joint rates of certain street electric railways).
76. 30 U.S.C. § 727 (1982).
77. 46 U.S.C. § 660 (1982).
78. 19 U.S.C. § 467 (1982).

is absent.

The statutory barrier is also present in the area of mandatory paperwork, the reports and records required by statute rather than administrative order. Thus, there is no administrative choice or discretion in the records to be kept by poultry packers,[79] warehouses storing agricultural products,[80] certain labor organizations and their officers and employees,[81] and persons subject to OSHA[82] and ERISA.[83] These are illustrative.[84] Statutorily mandated reports and records are a common phenomenon.

A number of statutory barriers exist in the area of governmental control of agriculture. These affect both the production and marketing of agricultural products. They take such forms as acreage allotments,[85] price supports[86] and commodity marketing quotas.[87]

The other principle area in which a significant number of statutory barriers were identified is in the dispensation of governmental benefits. This includes not only traditional benefits, but also grants, contracts and loans.

In connection with social welfare benefits one finds a mandatory definition of household income for purposes of determining eligibility for food stamps.[88] Similarly, there are mandatory allocations and limitations in the determination of various Veterans Administration benefits.[89]

A common mechanism for administrative control is the attachment of terms and conditions to government contracts which do not necessarily relate to the direct objects of the contract. In nu-

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79. 7 U.S.C. § 221 (1982).

80. *Id.* § 260.

81. 29 U.S.C. §§ 431-33, 438, 461 (1982).

82. *Id.* § 657.

83. *Id.* §§ 1023-24, 1030.

84. *See also* 30 U.S.C. § 732 (1982) (Metal and Nonmetallic Mine Safety Act); *id.* § 813 (Coal Mine Health and Safety Act); 31 U.S.C. § 1101 (1982) (reports and records of currency and foreign monetary transactions); 47 U.S.C. § 1434 (1982) (certain firms subject to FCC jurisdiction); 50 U.S.C. § 126 (1982) (licensees for disposition of explosives or ingredients for explosives).

85. 7 U.S.C. §§ 1374, 1379(c) (1982) (mandatory acreage allotments for wheat and mandatory monitoring).

86. *Id.* §§ 1421-22, 1441 (mandatory price support floors).

87. Marketing quotas under the jurisdiction of the Secretary of Agriculture for cigar-filler tobacco, 7 U.S.C. § 515(h) (1982); sugar, *id.* §§ 1111-18, 1134 (1982); tobacco, *id.* §§ 1312-13 (1982); corn, *id.* § 1329 (1982); wheat, *id.* §§ 1330, 1334, 1340 (1982); cotton, *id.* §§ 1342, 1347 (1982); rice, *id.* §§ 1352, 1355 (1982).

88. 7 U.S.C. § 2014 (1982).

89. 38 U.S.C. §§ 102, 103, 105, 110, 246, 302, 404, 360, 505, 705, 708, 743, 712, 1504, 1511, 1621, 1631, 1661, 1673, 1682, 1685, 1690-93, 1700-14, 1762 (1982).

merous instances it is Congress and not the agencies which has made the determination of what those terms and conditions are to be. The effect is a statutory barrier to agency assessment of whether the benefit of such terms and conditions is outweighed by their cost. Thus, there are statutory time limitations on USDA contracts for supplying and mailing seed packets,[90] limitations on military contracts for property and services,[91] limitations on conflicts of interest in certain research contracts,[92] preferences for concessionaires under prior contracts with the Secretary of the Interior,[93] mandatory elements for certain historic preservation grants,[94] various mandatory provisions in highway construction contracts,[95] limits on the amount the Veterans Administration may pay for care in a state home,[96] and time limitations on the length of public utility contracts[97] and the completion of railroads on public lands.[98]

Many of these limitations pertain to wages and working conditions for employees of those who contract with the government. In this vein there are prevailing wage rate and hiring preferences in certain contracts and grants relating to Indians,[99] prevailing wage rate requirements in pollution prevention grants,[100] in the conversion of leased postal facilities,[101] and in various Housing and Urban Development contracts.[102] Hours of labor on public works are also limited,[103] and the use of convict labor is prohibited in connection with Postal Service equipment and supplies.[104]

A variety of statutory limitations also restrict agency discretion in the area of government loans. There are limitations on persons eligible for Department of Agriculture real estate loans, on their purposes and terms,[105] and on persons eligible for operating

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90. 7 U.S.C. § 416 (1982).
91. 10 U.S.C. §§ 2304, 2306 (1982).
92. 15 U.S.C. § 789 (1982).
93. 16 U.S.C. § 20(d) (1982).
94. *Id.* § 560.
95. 23 U.S.C. §§ 113, 114, 127, 131, 136, 154 (1982).
96. 38 U.S.C. § 1820(b) (1982).
97. 40 U.S.C. §§ 327-32 (1982).
98. 43 U.S.C. §§ 942-45 (1982).
99. 25 U.S.C. §§ 450(e), 1612(b)(1) (1982).
100. 33 U.S.C. § 1372 (1982).
101. 39 U.S.C. § 410(d) (1982).
102. 42 U.S.C. § 3310 (1982).
103. 40 U.S.C. §§ 327-32 (1982).
104. 39 U.S.C. § 2201 (1982).
105. 7 U.S.C. §§ 1922-25 (1982).

loans[106] as well as emergency loans.[107] Similarly, loans under the Export-Import Act,[108] to countries found to violate human rights,[109] for education[110] and homes by the Veterans Administration,[111] and for urban renewal[112] are subject to statutory limitations on agency discretion.

Many of the statutory barriers just discussed have obvious impact on individual persons, but there are some of an even more direct and personal nature. There are those which affect government employees within the armed services in the form of mandatory retirement ages for certain members of the military.[113] Outside the military one statute precludes appointment to certain Veterans Administration medical positions unless the person is proficient in English.[114] In the case of immigration controls there are statutory limitations on the number of immigrant visas which may be issued.[115]

The survey also revealed a number of statutory barriers which do not lend to broad categorization or generalization. One finds, for example, various limitations on the powers of the Department of Agriculture, including provisions for mandatory retention of officially inspected grain samples,[116] and limitations on the use of cooperative extension funds.[117] There are limits on the outstanding bonds and notes of the Commodity Credit Corporation,[118] on when professional football games may be televised,[119] on the number of governing bodies the United States Olympic Committee is allowed to recognize per sport,[120] and on postal rates for certain articles which may not vary with distance.[121] Others are mandatory discriminating duties on goods imported in non-United States ships,[122] mandatory presumptions under the Black Lung Benefits

106. *Id.* §§ 1941-43.
107. *Id.* § 1961.
108. 12 U.S.C. § 635 (1982).
109. 22 U.S.C. § 262(f) (1982).
110. 38 U.S.C. §§ 1686, 1998 (1982).
111. *Id.* § 1801; 42 U.S.C. § 1477 (1982).
112. *Id.* §§ 1451, 1455, 1459 (1982).
113. 10 U.S.C. §§ 1164, 3883, 3885-86 (1982).
114. 38 U.S.C. § 4105(c) (1982).
115. 8 U.S.C. §§ 1151-52, 1159 (1982).
116. 7 U.S.C. § 87(a) (1982).
117. *Id.* § 345.
118. 15 U.S.C. § 713(a) (1982).
119. *Id.* § 1293.
120. 36 U.S.C. § 391 (1982).
121. 39 U.S.C. § 3683 (1982).
122. 19 U.S.C. § 128 (1982).

Act,[123] and limitations on the power of the Secretary of Transportation to approve certain projects.[124]

C. *Some Observations on the Illustrative Varieties*

In addition to the relative rarity of statutory barriers to cost/benefit analysis,[125] a candid appraisal of these statutes also indicates that as a group they are generally obscure. This is not to suggest that on an individual basis they are unimportant. Yet in the grand sweep of what Congress and its delegatees, the agencies, are about, the statutory barrier has only a limited and minor role.

Nevertheless, it does appear that on those occasions when Congress does elect to create a statutory barrier to cost/benefit analysis, rather than to delegate that authority to an administrative agency, it is most likely to do so in the context of governmental control of business activities. Beyond that, it is difficult to discern any common threads.

The illustrative varieties as a whole also demonstrate the divergence between cost/benefit analysis as perceived by the economist and the lawyer. The economist is likely to view these limitations on discretion as constraints and thus barriers. The lawyer, in contrast, is likely to view many of them as cases of specificity in congressional action, often in areas which one would not consider appropriate candidates for cost/benefit analysis. Yet the economist's view of the role and potential of this method of decision making is much more expansive, and he is likely to view the specificity of the statute as a constraint which reflects a prior, perhaps crude and perhaps unintended weighing of costs and benefits in the design of the statute itself. What the statute does is confine the alternatives which true and full cost/benefit analysis would consider.

III. Case Studies of Some Specific Statutory Barriers—The Need for Retention or Change

The following portion of this article examines a few of the illustrative varieties in detail. The seven were selected with an eye to their importance in some instances and in others their representation of different types of statutory barriers designed to achieve different objectives. Most, it will be noted, are drawn from the area of governmental control of business activities. The seven concern oc-

123. 30 U.S.C. § 921(b) (1982).
124. 49 U.S.C. § 1653(f) (1982).
125. *See supra* part II.A.

cupational safety and health, food safety, control of toxic substances, mine closure, commodity marketing quotas, prevailing wage rates in government contracts and grants and transport of explosive materials.

The purpose of these case studies is to consider the meaning and impact of each statutory barrier in the context of the desirability of retention or change. If they in fact serve useful purposes without unintended or unduly burdensome consequences, there is no need for change. On the other hand, if the conclusion is to the contrary, perhaps the barrier merits relaxation or abandonment. The thought is that the case studies may give some indication of whether statutory barriers to cost/benefit analysis are generally useful and desirable, and may, in addition, provide insight concerning what constitutes a true statutory barrier.

A. *Occupational Safety and Health*

The Occupational Safety and Health Act of 1970 placed significant administrative responsibilities on the Secretary of Labor to pursue the objective of a safe workplace with an attendant reduction in injury and illness on the job. One of the means employed by Congress in pursuit of this objective was the delegation to the Secretary of the authority "to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce . . . ."[126]

Section 655(b) of the Act provides the Secretary discretionary authority to adopt such standards by rule when he "determines that a rule should be promulgated in order to serve the objectives"[127] of the Act. The Secretary's task in developing certain occupational and health standards is complicated, however, by the provision that:

> The Secretary, 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. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the

126. 29 U.S.C. § 651(b)(3) (1982).
127. *Id.* § 655(b)(1).

> latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.[128]

This special attention given toxic materials and harmful physical agents in the workplace was motivated in part by recognition of their increasing use in the workplace. It was estimated that every twenty minutes a new and potentially toxic chemical was introduced.[129]

As a statutory barrier to cost/benefit analysis this section is an anomaly. As indicated in the Senate Report,

> [t]he committee intends that standards promulgated under section 6(b) shall represent feasible requirements, which, where appropriate, shall be based on research, experiments, demonstrations, past experience and the latest available scientific data. Such standards should be directed at assuring, so far as possible, that no employee will suffer impaired health or functional capacity, or diminished life expectancy, by reason of exposure to hazards involved, even though such exposure may be over the period of his entire working life.[130]

This suggests the possibility that the highest priority must be given matters of worker safety. On the other hand, there is language in the statute as well as the Senate Report suggesting that feasibility provides a countervailing consideration which opens opportunities for cost/benefit analysis.

The United States Supreme Court has considered the meaning of this statute in recent years. Its decisions provide guidance on the issue of what is required to create an effective statutory barrier.

Industrial Union Department v. American Petroleum Institute[131] concerned the Occupational Safety and Health Administration's (OSHA) standard limiting occupational exposure to the carcinogen benzene. The issue was whether a showing that the substance causes cancer at high exposure levels "is a sufficient basis for a standard that places the most stringent limitation on exposure to benzene that is technologically and economically possible."[132] The agency position was that the statute required this result and that it was under no obligation to engage in cost/benefit

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128. *Id.* § 655(b)(5).
129. S. REP. No. 91-1282, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5778.
130. *Id.* at 5183-84.
131. 448 U.S. 607 (1980).
132. *Id.* at 611.

analysis.[133] The Court of Appeals for the Fifth Circuit disagreed. It concluded that the benefits of the regulation had to bear a reasonable relationship to its costs and that OSHA had failed to demonstrate this.[134]

The judgment was affirmed in the Supreme Court. A plurality did not directly resolve the cost/benefit analysis issue. It found that there is a threshold determination which must be and had not been made. What the Secretary must do first is determine whether issuance of a standard is necessary and appropriate to deal with the health question at issue. Only then would it be necessary to determine whether the statute

> requires him to select the most protective standard he can consistent with economic and technological feasibility, or whether, as respondents argue, the benefits of the regulation must be commensurate with the costs of its implementation. Because the Secretary did not make the required threshold finding in this case, we have no occasion to determine whether costs must be weighed against benefits in an appropriate case.[135]

The plurality did, however, give some indication of its inclination to conclude that the respondents' position was consistent with congressional intent.[136] And Justice Powell, concurring in part, was willing to answer the question which the plurality reserved, rejecting OSHA's claim that once the threshold determination was made, cost/benefit analysis need not be employed.[137]

Justices Blackmun, Brennan and White joined Justice Marshall in dissent. They found the language of the statute and the intent of Congress clear and noted that "no cost-benefit analysis is referred to at any point in the statute or its legislative history."[138] The feasibility standard was only "to prevent the Secretary from materially harming the financial condition of regulated industries in order to eliminate risks of impairment,"[139] although they also felt it was not necessary to decide this definitively.[140]

The Benzene case, thus, left open the basic issues concerning the role, if any, for cost/benefit analysis under section 655(b). The Cot-

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133. American Petroleum Inst. v. OSHA, 581 F.2d 493, 502 (5th Cir. 1978).

134. *Id.* at 502-05.

135. Industrial Union Dep't v. American Petroleum Inst., 448 U.S. at 640.

136. *Id.* at 642.

137. *Id.* at 668-69. See *infra* Part IV.B for a discussion of the concurring opinion of Justice Rehnquist on grounds of impermissible delegation of legislative power.

138. *Id.* at 719.

139. *Id.* at 720.

140. *Id.* at 720-21.

ton Dust case[141] in 1981 resolved the matter.

The Court focused on the "to the extent feasible" language in the statute and concluded that "cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is."[142] Feasibility analysis requires an assessment and conclusion that the standard is "capable of being done."[143] Under this interpretation the statute did constitute a barrier to cost/benefit analysis, but by virtue of a statutory requirement for a different and lesser kind of analysis.

These two cases are instructive on the subject of statutory barriers in a number of important respects. At the most fundamental level they demonstrate that if Congress desires to create a statutory barrier to application of principles of cost/benefit analysis, it must do so with considerable specificity and above all, clarity. To the extent that ambiguity in the statutory language and even the legislative history can be reduced or eliminated, the likelihood of effectuating the will of Congress will increase.

The alternative is substantial risk of what occurred in the Benzene and Cotton Dust cases. In each there was a supportive agency which believed it was required to act without cost/benefit analysis, there was an affected industry which believed the contrary, and the judiciary was in substantial disagreement and disarray on the issue of just what Congress intended. Justice Marshall in dissent in the Benzene case charged the plurality with ignoring "the plain meaning of the Occupational and Health Act of 1970 in order to bring the authority of the Secretary of Labor in line with the plurality's own views of proper regulatory policy."[144] Obviously there is basis for disagreement on the legitimacy of this charge, but unquestionably a more precise statute would have materially reduced the risk of judicial manipulation of the kind alleged.

Arguably, the principal loss attributable to the uncertainty surrounding section 655(b)(1) was time and resources until the Supreme Court resolved the issue in the Cotton Dust case by finding that consideration of feasibility and cost/benefit analysis were not synonymous and that Congress did not require the latter. But the question of what the Court would have done if the agency had interpreted the statute as requiring cost/benefit analysis presents an intriguing hypothetical. Certainly the probability is greater that

141. American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981).
142. *Id.* at 509.
143. *Id.*
144. Industrial Union Dep't v. American Petroleum Inst., 448 U.S. at 688.

the Court would have supported the agency interpretation, and if so, this accentuates the point that specificity and clarity are desirable in the design of statutory barriers.

The Cotton Dust case also raises another intriguing aspect of the issue of the application of principles of cost/benefit analysis. Mandatory use of cost/benefit analysis must be as expressly required as a barrier to use. The Court indicated that Congress must require cost/benefit analysis if an agency is to be required to employ it: "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute. . . . Congress uses specific language when intending that an agency engage in cost-benefit analysis."[145] This void may be filled by other than congressional action. This is what Executive Order 12291 accomplished with respect to major rules, although the legality of this approach has been questioned.[146]

The implication is that if Congress does not require cost/benefit analysis, an agency is not inclined to employ it and the action does not pertain to a major rule subject to the Executive Order, the agency will not be forced to do so. If this is important to Congress, it should anticipate this and deal with the matter by express statutory requirement.

From the cases one discerns that the true statutory barrier to cost/benefit analysis, in contrast to the economist's perception, requires more than mere specificity of delegation. Although specificity may restrict the scope of cost/benefit analysis in precluding consideration of some otherwise available alternatives, there would appear to be a remaining range of alternatives for further and full application of the principles if an agency is so inclined. Thus specificity of delegation alone presents only a partial barrier. A full and true barrier would seem to require a clear expression of legislative intent, preferably on the face of the statute and at a minimum in its legislative history, before the courts will find that cost/benefit analysis is precluded.

B. *Food Safety*

Perhaps the most celebrated example of the statutory barrier to the application of principles of cost/benefit analysis is found in the

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145. American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. at 510.

146. *See, e.g.*, Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981).

Federal Food, Drug, and Cosmetic Act.[147] The Delaney Clause, as it is commonly known, is included in three separate provisions of the Act which concern food additives, animal drugs and color additives.[148] The Clause as it appears in the food additives provision is representative of the others; it provides with regard to issuance of food additive regulations that:

> No such regulation shall issue if a fair evaluation of the data before the secretary
> (A) fails to establish that the proposed use of the food additive, under the conditions of use to be specified in the regulation, will be safe: Provided, that no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal . . . .[149]

The purpose of the clause is clear. It precludes the approval of food additives shown to induce cancer in humans or animals. Furthermore, the courts have recognized the absolute nature of the prohibition. This is unlike some other important areas of regulatory policy within the Food and Drug Administration's (FDA) control. As the Court of Appeals for the District of Columbia Circuit observed in a case involving the animal drug, DES:

> Outside the *per se* rule of the Delaney Clause, the typical issue for the FDA is not the absolute safety of a drug. Most drugs are unsafe in some degree. Rather, the issue for the FDA is whether to allow sale of the drug, usually under specific restrictions. Resolution of this issue inevitably means calculating whether the benefits which the drug produces outweigh the costs of its restricted use.[150]

Others have concluded similarly that the strictures of the Delaney Clause are absolute. As Dr. Charles Black noted: "In short, the policy precludes the rational weighing of cost against benefit in the contemplation of any particular substance as a food additive."[151]

An absolutist view of the Delaney Clause merits some refinement. Peter Hutt and Richard Merrill have noted that although the Clause gives equal weight to animal and human studies and

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147. 21 U.S.C. §§ 301-92 (1982).

148. *Id.* §§ 348(c)(3)(a), 360b(d)(1)(H), 376(b)(5)(B).

149. *Id.* § 348(c)(3)(a).

150. Hess & Clark, Div. of Rhodia, Inc. v. FDA, 495 F.2d 975, 993-94 (D.C. Cir. 1974). *See also* Bell v. Goddard, 366 F.2d 177, 181 (7th Cir. 1966) (Delaney Clause "is generally intended to prohibit the use of any additives which under any conditions induce cancer in any strain of test animal.").

151. Blank, *The Delaney Clause: Technical Naivete and Scientific Advocacy in the Formulation of Public Health Policies*, 62 CALIF. L. REV. 1084, 1111 (1984).

allows no opportunity to take the size of dose into consideration, certain statutory terms in the Clause are undefined and thus leave room for scientific judgment. Neither "induce," "cancer," nor "tests appropriate" are defined. They believe this means that "scientific judgment has played, and apparently was intended to play, an important role in the policy's application."[152] The result under this analysis is flexibility and discretion in determining whether the conditions of Delaney are met and none once it is determined they are.[153]

Indeed, Peter Hutt has written that much of the controversy surrounding the Delaney Clause is based on false premises. He suggests that it was never intended to be a statement of scientific principle, but rather one of public policy, that the public policy reflected in the Clause is in accord with the public policy of the food safety laws generally and that the FDA's position on food additives would be the same even without the Clause.[154] Hutt concludes that "the Delaney Clause is utterly irrelevant to current food safety policy . . . ."[155] The implication is that other food safety policies reflected in the Act would require actions comparable to those which the FDA has taken under the Delaney Clause.

The Hutt view is supported by the FDA's own position in its regulatory actions with respect to the artificial sweetener saccharin. In proposing to remove saccharin from food usage, the Commissioner emphasized that his actions were not based exclusively on the Delaney Clause, notwithstanding press reports to the contrary. He noted that the same result would be required under the Act's general safety requirements for food additives and that under these the FDA "is not empowered to take into account the asserted benefits of any food additive . . . ."[156] If so, the significance is that the statutory barriers in the food safety law are not confined to the Delaney Clause.

Nevertheless, the prevailing view and common denominator in these various positions seems to be that the Delaney Clause does serve as a statutory barrier to application of principles of cost/benefit analysis. And, whatever its perceived nature in the eyes of others, congressional behavior suggests that it considers it such. In

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152. R. MERRILL & P. HUTT, FOOD AND DRUG LAW-CASES AND MATERIALS 78 (1980).

153. *Id.*

154. Hutt, *Public Policy Issues in Regulating Carcinogens in Food*, 33 FOOD DRUG COSM. L.J. 541, 542 (1978).

155. *Id.* at 542.

156. 42 Fed. Reg. 19996, 19999 (April 15, 1977).

1977, Congress found it necessary to move to prevent the impending FDA ban on saccharin. It was common knowledge that Congress was motivated in substantial measure by public perceptions of the benefits and utility of the artificial sweetener.[157] Even though Congress did not eliminate the statutory barrier, its moratorium and study decision had the effect of deflecting and deferring the impact of the Delaney Clause.[158] In this manner, benefits were taken into account.

Whether the Delaney Clause is viewed as a statement of scientific policy or a statement of public policy, it does seem to be immaterial from the perspective of the desirability of statutory barriers to cost/benefit analysis. In either case, the consequences appear to be the same. The Delaney Clause was based on the state of scientific knowledge and testing capabilities at the various times it was incorporated in the food additives, animal drug and color additives laws. At that time, for example, saccharin was considered generally recognized as safe and not even a probable candidate for application of the Delaney Clause. Later studies, however, demonstrated saccharin's capacity for inducing cancer in laboratory animals. The issue was drawn, and the agency could not consider its benefits in light of its costs. In general terms Congress had done this in the Delaney Clause without having saccharin in mind.

With this history in mind, a statutory barrier in an area requiring considerable expertise and state of the art medical and scientific judgments seems undesirable. This is aggravated when medicine and science are constantly expanding and improving in their ability to measure and predict the effects and consequences of use of substances in food.

Furthermore, the lessons of the Benzene and Cotton Dust cases discussed in the preceding part are highlighted by the Delaney Clause and its history. The Delaney Clause is an example of a true statutory barrier to cost/benefit analysis. It is characterized by much more than specificity of congressional action. On its face the Clause manifests an intent to preclude cost/benefit analysis, yet it falls short of specific and express preclusion. In that respect it may seem similar to numerous other specific limitations on agency discretion, which constitute at most partial statutory barriers. What does set the Delaney Clause apart is the language of the statute,

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157. Saccharin Study and Labeling Act, Pub. L. 95-203, 91 Stat. 1452 (1977).

158. Act of June 17, 1980, Pub. L. 96-273, 94 Stat. 536; Act of Aug. 14, 1981, Pub. L. 97-42, 95 Stat. 946.

buttressed by a legislative history and subsequent judicial and administrative record which makes clear that cost/benefit analysis is not to be employed in certain matters of food safety.

C. *Control of Toxic Substances*

The Toxic Substances Control Act was enacted in 1976.[159] Its fundamental purpose was to regulate chemical substances and mixtures which present unreasonable risks of harm to health or the environment.[160]

Notwithstanding the public protection goals of the Act, Congress was cognizant of the costs in dealing effectively with toxic substances. Thus, in its statement of policy Congress declared that

> authority over chemical substances and mixtures should be exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation while fulfilling the primary purpose of this chapter to assure that such innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment.
> (c) Intent of Congress.—It is the intent of Congress that the Administrator [of the Environmental Protection Agency (EPA)] shall carry out this chapter in a reasonable and prudent manner, and that the Administrator shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this chapter.[161]

This congressional expression of policy and intent represents a sympathetic posture toward the costs as well as the benefits in the regulation of toxic substances. Many examples of the necessity and desirability of administrative weighing of costs and benefits are included in the statute.

An important exception to this basic attitude and approach is the statutory provision dealing with polychlorinated biphenyls (PCBs):

> (1) Within six months after January 1, 1977, the Administrator shall promulgate rules to—
> (A) prescribe methods for the disposal of polychlorinated biphenyls,
> (B) require polychlorinated biphenyls to be marked with clear and adequate warnings, and instructions with respect to their processing, distribution in commerce, use, or disposal or with respect to any combination of such activities.

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159. Act of Oct. 11, 1976, Pub. L. 94-469, 90 Stat. 2003, *codified at* 15 U.S.C. §§ 2601-29 (1982).

160. 15 U.S.C. § 2601(a) (1982) (findings). *See* S. REP. No. 94-698, 91st Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 4491.

161. 15 U.S.C. §§ 2601(b)(3), (c) (1982).

> Requirements prescribed by rules under this paragraph shall be consistent with the requirements of paragraphs (2) and (3).
> (2)(A) Except as provided under subparagraph (B), effective one year after January 1, 1977, no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.
> (B) The Administrator may by rule authorize the manufacture, processing, distribution in commerce or use . . . of any polychlorinated biphenyl in a manner other than in a totally enclosed manner if the Administrator finds that such manufacture, processing, distribution in commerce, or use . . . will not present an unreasonable risk of injury to health or the environment.
> (C) For the purposes of this paragraph, the term "totally enclosed manner" means any manner which will ensure that any exposure of human beings or the environment to a polychlorinated biphenyl will be insignificant as determined by the Administrator by rule.
> (3)(A) Except as provided in subparagraphs (B) and (C)—
> (i) no person may manufacture any polychlorinated biphenyl after two years after January 1, 1977, and
> (ii) no person may process or distribute in commerce any polychlorinated biphenyl after two and one-half years after such date.
> (B) Any person may petition the Administrator for an exemption from the requirements of subparagraph (A), and the Administrator may grant by rule such exemption if the Administrator finds that—
> (i) an unreasonable risk of injury to health or environment would not result, and
> (ii) good faith efforts have been made to develop a chemical substance which does not present an unreasonable risk of injury to health or the environment and which may be substituted for such polychlorinated biphenyl.
> An exemption granted under this subparagraph shall be subject to such terms and conditions as the Administrator may prescribe and shall be in effect for such period (but not more than one year from the date it is granted) as the Administrator may prescribe.
> (C) Subparagraph (A) shall not apply to the distribution in commerce of any polychlorinated biphenyl if such polychlorinated biphenyl was sold for purposes other than resale before two and one-half years after October 11, 1976.[162]

Although the statute does confer discretion in several important respects, the fundamental and most important application of principles of cost/benefit analysis has been made by Congress. It and not its delegate determined that PCBs lack sufficient merit, represent sufficient risk, and thus justify drastic governmental action. What this statute "imposes [is] a statutory ban on the manufacture, processing or distribution of 'polychlorinated biphenyls' ('PCBs'), subject to limited administrative exemption . . . ."[163]

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162. *Id.* § 2605(e)(1),(2),(3).
163. Dow Chem. Corp. v. Costle, 484 F. Supp. 101, 102 (D. Del. 1980).

An interesting characteristic of this statutory barrier is its "rolling" nature. Congress did not impose an immediate total ban of PCBs. Instead it prescribed a ban of increasing severity which was to unfold over a two and one-half year period, and it was in the unfolding of the ban that the Administrator was given some discretionary authority to relieve industry from its impact. The objective was nevertheless clear. As Congressman Broyhill observed in debate on this legislation, the statute

> sets out a timetable for regulating PCB's culminating in a ban on the processing or distribution in commerce of PCB's 2½ years after the effective date of this act. The purpose of this ban is to preclude the manufacture, processing or distribution in commerce of new PCB's or new equipment containing PCB's in 2½ years after the effective date of this act.[164]

Furthermore, the statute left much to the Administrator beyond implementation of the rolling ban. The widespread use and persistent nature of PCBs left much to be done in the future with respect to PCBs already in existence. The result was extensive administrative regulations pertaining to PCBs.[165]

Not surprisingly, some of these regulations came under attack as the Administrator attempted to be reasonable and practical, as a result of either his own inclinations, industry pressure or both. The result was a test of the efficacy of the statutory barriers to cost/benefit analysis in connection with the PCB problem.

Not long after their promulgation the Environmental Defense Fund (EDF) instituted a proceeding for judicial review of various provisions of the EPA's rules concerning PCBs. Specifically, EDF challenged the validity of EPA's classification of certain uses of PCBs as "totally enclosed," its exclusion from regulatory control of materials containing PCBs in concentrations of fifty parts per million or less, and its authorization of continuation of certain uses not totally enclosed.[166]

With respect to the issue last mentioned, EDF contended that the Administrator had employed the wrong standard in authorizing certain non-totally enclosed uses and making a determination that these uses would not involve unreasonable risk to health or the environment.[167] The court concluded that it was reasonable

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164. 122 CONG. REC. 11,344 (1976).

165. *See generally* 40 C.F.R. §§ 761.1-761.185 (1983). The regulations address such matters as definitions, prohibitions, authorizations, markings, storage and disposal of PCBs.

166. Environmental Defense Fund, Inc. v. EPA, 636 F.2d 1267, 1269 (D.C. Cir. 1980).

167. *Id.* at 1275. See 15 U.S.C. § 2605(c)(1) (1982), which permits "reasonably ascertainable economic consequences . . . after consideration of the effect on the national econ-

and permissible for the Administrator to bring to bear the standard for risk assessment generally applicable to other chemical substances under the Act. The latter affords an opportunity for cost/benefit analysis, and the court noted that "this formulation, which considers a broad range of benefits and costs of the ban and use authorization, is entirely consistent with the . . . requirement that the Administrator consider the economic and social impact of his actions."[168]

The court was not speaking of the PCBs provision in its entirety. The opportunity for cost/benefit recognized here was confined to a limited area in which it was reasonable to conclude that Congress had intended that economic consequences be taken into account. The decision in other respects established the true strength of the statutory barriers in this provision.

When the court turned its attention to the fifty parts per million line which the Administrator had drawn for regulatory purposes, it was necessary to deal with the statutory language which addressed "any polychlorinated biphenyl." The EPA had selected this line for enforcement convenience and due to its fear of adverse impact on commercial products and "municipal sludges."[169] Although the court was reluctant to take the language literally "to require EPA to regulate every molecule of PCB . . . absent support in the legislative history,"[170] it did conclude that Congress did intend to control non-ambient sources of PCBs. In this light and as to these sources, the fifty parts per million line was impermissible. Congress had expressed its will that even "inadvertent commercial production of PCBs . . . be regulated,"[171] and the agency had no choice in the matter. The statutory barrier to agency application of principles of cost/benefit analysis was to be honored, although Congress required judicial assistance to assure that its intent was realized.

The provisions concerning PCBs in the Toxic Substances Control Act in most respects represent a statutory barrier to application of principles of cost/benefit analysis in the form of a ban. The PCB problem was perceived by Congress as too obvious, too immediate and too important to leave to the agency.

Yet the terms of the statute illustrate the difficulty of imposing

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omy, small business, [and] technological innovation . . ." to be taken into account.

168. 636 F.2d at 1276-77.

169. *Id.* at 1280.

170. *Id.* at 1281.

171. *Id.* at 1282. The court also found that the evidence in the record was insufficient to support the classification of certain uses as totally enclosed. *Id.* at 1284-86.

an immediate ban. The rolling nature of the PCBs provisions demonstrates that immediate imposition of a ban, especially in a case involving a longstanding and long-used substance, may be impossible. The costs of the ban must be considered no matter how beneficial the outcome. For this reason the phased-in ban is not surprising. It simply reflects the congressional inclination to be realistic and spread at least some of the costs into the future. Consequently, Congress found it necessary to give some discretion to the agency to oversee this aspect of the ban. But the significant point is that the terms of the ban and the corresponding weighing of costs and benefits were established by Congress and not the agency.

The PCBs provision also illustrates that a statutory barrier may be undesirable from the perspective of Congress in that failure is more conspicuous. If an agency has authority to engage in cost/benefit analysis, it may not be as obvious that the stated objective has not been or never will be reached. And, when failure is perceived in the efficacy of a statutory barrier, Congress must shoulder more of the blame than is customary when agencies are criticized. As the court in the case just discussed noted:

> We feel constrained to add one final note to emphasize our concern in this case. Human beings have finally come to recognize that they must eliminate or control life threatening chemicals, such as PCBs, if the miracle of life is to continue and if earth is to remain a living planet. This is precisely what Congress sought to do when it enacted section 6(c) of the Toxic Substances Control Act. Yet, as we find that forty-six months after the effective date of an act designed to either totally ban or closely control the use of PCBs, 99% of the PCBs that were in use when the Act was passed are still in use in the United States. With information such as this in hand, timid souls have good reason to question the prospects for our continued survival, and cynics have just cause to sneer at the effectiveness of governmental regulation.[172]

It seems difficult to attribute this only to agency ineptitude and to resolve it by scheduling oversight hearings. Congress itself struck the balance between costs and benefits in the statute, and certainly it sided significantly with health and the environment as to PCBs. But if critics deem its efforts inadequate, Congress must bear the primary responsibility and answer the critics. This may be desirable or undesirable, depending on one's perspective and position of the moment.

The treatment of PCBs under the Toxic Substances Control Act represents an absolute statutory barrier as to the ban and, as

172. *Id.* at 1286-87.

noted, a "rolling" barrier in its implementation. As in the case of the Delaney Clause, the fact of the barrier's existence cannot be attributed exclusively to the specificity of the statute. One also must look to the other provisions in the statute which intentionally require cost/benefit analysis in other substantive settings.

D. *Mine Closure*

By nature mines are dangerous workplaces; it is thus not surprising that congressional initiative, public pressure, or both have addressed the matter of mine safety. The most obvious and drastic course of action with respect to an unsafe mine is to close it, permanently or until such time as the unsafe conditions are rectified. In the history of mine controls in this country, Congress has considered and in various ways implemented these alternatives. In the process, it has considered and sometimes employed the statutory barrier to cost/benefit analysis by agencies entrusted with overseeing mine safety.

The particular statutory barriers presented in this part provide an opportunity to observe Congress experimenting with the statutory barrier as a means of administrative control. The record indicates the difficulty of controlling administrative discretion even in the presence of a statutory barrier and suggests that the mere existence of an agency constitutes a grant of considerable discretionary power which, as a practical matter, is difficult if not impossible to control.

Congressional interest in mine safety and regulation is not new. A mining bill was proposed as early as 1865, but little was done until the early twentieth century when a series of mine disasters led to the establishment of the Bureau of Mines in 1910.[173] In 1966, Congress enacted the Federal Metal and Nonmetallic Mine Safety Act; it was motivated by its concern for safety in the workplace: "The number and severity of the injuries experienced each year by persons employed in the extractive industries should be alarming to an America that prides itself on its . . . concern for the welfare of its citizens."[174]

The 1966 Act contained a provision illustrative of the statutory barriers. Section 727(a) provided:

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173. *See* S. REP. No. 95-181, 95th Cong., 1st Sess. 1 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3401.

174. S. REP. No. 1296, 89th Cong., 2d Sess. 5 (1966), *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2846, 2850.

> If, upon any inspection or investigation of a mine which is subject to this chapter, an authorized representative of the Secretary finds that conditions or practices in such mine are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated, such representative shall determine the extent of the area of such mine throughout which the danger exists, and thereupon issue an order requiring the operator of such mine to cause all persons, except the following persons [as identified in sec. 727(a)(1)] whose presence in such area is necessary to eliminate the danger described in such order, to be withdrawn from, and to be debarred from, entering such area.[175]

The "Secretary" in this instance was the Secretary of the Interior.[176]

What Congress sought to accomplish with this provision was a mandate for mine closure under certain prescribed circumstances. The agency necessarily was granted the task of determining when conditions could reasonably be expected to cause death or serious physical harm and whether these conditions existed only in part or all of a mine, but the statute conferred no express discretion to weigh the costs of closure versus the benefits of safety. The administrative function delegated was not one of making rules to deal with mine safety under a broad delegation of authority; rather it was one of inspection to identify specified dangers and enforcement.

In 1977, section 727(a) and the remainder of the 1966 Act were repealed by the Federal Mine Safety and Health Amendments Act which themselves represented amendments to the Federal Coal Mine Health and Safety Act of 1969.[177] In practice, the Metal and Nonmetallic Mine Safety Act had come to be viewed as more advisory in nature; its ineffectiveness was noted by the Senate which determined that in 1975, nine years after its enactment, there had not been one appeal from an adverse determination of the Secretary.[178] Obviously, the affected industry had not been particularly disenchanted with enforcement of the 1966 Act.

The Senate concluded that in part this situation was attributa-

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175. Act of Sept. 16, 1966, Pub. L. No. 89-577, § 8(a), 80 Stat. 775, *repealed by* Act of Nov. 9, 1977, Pub. L. No. 95-164, 91 Stat. 1322.

176. *Id.* § 721(d).

177. Act of Nov. 9, 1977, Pub. L. No. 95-164, 91 Stat. 1322, *codified at* 30 U.S.C. §§ 801-78 (1982). The Federal Coal Mine Health and Safety Act was enacted in 1969 and in some measure reflected disenchantment with the efficacy of the Metal and Nonmetallic Mine Safety Act. *See* Act of 1969, Pub. L. No. 91-173, 83 Stat. 742-43.

178. S. REP. No. 95-181, 95th Cong., 1st Sess. 6 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3401, 3406.

ble to a conflict inherent in assigning responsibility for mine safety to the Secretary of the Interior. The desire to increase production was in tension with the need to interrupt production for safety reasons. Thus, one of the changes under the 1977 Act was to transfer mine safety to the jurisdiction of the Secretary of Labor because "no conflict could result if the responsibility for enforcing and administering the mine safety and health law was assigned to the Department of Labor since that department has as its sole duty the protection of workers and insuring of safe and healthful working conditions."[179]

The role previously performed by section 727(a) was assigned to section 814 under the 1977 Act. The relevant portions of the latter statute are not without statutory barriers to application of principles of cost/benefit analysis, although their overall impact suggests less specificity of congressional action than section 727(a) and greater reliance on the presumed objectivity and independence of the Secretary of Labor. These relevant subsections of the new provision generally encompass what section 727(a) once did.[180] There

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179. S. REP. No. 95-181, 95th Cong., 1st Sess. 5 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3401, 3405.

180. *See* 30 U.S.C. §§ 814(a), (b), (d)(1) (1982):

(a) *Issuance and form of citations; prompt issuance*

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine . . . has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation . . . he shall, with reasonable promptness, issue a citation to the operator. . . . [T]he citation shall fix a reasonable time for abatement of the violation . . . .

(b) *Follow-up inspections; findings*

If, upon any follow-up inspection . . . an authorized representative of the Secretary finds (1) that a violation described in a citation . . . has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agency to immediately cause all persons, except those referred to in subsection (c) [comparable to section 727(a)(1) of the 1966 Act and is confined to persons necessary for dealing with the conditions to be abated] to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(d) *Findings of violations; withdrawal order*

(1) If, upon any inspection . . . an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator . . . . If during the same inspection or any sub-

is little doubt that the new provisions afford greater administrative discretion than the 1966 Act. Close inspection, however, of the statute reveals that significant statutory barriers remain.

Section 814(a) provides for citation upon finding of a violation with a reasonable time for abatement, and section 814(b) provides for closure of the mine if on follow-up inspection the violation in the original citation has not been totally abated. The latter provision clearly provides no opportunity for inspectional cost/benefit analysis in the course of a follow-up inspection; however, section 814(a) might be taken as precluding closure of a mine during an initial inspection, no matter how dangerous and life-threatening the violation—that a reasonable time must always be allowed for abatement and more than a moment is needed to be reasonable. A close reading of section 814(d)(1) suggests the contrary. The manner in which the term "imminent danger" is employed in that provision suggests that even on an initial inspection a determination of imminent danger requires immediate closure of a mine. There is no opportunity for the inspector to engage in cost/benefit analysis just as there was none under the 1966 Act.

The difficulty with this interpretation is that until the 1977 amendments, section 814(a) included an "imminent danger" standard for mine closure.[181] This was deleted in 1977. Perhaps the continued inclusion of this language in section 814(d)(1) was more oversight than a continuation of the policy only with respect to withdrawal orders under that section. But it seems likely that the "reasonable time" to be allowed under section 814(a) for abatement could be as little as a moment when mine roofing supports are on the verge of collapse. If so, the absence of the "imminent danger" standard may be of little consequence, although determining reasonableness carries with it a degree of discretion. It is for that reason somewhat less a statutory barrier.

Section 814(d)(1) also contains its own version of a statutory barrier, and even during an initial inspection the inspector may

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sequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative . . . determines that such violation has been abated.

Id.

181. Act of December 30, 1969, Pub. L. No. 91-173, Title 1, § 104, 83 Stat. 742, 750.

have no choice but to issue a withdrawal order. If he finds an unwarrantable violation which threatens safety or health, although not imminently dangerous, he must include such in the citation issued. But if during that inspection he finds another unwarrantable violation, the inspector must issue a withdrawal order. Admittedly there appears to be some discretion in determining what constitutes an "unwarrantable" violation, but there is none concerning what must be done once that finding is made. The withdrawal order must be issued and the mine closed.

It should be noted that the intensity and efficacy of the statutory barrier appear to be a function of the nature of the violation which might precipitate a withdrawal order. In an early case under the Coal Mine Health and Safety Act not involving imminent danger, the court found that the statute afforded the discretion to hold an administrative hearing before closure of a mine; otherwise the Act "would indeed face serious claims of deprival of due process."[182] In such cases, not involving imminent danger, it cannot be said that the statute constitutes a statutory barrier in the course of inspection if closure of the mine must await an administrative hearing.

In contrast, a true statutory barrier to cost/benefit analysis by the inspector would exist only if the conditions at the mine are of a magnitude sufficient to require immediate action without a prior hearing. What is required to constitute a true statutory barrier is a situation in which the inspector has no choice but to close the mine immediately.[183]

What the 1977 amendments appear to have done is reduce the clarity and efficacy of the statutory barriers to discretionary cost/benefit analysis in the course of mine inspections. But, as just discussed, the statutory barriers were not eliminated entirely. There are still those situations in which it is clear that the inspector has no alternative except to order immediate withdrawal from a mine.

Indeed, in one instance the effect of the replacement of the Metal and Nonmetallic Mine Safety Act by the 1977 amendments was to add a new statutory barrier which is as clear and unequivocal as any now in the statute. Section 814(g)(1) provides:

> If, upon any inspection or investigation . . . the Secretary or an authorized

182. Lucas v. Morton, 358 F. Supp. 900, 903 (W.D. Pa. 1973).

183. Under traditional notions of summary administrative action in emergency situations it would be permissible and consistent with due process for the hearing to take place after closure of the mine. *See, e.g.*, Sink v. Morton, 529 F.2d 601, 604 (4th Cir. 1975).

> representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 825 of this title, the Secretary or an authorized representative shall issue an order . . . which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 825 of this title.[184]

Here there is no uncertainty. The mine's immediate need for the untrained miner is not relevant. The inspector must order withdrawal from the mine.

The interesting feature of the various statutory barriers concerning mine closure is the timing of their impact. If applicable, the barrier precludes cost/benefit analysis at one of the earliest phases of the administrative process. These are not barriers limiting the agency in the course of rulemaking or adjudication of individual cases. Rather, they confine discretion to the early phase of investigation and inspection.

Furthermore, these are statutory barriers the effect of which is felt most drastically by agency operating personnel. It will not be the Secretary of Labor who will be at the mine site; it will be a line employee. Consequently, the barrier may be especially useful. It reduces uncertainty for the inspector because what is expected is often clear. It may also be useful in reducing pressure from mine operators for the inspector to engage in ad hoc cost/benefit analysis during an inspection. Opportunities for such, if they exist at all, will arise later in the administrative process and presumably at a higher level.

None of this, however, explains why Congress itself should create these barriers. The agency should be capable of doing the same. Yet when Congress creates the barrier it is more difficult to alter and the agency itself may be relieved of pressure to reach contrary results administratively. This could be the principal advantage of statutory barriers to cost/benefit analysis in connection with mine inspections.

These statutory barriers, however, are unlike those reflected in the Delaney Clause or in the Toxic Substances Control Act with respect to PCBs. The barriers here are more implicit in nature. There is nothing to indicate that Congress made a conscious decision to preclude cost/benefit analysis; rather it establishes firm guidance on what was to be done in certain situations in the course

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184. 30 U.S.C. § 814(g)(1) (1982).

of mine inspections, notwithstanding any pleas from a mine operator to "consider the costs." This does not seem to make it any less a barrier. Certainly the economist *would* consider it such, although a lawyer may not. But the mine closure provisions involve more than prosecutorial discretion. As with the Delaney Clause, which dictates that under certain defined circumstances a food additive must be banned, the mine closure provisions dictate that under certain circumstances the mine must be closed without regard to cost. Whatever discretion remains is merely that residual "discretion" to ignore the closure mandate with the hope that the abuse of discretion will not be noticed and challenged.

E. *Commodity Marketing Quotas*

The most complex and frequently amended statutory barriers to cost/benefit analysis included in these case studies are those found in the Agricultural Adjustment Act of 1938.[185] As a byproduct of this statute, terms such as "parity," "price support," "acreage allotment," and commodity "marketing quota" have become entrenched in the lexicon of American agriculture. It is not an unimportant statute.

The purpose here is to identify a few of the statutory barriers representative of the legislative approach taken in the 1938 Act, although it is worth emphasizing that throughout the Act Congress elected to specify in considerable detail just what the Secretary of Agriculture is entitled to do and how he is to do it. This is not to say that no discretion is conferred on the agency, but this statute is at the opposite end of the spectrum from those where Congress in broad terms charges an agency to deal with a matter "in the public interest, convenience and necessity."

The general intent of Congress in enacting the Agricultural Adjustment Act is reflected in its statutory declaration of policy which provides:

> It is declared to be the policy of Congress to continue the Soil Conservation and Domestic Allotment Act, as amended, for the purpose of conserving national resources, preventing the wasteful use of soil fertility, and of preserving, maintaining, and rebuilding the farm and ranch resources in the national public interest; to accomplish these purposes through the encouragement of soil-building and soil-conserving crops and practices; to assist in the marketing of agricultural commodities for domestic consumption and for export; and to regulate interstate and foreign commerce in cot-

185. *See generally* 7 U.S.C. §§ 1281-1393 (1982).

> ton, wheat, corn, tobacco, and rice to the extent necessary to provide an orderly, adequate, and balanced flow of such commodities in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas, assisting farmers to obtain, insofar as practicable, parity prices for such commodities and parity of income, and assisting consumers to obtain an adequate and steady supply of such commodities at fair prices.[186]

In its efforts to achieve its stated objectives Congress addressed each of the specified crops individually, and made specific findings concerning the effects on interstate and foreign commerce and the need for regulation. With respect to wheat it emphasized the large number of farmers producing wheat, the undesirable and harmful consequences of "abnormally excessive and abnormally deficient supplies,"[187] the inadequacy of normal market forces in avoiding these problems and thus the necessity for federal intervention, and the need for fair prices for consumers and farmers.

Under the statutory scheme for wheat the Secretary of Agriculture is empowered to declare each year that supplies are likely to be excessive in the absence of a marketing quota program and, for that reason, to institute such a program.[188] The Secretary is given the further power to proclaim a national acreage allotment for each crop of wheat based on the number of acres necessary to produce the quantity set under the national marketing quota.[189]

Section 1334 is central to the statutory scheme and addresses apportionment of the national acreage allotment for wheat. Section 1334 has been amended with remarkable frequency—some twenty-six times.[190] In its present form the statute guides the Secretary carefully through the process of allotment. It specifies that reserves are not to exceed one percent and that the allotment among the states must be based on the preceding year's allotment, subject to adjustment to assure fair and equitable apportionment.[191] The entire section and its intricacies need not be repeated here, but throughout one finds instances in which Congress instructs that an allotment must be "less by at least 20 percentum," "at least 10 percentum," "not in excess of one million acres," not "in excess of one-half of such county average ratio" and so on. The specificity and complexity are remarkable, and in each instance the effect is

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186. 7 U.S.C. § 1282 (1982).
187. *Id.* § 1331.
188. *Id.* § 1332.
189. *Id.* § 1333.
190. *See* 7 U.S.C.A. § 1334 (1973 & 1983 Supp.).
191. 7 U.S.C. § 1334(a) (1982).

to limit the discretion of the Secretary in his efforts to achieve the objectives of the Act. Each in its fashion stands as a potential barrier to cost/benefit analysis.

Section 1334 has proved, as noted, to be a provision requiring constant adjustment and "fine tuning." Throughout this process it seems that two considerations have necessitated change—the increasing cost of the allotment program and the increasing productive capacity of wheat producers. For example, in 1953 Congress passed temporary legislation raising the national allotment to sixty-one million acres to avoid reducing planted acreage by almost thirty percent. This was in response to the effect of the statute which would have provided an allotment of only fifty-five million acres. Congress concluded that putting a large number of wheat farmers out of business was in the best interests of neither the nation nor the world.[192] But the significant point for present purposes is that the nature of the statute required legislation and not administrative action to make the necessary assessment of costs versus benefits.

In 1958 the section was amended to make adjustments made necessary when the apparently unanticipated effects of a 1957 amendment became evident.[193] The 1957 statute provided that any acreage seeded to wheat for harvest as grain for 1958 and thereafter in excess of allotments would not be considered in setting future acreage allotments.[194] The 1958 amendment prevented application of this principle to the 1958 crop because farmers did not have adequate notice of the change when they voted on 1958 acreage allotments and when they planted their winter acreage. In effect the 1957 statute had changed the rules in midgame, and the 1958 legislation corrected the problem. It took congressional action to make the correction.

On occasion Congress has suspended the applicability of section 1334 and moved on to experiment with other means of dealing with production and supply problems in wheat as well as other agricultural commodities. The section was suspended and declared inapplicable for the period from 1971 to 1977.[195] Congress took similar suspending action and declared the section inapplicable for

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192. S. REP. No. 520, 83d Cong., 1st Sess., *reprinted in* 1953 U.S. CODE CONG. & AD. NEWS 1877.

193. Act of April 4, 1958, Pub. L. No. 85-366, § 1, 72 Stat. 78.

194. Act of Aug. 28, 1957, Pub. L. No. 85-203, § 2, 71 Stat. 477.

195. Act of Nov. 30, 1970, Pub. L. No. 91-524, Title IV, § 404(1), 84 Stat. 1366, *as amended*, Act of Aug. 10, 1973, § 1(11), 87 Stat. 229.

the 1982-1985 wheat crops.[196]

This general description of the commodity marketing quota and acreage allotment program for wheat is illustrative of congressional programs for other commodities such as tobacco, cotton, corn and rice.[197] Typical of each is a high degree of specificity in the congressional mandate to the Secretary of Agriculture and an attendant reduction in administrative discretion and the opportunity to engage in cost/benefit analysis.

Perhaps it is imperative in the politics of agriculture that Congress take an active and specific role in the formulation of agricultural policy. It may be impolitic to delegate agricultural problems to an administrative official without specific guidance. It may be that the Department of Agriculture is quite content to have these sensitive judgments made by Congress. It may be that the Department would not want to engage in cost/benefit analysis even where it might. However, the history of congressional control over the wheat markets suggests that the political realities may not produce the most efficient and effective agricultural policy.

The traditional approach has been for Congress itself to weigh the costs and benefits of different approaches to agricultural problems, to design a statute to reflect the balance struck and to delegate lesser matters to the Secretary of Agriculture for implementation of the policies it has set. As an abstract proposition this approach has some appeal. It is certainly more democratic as well as politically realistic, but the frequent necessity for statutory change indicates that these matters require a level of continuing supervision in the weighing of costs and benefits which an agency is more able to provide.

Too much significance should not be attached to the fact that Congress did devote attention to the need for statutory amendments on a regular basis. There is no way of being certain that it did so in all cases where it was needed; Congress may have been simply doing other important things and turning to marketing quotas only when absolutely necessary. In addition, the number of amendments is probably a symptom of underlying problems. It may be that intrusive economic regulation is especially disrupted by statutory barriers because of the complexity and fluidity of the economy itself, and if such regulation is desired, statutory barriers

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196. Act of Dec. 22, 1981, Pub. L. 97-98, Title III, § 303, 95 Stat. 1227.

197. *See* 7 U.S.C. §§ 1311-30 (1982) (tobacco); *id.* §§ 1311-16 (cotton); *id.* §§ 1321-30 (corn); *id.* §§ 1351-56 (rice).

should be avoided.

These barriers are another example of implicit rather than explicit barriers which are a product of the specificity of the statute without evidence that Congress intentionally constricted the Department's capacity to engage in cost/benefit analysis. Nevertheless, this is an area of economic policy and regulation in which cost/benefit analysis is necessary and even inevitable and in which Congress has elected to perform the fundamental analysis itself.

F. *Prevailing Wage Rates in Government Contracts and Grants*

A common provision in statutes pertaining to government contracts and grants is one which establishes a minimum for wages to be paid by outside contractors and grant recipients. Generally the wages are tied to a determination of locally prevailing rates.

Provisions of this nature are found in a variety of statutes, ranging from contracts and grants relating to Indians,[198] pollution prevention grants,[199] contracts for conversion of leased postal facilities,[200] to Housing and Urban Development contracts and subcontracts.[201] However, the precedent, model and primary source of the prevailing wage rate principle throughout federal law is the Davis-Bacon Act.[202]

The Davis-Bacon Act was enacted on March 3, 1931. Originally the objective was an emergency price measure. The history of the legislation indicates that the primary objective was to provide some form of relief from abuses in the extensive building and construction programs created in response to the Depression.[203] Debate focused on unscrupulous contractors who would submit bids based on cheap "imported" labor to obtain government contracts. The concerns voiced were basically twofold. First, there was the obvious concern on the effect of such bids on local workers and the impact of their unemployment on taxes and domestic life. Second, there was concern with the treatment and conditions which the imported workers were often forced to endure. Obviously there was some opposition to this legislation, but generally it had considerable support. Proponents pointed to the fact that many municipali-

198. 25 U.S.C. §§ 450(e), 1612(b)(1) (1982).
199. 33 U.S.C. § 1372 (1982).
200. 39 U.S.C. § 410(d) (1982).
201. 42 U.S.C. § 3310 (1982).
202. Act of March 3, 1931, ch. 441, 46 Stat. 1494, *codified at* 40 U.S.C. § 2762 (1982).
203. 74 CONG. REC. 6505 (1931).

ties and states already had similar statutes.[204]

In 1964 the Davis-Bacon Act was amended to take into account the increasing significance of fringe benefits in total employee compensation since 1931.[205] Thus, the amendments allowed consideration of benefits such as group life insurance, group hospitalization, and disability programs.[206] The view was that if these benefits were not included, only part of compensation would be reflected in the prevailing wage rates. Yet there was concern that the amendment would adversely affect the government by way of increased costs.[207] The Senate Committee acknowledged that there would be increased costs, including administrative costs in the Department of Labor in making prevailing wage determinations. In 1963, for example, the Department issued 46,000 prevailing wage determinations involving 5,000,000 job classifications. But the Committee believed that administrative improvement such as the creation of a Wage Appeals Board with jurisdiction over such cases would mitigate the financial impact of the amendments.[208] In any event it seems certain that Congress believed the benefits of prevailing wage rate controls outweighed any additional costs.

Section 276a, the central provision in the Davis-Bacon Act provides:

> The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed . . .; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of pay-

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204. *Id.* at 6510.

205. Act of July 2, 1964, Pub. L. No. 88-349, 78 Stat. 238, *codified at* 40 U.S.C. § 276a(b) (1982).

206. 1964 U.S. CODE CONG. & AD. NEWS 2341 (citing S. REP. No. 963, 88th Cong., 2d Sess. (1964)). *See* 40 U.S.C. § 276a(b) (1982).

207. 1964 U.S. CODE CONG. & AD. NEWS 2341, 2342 (citing S. REP. No. 963, 88th Cong., 2d Sess. (1964)).

208. *Id.* at 2343.

> ment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid . . . and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.[209]

The sanctions for failure to comply with these prevailing wage rate requirements include termination of the contract,[210] payment of excess costs incurred by the government in completion of the terminated contract project,[211] payment of the amounts owed laborers and mechanics from accrued payments otherwise due the contractor,[212] and a ban on any other contracts with the government for three years.[213]

These provisions represent a pervasive and significant statutory barrier to the application of principles of cost/benefit analysis. No matter how attractive the prospect of substantial savings on government contracts by retaining contractors who pay less than prevailing wages, an agency has little discretion to favor savings to the government over prevailing wages to workers. This is consistent with the purposes of the Davis-Bacon Act which "was not enacted to benefit contractors [and indirectly the public fisc], but rather to protect their employees from substantial earnings losses by fixing a floor under wages on Government projects."[214] It was designed to protect workers from those contractors inclined to import cheap labor to work on government contracts.[215]

Nevertheless, the statute is not without opportunity for the exercise of discretion. There is a degree of discretion in the contracting

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209. 40 U.S.C. § 276a (1982).

210. *Id.* § 276a-1.

211. *Id.* Should the accrued payments prove insufficient, the statute specifies that the laborers and mechanics have a right of action against the contractor. *Id.* § 276a-2(b).

212. *Id.* § 276a-2(a).

213. *Id.* See generally Warner, *Congressional and Administrative Efforts to Modify or Eliminate the Davis-Bacon Act*, 10 W. STATE L. REV. 1 (1982), for a discussion of the legislative history of the Act and recent administrative and legislative efforts to alter or repeal it.

214. United States v. Binghamton Const. Co., 347 U.S. 171, 176-77 (1954). *See also* Building and Const. Trades' Dep't v. Donovan, 712 F.2d 611, 613-15 (D.C. Cir. 1983).

215. *E.g.*, Universities Research Ass'n v. Coutu, 450 U.S. 754, 774-80 (1981); Tennessee Roadbuilders Ass'n v. Marshall, 446 F. Supp. 399, 400-01 (M.D. Tenn. 1977).

agencies as to applicable job classifications, as established by the Secretary. This is subject to review by the Secretary. There is also discretion inherent in the Secretary's establishment of classifications and prevailing wage rates.[216] However, this discretion prevails over a relatively narrow range within the framework of the statutory barrier.

It is established that there is no discretion to apply or not apply the Act; if it does apply, it must be enforced.[217] Furthermore, the ability of a contracting agency or the Secretary to proceed in an area within the reach of the Act in a manner inconsistent with its purposes is tightly circumscribed.

Recently the limits and strength of this statutory barrier and the corresponding limits on agency discretion have been tested in efforts by the Department of Labor to modify traditional prevailing wage rate principles for the purpose of effecting cost savings. This raised the question of whether the prevailing wage rate statute did in fact preclude cost/benefit analysis. The judiciary was compelled to resolve the matter.

The controversy arose when new regulations were promulgated by the Secretary of Labor. The court of appeals described the effect of the changes:

> Three of the new regulatory provisions of concern here would alter the method for finding the prevailing wage. Another set of regulations would allow federal contractors far greater freedom to use semi-skilled helpers on projects than has previously been permitted. The Secretary asserts that this expanded use of helpers would better reflect the practice on private projects. The fifth provision is intended to ease the regulatory burden on federal construction contractors by reducing the detail required in their weekly submissions to the government regarding wages. All of the regulations under challenge are expected to reduce federal construction costs; the Secretary has estimated that the last two provisions alone would save the government or its contractors about $463 million per year.[218]

The district court which first considered the regulations was more direct: "The new regulations will permit precisely that which Congress intended to halt in 1935."[219]

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216. *See, e.g., Universities Research Ass'n*, 450 U.S. at 757-61, 771-83; North Ga. Bldg. & Const. Trades Council v. Goldschmidt, 621 F.2d 697, 701-05 (5th Cir. 1980); Associated Builders & Contractors of Texas Gulf Coast, Inc. v. United States Dep't of Energy, 451 F. Supp. 281, 283 (S.D. Tex. 1978).

217. *Cf. Universities Research Ass'n*, 450 U.S. at 759-60.

218. Building & Const. Trades' Dep't v. Donovan, 712 F.2d 611, 613 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 975 (1984).

219. Building & Const. Trades' Dep't v. Donovan, 543 F. Supp. 1282, 1285 (D.D.C.

The Secretary had determined that the cost to the government of prevailing wage rates in government contracts now outweighed the benefit of higher wages and thus, through the new regulations, was attempting to strike a new balance. Seventeen unions asserted that this was contrary to the principles of the Davis-Bacon Act.

The district court agreed with the unions and observed:

> It is not for the Court to judge whether the basic policy decision to prefer wage floors over expense to the government was or is wise. More to the point, it is not for the Secretary of Labor or his subordinates to make that judgment. Under our constitutional system, policy decisions are not made by government administrators; they are made by the Congress.[220]

The preceding quote is taken from the district court's memorandum opinion in support of issuance of a preliminary injunction restraining enforcement of the rules. Subsequently the court considered the matter again on cross motions for summary judgment and permanently enjoined enforcement of the new rules, with the exception of the rule which raised the percentage of employees in each class of laborers and mechanics for purposes of defining prevailing wage rates.[221] Yet generally and not surprisingly the statutory barrier prevailed in the district court.

In a number of important respects the result was similar in the court of appeals, but the Secretary was successful on some issues. The court of appeals agreed with the district court that the elimination of the thirty percent rule was within the Secretary's discretion.[222] It was, however, more selective concerning the other issues in the case. It reversed on the aspect of the rules requiring that urban and rural areas not be combined in wage determinations[223] and concluded that the Secretary's position was consistent with legislative intent because he had been given sufficient discretion to make the choice.[224] It also concluded that the statute allowed the Secretary to exclude wages paid on federal projects in the computation of prevailing wages, notwithstanding prior administrative practice to the contrary.[225]

Concerning the treatment of helpers under the new rules the court of appeals both agreed and disagreed with the district court.

1982).

220. *Id.* at 1291.
221. Building & Const. Trades' Dep't v. Donovan, 553 F. Supp. 352 (D.D.C. 1982).
222. Building & Const. Trades' Dep't v. Donovan, 712 F.2d 611, 616 (D.C. Cir. 1983).
223. *Id.* at 633.
224. *Id.* at 617-19.
225. *Id.* at 619-22.

In its simplest terms the issue was whether lower paid helpers could effectively replace higher skilled and paid workers in prevailing wage determinations. Part of what the Secretary wanted to do was considered inconsistent with the purposes of the Act, but an expanded definition of helpers was allowed.[226]

The district court was considerably more supportive of the statutory barriers than the court of appeals. The former was influenced by the administrative as well as legislative history of the Act.[227] Yet even though the court of appeals decision afforded greater opportunity for the sway of cost/benefit analysis in the agency, it did so within a range. Even its decision upheld the basic precepts and underlying philosophy of Davis-Bacon, and the fundamentals of the statutory barrier prevailed.

The statutory barriers to cost/benefit analysis in the prevailing wage rate statute illustrate that the specificity of a statute may determine the efficacy of the barrier. If some measure of discretion is granted, there will be an opportunity for agency departure from congressional intent.

In this instance the principles of the barrier were honored by the agency and the courts for over four decades. Yet when the Secretary attempted to introduce principles of cost/benefit analysis through rulemaking, the Secretary's margin of discretion permitted some whittling away at the underlying intent of Congress. The court of appeals was supportive of the Secretary in at least some respects with the effect that greater weight is now placed on governmental costs than on the benefits to workers.

The message for Congress is that a modicum of discretion granted in conjunction with a statutory barrier may provide the opening for the introduction of a degree of cost/benefit analysis by the agency. Thus, if Congress wishes to assure that the balance it has struck between costs and benefits is not disturbed, it should eliminate discretion whenever possible. If it cannot eliminate discretion, it should at least eliminate any avoidable ambiguity in the statute. The Delaney Clause and its accompanying legislative history provide a contrasting model for how this can be accomplished.

The prevailing wage rate statute is instructive in other respects. This barrier clearly was not created by Congress because the

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226. *Id.* at 622-30. The court also affirmed the district court in declaring invalid a simplified method for contractor reporting. *Id.* at 630-33.

227. *See generally* Building & Const. Trades' Dep't v. Donovan, 553 F. Supp. 352 (D.D.C. 1982); Building & Const. Trades' Dep't v. Donovan, 543 F. Supp. 1282, 1285 (D.D.C. 1982).

agency was not capable of weighing the costs and benefits in setting wages under government contracts. The task was one within the competence of the agency. But more importantly it was a matter within the competence of Congress. Expertise is not pertinent to determining that there must be limits to competition in the wages reflected in government contracts.

Yet equality of institutional competence alone does not explain why Congress did not delegate the matter to an agency. This statutory barrier reflects a political and social judgment which was important to significant segments of the public and to Congress, and the statutory barrier is the best means of assuring that the judgment is preserved. The barrier prevents shifts in executive branch policy as administrations come and go. It guarantees that if a shift in policy is to take place, it must occur in Congress.

Davis-Bacon would be considered by economists as a legal constraint limiting alternatives subject to cost/benefit analysis. It seems equally clear that the Act was similarly viewed and designed by Congress. It is another of those cases which goes beyond mere specificity. The balance between costs and benefits was struck by Congress and subsequently recognized and generally supported by the judiciary. One can readily predict how Department of Labor officials would respond if asked whether their recent efforts to give greater weight to the costs of prevailing wage rates have encountered a statutory barrier to cost/benefit analysis. It is obvious that they have.

G. *Transport of Explosive Materials*

Chapter 7 of Title 46 of the Code concerns carriage of explosives or dangerous substances on vessels. Included are provisions which represent a statutory bar to carriage of certain materials without opportunity for the exercise of agency discretion to relax or relieve the prohibition:

> (3) It shall be unlawful knowingly to transport, carry, convey, store, stow, or use on board any vessel fulminates or other detonating compounds in bulk in dry condition, or explosive compositions that ignite spontaneously or undergo marked decomposition when subjected for forty-eight consecutive hours to a temperature of one hundred and sixty-seven degrees Fahrenheit, or compositions containing an ammonium salt and a chlorate, or other like explosives.
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> (4) It shall be unlawful knowingly to transport, carry, convey, store, stow or use on board any passenger-carrying vessel any high explosives such as, and including, liquid nitroglycerin, dynamite, trinitrotoluene, picrates, detonating fuses, fireworks that can be exploded enmasse, or other explosives sus-

> ceptible to detonation by a blasting cap or detonating fuse, except ship's signal and emergency equipment, and samples of such explosives (but not including liquid nitroglycerin) for laboratory or sales purposes in restricted quantities as may be permitted by regulations of the Commandant of the Coast Guard established hereunder.[228]

These two provisions afford virtually no opportunity for the application of principles of cost/benefit analysis.[229]

These provisions on the transport of certain dangerous materials on vessels are not of recent origin. They are modern vestiges of a statutory scheme originally enacted on February 28, 1871 which concerned transportation of hay, loose cotton, loose hemp, camphene, nitroglycerin or other explosive articles on steamers carrying passengers. The original statute also provided specific guidance on the transport of certain of these materials which were not absolutely prohibited. For example, the statute indicated that cotton or hemp which was transported on such vessels must be compactly pressed and thoroughly covered with bagging of similar material.[230]

In 1940 the statute was revised in substantial measure to account for technological advances; the sections quoted above were enacted in essentially their present form.[231] What is significant, however, is that throughout the history of these statutory provisions there has been little in the way of conferred administrative discretion. Indeed, the most significant change was in the transfer of responsibility for inspection and enforcement from the Secretary of Commerce to the Coast Guard.[232]

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228. 46 U.S.C. § 170(3), (4) (1982). See also § 170(7)(e), which concerns permits for loading or discharging explosives. This provision requires that such permits not be granted unless state or local requirements are equalled or exceeded. It represents another limitation on the ability of the Coast Guard to engage in cost/benefit analysis and the congressional response to an explosion which occurred in South Amboy, New Jersey. *Cf.* Pennsylvania R.R. Co. v. United States, 124 F. Supp. 52 (D.C.N.J. 1954).

229. 46 U.S.C. § 170(11) (1982) allows the Commandant of the Coast Guard to exempt any vessel from provisions of section 170 upon finding, normally after public hearings, that "the vessel, route, area of operations, conditions of the voyage or other circumstances" make a statutory requirement unnecessary "for the purposes of safety." This would not, however, seem to lift the strictures against cost/benefit analysis. Rather, it permits waiver of the prohibitions of the statute when its purposes are inapplicable. *Cf.* Geotechnical Corp. v. Pure Oil Co., 196 F.2d 199 (5th Cir. 1952).

230. Act of February 28, 1871 § 4, ch. 100, 16 Stat. 441 (1871). The 1871 statute also prohibited the transport of gunpowder on passenger-carrying vessels except under special license.

231. Act of October 9, 1940, ch. 777, 54 Stat. 1023 (1940).

232. In 1946 the Commandant of the Coast Guard replaced the Secretary of Commerce in these matters pertaining to "issuance of certificates of inspection, and of permits indicating the approval of vessels for operations which may be hazardous to persons or property . . . ." 1946 Reorg. Plan No. 3, § 104, 60 Stat. 730 (1946). What the 1946 Reorgani-

The obvious congressional purpose in enacting these provisions was to protect the public welfare and safety. It might have delegated this responsibility to an agency in broad terms. It did not, and in the process created a statutory barrier to the application of principles of cost/benefit analysis on the part of its administrative delegate. Congress itself responded to obvious hazards, and made its own determination of the relative weight to be given the costs and benefits of the transport of certain hazardous materials on vessels.

There are a number of possible explanations for why Congress elected to proceed in this fashion. First, it is unlikely that there would be extensive debate on the need for limitations and even prohibitions on the transport of explosives and hazardous materials on vessels, especially on passenger-carrying vessels. Consequently, there would be less reason to avoid potentially divisive and disruptive legislative debate by delegating the entire problem to an agency for it to resolve.

Second, the matters before Congress were within its relative competence. It could legislate on these matters with a high degree of specificity without sensing the need for continuing administrative expertise and guidance. It is nevertheless noteworthy that Congress did find it necessary to delve into technical matters when it addressed the time and temperature for decomposition of certain explosives and the specific chemical components of others. Yet in the spectrum of technical complexity these matters are not of the nature of those concerning, for example, the safety of nuclear power plants. Here the nature of the cost/benefit issues was such that there was little need for the accumulated and continuing expertise of an agency to determine whether certain materials should be carried on vessels. It was clear to Congress that an agency should not be involved in the determination. Thus, the primary functions of the agency in this instance were in the areas of inspection and enforcement.[233]

Finally, it may be that Congress recognized that delegation of any opportunity for an agency to engage in cost/benefit analysis on

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zation Plan did was to make permanent what the President had done by Executive Order early in World War II. Harry S. Truman, Letter to Congress *re* Reorg. Plan of 1946, 79th Cong., 2d Sess., *reprinted in* 1946 U.S. CODE CONG. SERV. 1673. The permanent assignment of the responsibility to the Coast Guard recognized that the functions involved were related to the regular activities and general purposes of the Coast Guard and that it had been successful in discharging these responsibilities during the war.

233. *See* 46 U.S.C. § 170(7)(a) (1982).

these issues would carry a higher degree of political risk. In the setting of a major disaster it might prove difficult to convince the public that Congress had no choice but to let an agency deal with the issue. Constituents might be prone to ask why Congress even gave an agency the chance to err when Congress itself was capable of addressing the issues and barring the transport of dangerous materials. The statutory barrier eliminates this political risk.

In this context it would seem that these particular statutory barriers are not particularly harmful. Congress undertook the task of cost/benefit analysis in an area where it could reasonably be expected to deal intelligently and effectively with the technical issues and delegated only those tasks which it could not be expected to perform, namely inspections and enforcement. As noted, it may even be the preferable route from a political perspective. Thus, the statutory barrier in this case could be considered useful and desirable.

One flaw in this assessment is the assumption that Congress does have the expertise to legislate in definitive fashion on these matters. Certainly the fact that Congress had to amend the statute in major respects in 1940 suggests that technological developments may require statutory revisions. Naturally an agency could provide continuing supervision without the risk of having attention diverted to other matters. Congress, on the other hand, may not be able to devote attention to changing a statutory provision on a "temperature of one hundred and sixty-seven degrees Fahrenheit" even when present information indicates that it should. Congress typically will have other matters with which it must deal. This suggests an inevitable and perhaps undesirable effect of a statutory barrier; science and technology are "frozen" by the terms of the statute.

IV. Statutory Barriers—The Relationship to Broader Themes in Administrative Law

In the preceding two parts of this study the focus has been upon the varieties of statutory inhibitions to the application of principles of cost/benefit analysis, with the part just concluded considering specific case studies involving statutory barrier and the question of the need for their retention or change. Perhaps the statutory barrier is simply one more of life's opportunities for selective hostility or enthusiasm. If so, it should be recognized and accepted as such. Yet either hostility or enthusiasm may be tempered when the immediate object of attention is placed in broader

perspective.

With this in mind, the objective in the following sections is to relate the phenomenon of the statutory barrier to broader themes in administrative law. It is hoped that this analysis will aid in assessing the utility and desirability of statutory barriers to the application of principles of cost/benefit analysis.

A. *The Delegation Doctrine—Strains in Administrative Law Espousing Revival of the Doctrine and Alternative Means of Achieving Its Objectives*

In the past it has been a common tenet of administrative law that a legislative body is not entitled to delegate its power to another, including an administrative agency. It is equally well established that in the normal conduct of governmental affairs legislative bodies frequently delegate sweeping authority to administrative agencies, and at least at the federal level, the courts rarely have struck down such grants of authority on the ground of impermissible delegation.

Constitutional principles provide the basis for this doctrine. Under the Constitution all federal legislative authority lies in the Congress of the United States.[234] Logic, thus, leads to the conclusion that no others may exercise this power and remain within constitutional bounds, even with the consent of Congress manifested in an express delegation of that authority. Shortly before the turn of the century Justice Harlan stated the basic principle in *Field v. Clark*:[235] "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[236]

The judiciary, however, furnished the pragmatism necessary to mitigate the implications of this prohibition. Even as the Court reiterated the principle in *Field*, it found a delegation of authority to the President in connection with the imposition of tariffs constitutional. The Court observed that "[l]egislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the act of Congress. It was not the mak-

234. U.S. CONST. art. I, § 1. "All legislative powers herein granted shall be vested in the Congress of the United States."

235. 143 U.S. 649 (1892).

236. *Id.* at 692.

ing of law."[237] This result has been typical. Congress spins off some of its authority to persons in government outside the legislative branch, the Supreme Court upholds the delegation, and it does so without directly rejecting the basic prohibition and often offering it at least lip service.[238] The pragmatism conducive to such results is revealed in another of the earlier cases in which the Court observed that "[i]f Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission . . . to fix those rates . . . ."[239]

Indeed, only twice has the United States Supreme Court declared delegations of authority to government officials unconstitutional on the ground of impermissible delegation. In 1935 in *Panama Refining Co. v. Ryan*[240] it struck down the President's delegated authority to ban shipments of "hot oil" under the National Industrial Recovery Act. In the same year it took similar action in *Schechter Poultry Corp. v. United States*[241] with respect to the President's authority under the same act to approve codes of fair competition. However, after *Panama* and *Schechter* the Court returned to its prior practice of upholding the constitutionality of congressional delegations of authority to federal administrative officials.[242] The result has been the continued vitality of the abstract constitutional principle prohibiting delegation and the irrelevance of that principle as an effective means of constraining delegations of legislative authority. This, however, has not been enthusiastically embraced in all quarters as an acceptable or desirable accommodation of constitutional principle and practical reality.

The Supreme Court's traditional inclination to give little practical effect and meaning to the delegation doctrine has not escaped criticism. Both within and without the Court there have been those who have advocated that the doctrine be revived.

Various Justices have been troubled from time to time by the Court's failure to apply the doctrine more rigorously in controlling

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237. *Id.* at 693.

238. *See, e.g.,* Yakus v. United States, 321 U.S. 414 (1944) (price controls); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) (tariffs); Buttfield v. Stranahan, 192 U.S. 470 (1904) (tea standards).

239. *Hampton & Co.*, 276 U.S. at 407-08.

240. 293 U.S. 388 (1935).

241. 295 U.S. 495 (1935).

242. *See, e.g,* Lichter v. United States, 334 U.S. 742 (1948) (renegotiation of war contracts); Fahey v. Mallonee, 332 U.S. 245 (1947) (conservators for distressed financial institutions); Yakus v. United States, 321 U.S. 414 (1944) (price controls).

delegations of authority to administrative agencies. For example, in *Arizona v. California*[243] Justices Douglas and Stewart joined Justice Harlan in partial dissent. The case concerned the legitimacy of a delegation of authority to the Secretary of the Interior under the Boulder Canyon Project Act of 1928. Justice Harlan wrote that "[t]he unrestrained power to determine the burden of [water] shortages is the power to make a political decision of the highest order"[244] and, thus, "[t]he delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts."[245]

More recently Justice Rehnquist in particular has been the Court's principal advocate of resurrection of the delegation doctrine. *Industrial Union Department v. American Petroleum Institute* concerned the Occupational Safety and Health Administration's standard limiting occupational exposure to benzene.[246] The Court affirmed the judgment of the court of appeals holding the standard invalid. Justice Rehnquist agreed with this result, but for different reasons. In a concurring opinion he indicated that Congress, in delegating its authority to the Secretary of Labor, had failed to give any precise or even discernible indication of whether the Secretary was to weigh costs and benefits in promulgating standards. Thus, he concluded "that Congress, the governmental body best suited and most obligated to make the choice confronting us in this case, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court."[247] He urged that "[w]e ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority"[248] and "[i]f we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely

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243. 373 U.S. 546 (1963). *See also* United States v. Robel, 389 U.S. 258, 272-82 (1967) (Brennan, J., concurring) (Justice Brennan concurred in the decision striking down a portion of the Subversive Activities Control Act, Pub. L. No. 81-831, 64 Stat. 937 (1950), but preferred the delegation doctrine rather than the First Amendment as the basis for the unconstitutionality of the statute); Zemel v. Rusk, 381 U.S. 1, 20-23 (1965) (Black, J., dissenting) (Justice Black dissented from a decision upholding the authority of the Secretary of State to impose area restrictions on the right to travel. Unconstitutional delegation of legislative authority was the basis for his dissent.).

244. Arizona v. California, 373 U.S. 546, 626 (1963).

245. *Id.*

246. 448 U.S. 607 (1980). See generally SCHWARTZ, ADMINISTRATIVE LAW 51-52 (2d ed. 1984), for a discussion of Justice Rehnquist's views on revival of the delegation doctrine.

247. 448 U.S. at 672 (Rehnquist, J., concurring).

248. *Id.* at 686 (Rehnquist, J., concurring).

the cases in which to do it."[249]

A year later another OSHA standard concerning cotton dust in the workplace was before the Court. Again Justice Rehnquist was unsuccessful in convincing a majority of the unconstitutionality of the delegation of standard setting authority to the Secretary, although the Chief Justice did join him in dissent. He wrote: "Congress simply left the crucial policy choices in the hands of the Secretary of Labor" and "in so doing . . . unconstitutionally delegated its legislative responsibility to the Executive Branch."[250]

Justice Rehnquist's desire to revive and invoke the doctrine was founded on his view of the salutary purposes of the doctrine. First, it assures "that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."[251] Next, it makes it more likely that when Congress finds it necessary to delegate authority, its delegation will be accompanied by standards to guide the delegatee in its exercise.[252] And finally, the presence of accompanying standards will permit the judiciary to determine whether an agency has strayed beyond the confines of its delegated authority.[253]

Justice Rehnquist's position is not without support form outside the Court. Others have urged that the delegation doctrine be given more than its present status as historical curiosity.[254] Judge Skelly Wright is one prominent example. In reviewing Kenneth Culp Davis' 1969 book, *Discretionary Justice: A Preliminary Inquiry*,[255] Judge Wright questioned the practicality of reliance upon agency rulemaking as a means of defining and controlling discretionary administrative action.[256] Such discretion is typically the product of broad and uncontrolled delegations of authority to administrative agencies, and one of the means Judge Wright offers for controlling that discretion is the delegation doctrine:

> Yet at the risk of seeming antiquarian, I think the reported demise of the

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249. *Id.* at 687 (Rehnquist, J., concurring).

250. American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 548 (1981) (Rehnquist, J., dissenting). See generally *supra* Part III.A for a discussion of other implications of these cases.

251. *Industrial Union*, 448 U.S. at 685 (Rehnquist, J., concurring).

252. *Id.* at 685-86 (Rehnquist, J., concurring).

253. *Id.* at 686 (Rehnquist, J., concurring).

254. *Id.* at 687 n.6 (Rehnquist, J., concurring).

255. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969). See *infra* text accompanying notes 270-75 for a discussion of Professor Davis' alternatives to the delegation doctrine for control of agency discretion.

256. Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 580 (1972).

> delegation doctrine is a bit premature. To be sure, we can all join in rejecting broad formulations of the doctrine . . . . But one can reject . . . extreme position[s] without conceding that Congress should be permitted, in effect, to vote itself out of business. There must be some limit on the extent to which Congress can transfer its own powers to other bodies without guidance as to how these powers should be exercised.[257]

Thus, he concludes that "the delegation doctrine retains an important potential as a check on the exercise of unbounded, standardless discretion by administrative agencies"[258] and expresses his hope "that, with a slight nudge from the courts, Congress would eagerly reassume its rightful role as the author of meaningful organic charters for administrative agencies."[259]

John Hart Ely is another who finds no comfort in the widespread acceptance of broad delegations of authority. In *Democracy and Distrust, A Theory of Judicial Review* he explains this in part as a matter of political convenience. "[I]t is simply easier, and it pays more visible political dividends, to play errand-boy-cum-ombudsman than to play one's part in a genuinely legislative process."[260] The result is that the administrators perform the tasks of the legislators, and this Ely concludes "is wrong, not because it isn't 'the way it was meant to be'—in some circumstances there may be little objection to institutions' trading jobs—but rather because it is undemocratic, in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic."[261] Revival of the delegation doctrine with judicial insistence on meaningful policy guidance from legislators is one means Ely offers to correct the problem.

James O. Freedman also sees reason for revival of the delegation doctrine. Indeed, in some measure he sees evidence of an inclination on the part of the Supreme Court to do so.[262] If this is to occur, he urges, however, that the Court "must go beyond merely reiterating the doctrine's traditional teaching that Congress must state meaningful statutory standards for the exercise of delegated legislative power."[263] In his judgment more is required: "The new

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257. *Id.* at 582.
258. *Id.* at 583.
259. *Id.* at 584.
260. J. ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW 131 (1980).
261. *Id.* at 132.
262. J. FREEDMAN, CRISIS AND LEGITIMACY, THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 80-88, 93 (1978).
263. *Id.* at 93.

lines of the doctrine ought to be drawn to reflect the normative premise that Congress, in the act of delegating legislative power, may not abdicate its constitutional responsibility for making the nation's basic decisions of policy."[264]

These calls to revive the delegation doctrine[265] need not be viewed merely as nostalgia for a past which was rejected with clearly compelling good reason. Rather they would place a higher value and greater faith in democratic processes in lieu of exercises of expert discretion in relative political insulation. As Judge Wright observed: "An argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy."[266]

That the idea of reviving the delegation doctrine appears to be gaining adherents within and without the judiciary does not alter the reality that broad delegations remain entrenched and generally accepted and even valued.[267] As recently noted by three advocates of revival:

> [T]he occasional plea for resuscitation of the nondelegation doctrine has not prompted a response from the Supreme Court or the lower courts. Still, the *idea* of a change in constitutional rules governing legislative delegations has acquired a fresh dignity. It should inspire a serious dialogue if not imminent action.[268]

One reason for this seems to be the view that there are effective and desirable alternative means of achieving the objectives of the doctrine.[269]

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264. *Id.*

265. *See also* T. Lowi, The End of Liberalism: Ideology, Policy and the Crisis of Public Authority 129-46, 197-99 (1969); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 63-67 (1982); Koslow, *Standardless Administrative Adjudication*, 22 Ad. L. Rev. 407 (1970); McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1127-30 (1977); Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 Neb. L. Rev. 469 (1968).

266. Wright, *supra* note 256, at 585.

267. The judicial record amply demonstrates that the dominant position is supportive of broad delegation of power to administrative agencies. There is considerable support and even enthusiasm for the status quo. *See, e.g.*, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally, 337 F. Supp. 737 (D.D.C. 1971); Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1693-97 (1975).

268. Aranson, Gellhorn & Robinson, *supra* note 265, at 67 (emphasis in original).

269. Whether revival of the doctrine would produce the anticipated result of more refined legislation and less administrative discretion is a distinct and important practical question. *See* Bunn, Irwin & Sido, *No Regulation Without Representation: Would Judicial Enforcement of a Stricter Nondelegation Doctrine Limit Administrative Lawmaking?*, 1983 Wis. L. Rev. 341. This study sought to assess whether stricter adherence to the nondelegation doctrine influences the nature of legislation. Judicial decisions and statutes in Wiscon-

Perhaps the leading proponent of alternatives to the delegation doctrine has been Kenneth Culp Davis. His views on the subject are developed principally in his book, *Discretionary Justice: A Preliminary Inquiry,*[270] and in an article, *A New Approach to Delegation.*[271]

Davis would not resurrect the doctrine in its traditional form: "The non-delegation doctrine is almost a complete failure. It has not prevented the delegation of legislative power. Nor has it accomplished its later purpose of assuring that delegated power will be guided by meaningful standards."[272] His preference would be modification of the doctrine with an accompanying shift in its emphasis. The concern would not be to force legislative development of standards; nor would the objective be to inhibit delegations of authority.[273] Rather one would look to the agencies themselves for clarification of the standards to guide exercises of broad delegations of authority,[274] and the courts would stress administrative safeguards and standards to protect "against unnecessary and uncontrolled discretionary power . . . ."[275]

This suggested modification and expansion of the purposes of the doctrine clearly separate Davis from those who advocate its revival. Under the Davis approach the resolution of policy choices would not be more democratic. The basic decisions still would not be made by elected decisionmakers, although they would be made and with much greater clarity and specificity than at present. Yet this approach would not satisfy the concerns of the proponents that the decisions should be made by what they see as the constitutionally appropriate institution of government, the Congress.

Others have given less emphasis to the administrative development of standards to confine and structure delegated discretion and more to insistence on adequate administrative procedures to

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sin and Illinois were the focal point of the study; these two states represent the poles of judicial application of the doctrine. The authors concluded that "a strict nondelegation doctrine does not appear to prevail over the other differences between legislatures that affect the breadth of delegated discretion" and, consequently, "it is doubtful that the doctrine's revival by state or federal courts would be worth the resulting added uncertainty of statutory validity." *Id.* at 378. Under these circumstances alternative means of achieving the objectives of the doctrine would appear to have the advantage of practicality as well as whatever substantive merit that they carry.

270. DAVIS, *supra* note 255, at 27-51.

271. Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

272. *Id.*

273. DAVIS, *supra* note 255, at 50.

274. *Id.*

275. Davis, *supra* note 271, at 75.

protect against arbitrary and capricious action.[276] These individuals also accept Professor Davis' proposition that broad and even standardless delegations are the likely norm, and they move from this perception of the realities to focus on procedural safeguards as an alternative to revival. They, too, are subject to the criticism that the appropriate governmental institution still would not be making the fundamental policy choices.

Professor Richard B. Stewart offers yet another alternate to revival of the doctrine. He considers that the latter course would "clearly be unwise" because "[d]etailed legislative specification of policies under contemporary conditions would be neither feasible nor desirable in many cases, and the judges are ill-equipped to distinguish contrary cases."[277] For similar reasons he questions the Davis solution.[278] He does propose one possible alternative which he characterizes as the "interest representation" model. Under this approach one accepts that the administrative process should mirror the political process and then focuses on means by which affected interests would be afforded opportunities to participate in the process.[279]

The "interest representation" model, however, is not presented as a solution to the matter of delegation and its attendant problems; rather it provides an alternative way of thinking about the problem without any assurance of "simplistic remedies."[280] In this respect the model does present an alternative to the delegation doctrine, but it is one which is of less determinate and arguably more realistic nature. Furthermore, it, too, would not satisfy the desire that Congress alone make the basic policy choices.

B. *Statutory Barriers—Specificity of Congressional Delegation as an Alternative to the Delegation Doctrine*

The preceding discussion of the delegation doctrine, calls for its revival, and proposals for alternative means for achieving its objectives provide a framework for assessment of the utility and desirability of statutory barriers to the application of principles of cost/benefit analysis.

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276. *See* SCHWARTZ, *supra* note 246, at 59-60. This trend also derives in substantial measure from Professor Davis, although the courts adopting the approach place primary emphasis on assuring adequate procedures.

277. Stewart, *supra* note 267, at 1695.

278. *Id.* at 1698-1702.

279. *Id.* at 1711-70.

280. *Id.* at 1789-90, 1813.

The principal characteristic of the statutory barrier is its specificity. In the case of a true statutory barrier this specificity is complemented by a clear expression of legislative intent that cost/benefit analysis be precluded. In the case of a partial barrier it is specificity alone which confines, in some measure, the range of cost/benefit analysis. In the former,administrative discretion is confined to the point that it does not really exist. Indeed, the only latitude for administrative discretion with respect to a true statutory barrier is in the area of prosecutorial discretion and selective enforcement; a statutory barrier may prescribe what an agency must do if it acts, but the barrier alone will not compel action if an agency declines to act at all. Yet for present purposes and within the terms of a barrier itself, the hallmark is the absence of administrative discretion. Naturally there is a greater range for discretion and thus cost/benefit analysis in the case of a merely partial barrier.

For those, and particularly those in the judiciary, who developed the modern version of the delegation doctrine the statutory barrier can only mitigate any discomfort they may have in sustaining broad and undefined delegations of authority to administrative agencies. By its nature the statutory barrier eliminates the necessity for the doctrine and the tension which otherwise exists with the traditional prohibition of delegation. The specificity of the barrier in this sense substitutes for the doctrine. On the other hand, the barrier does represent an exception to the underlying assumption that broad delegations are necessary to modern government and therefore must be accommodated.

Similarly, those who advocate revival of the doctrine will have no difficulty with the statutory barrier which precludes cost/benefit analysis, in whole or in part. The barrier represents greater congressional precision in its delegation of authority to an agency, and the barrier accomplishes precisely what these persons seek through revival—democratic resolution of basic policy issues by elected representatives in Congress. In such cases there is the added virtue of voluntary congressional action without need for judicial prodding in the form of a resurrected delegation doctrine.

If the advocates of revival are dissatisfied with a particular statutory barrier, it is not likely to be the barrier itself which causes concern. Rather, the concern is the likely product of disagreement with the way in which the barrier was designed by Congress and in which the issues of costs versus benefits were resolved. For these persons in these instances the implication is that the statutory bar-

rier need not be eliminated, but merely that it be redesigned by Congress to strike a new balance between costs and benefits. The alternative would be to eliminate the barrier and transfer the discretion for cost/benefit analysis to an administrative body, and this would be unacceptable to the advocates of revival.

Statutory barriers to cost/benefit analysis are much less clearly a satisfactory alternative for those who espouse alternatives to the doctrine. These persons seems more inclined to accept the inevitability and even desirability of broad delegations, including the power to weigh costs and benefits in the balance. Consequently they stress the need for control of discretion once granted.

Thus, a statutory barrier to cost/benefit analysis avoids the problem which the delegation doctrine was developed to address; there is no broad delegation to be explained or justified. Similarly, a statutory barrier eliminates the need to revive classic principles precluding delegation; thus, there is no cause to explore alternatives to the doctrine or its revival.

C. *Statutory Barriers and Administrative Discretion*

The discussion in the preceding section provides a framework which should aid in assessing one's attitude toward statutory barriers to cost/benefit analysis. If a degree of logical consistency is a worthy objective, one should make certain to measure his position on the question of delegation against that on statutory barriers. There is an intellectual dilemma in opposing statutory barriers to cost/benefit analysis and supporting resurrection of the delegation doctrine in one form or another. As an alternative one can simply accept that the desirability of statutory barriers versus breadth of administrative discretion will fluctuate depending on the acceptability of the individuals who have the opportunity to design the barriers or exercise administrative discretion. Under this approach one favors statutory barriers if one has working control of Congress; one opposes them if one has working control of the agencies. If one controls both, the matter becomes academic, and if one controls neither it becomes traumatic.

The choice is, nonetheless, between a logically consistent resolution of the inherent tension between statutory barriers and administrative discretion, or a pragmatic recognition that "it all depends." The purpose of this study is not to recommend one course or the other, but only to suggest that there is merit in recognizing the implications of the choice eventually made.

Some further development of this point may be helpful. It ap-

pears that some of the current interest in statutory barriers to cost/benefit analysis is attributable to the suspicion that there are large numbers of these creatures abroad and that they tend to frustrate enlightened administrative decision making and impede progress. As this study concludes, the suspicion concerning their numbers is not justified by the facts. Indeed, it may be that the suspicion of the number of barriers may be based on agency assertions that an agency would be delighted to engage in cost/benefit analysis if it were not barred from doing so by statute. A more probable explanation of such assertions is agency intransigence, an unwillingness to engage in cost/benefit analysis. Another consideration which may contribute to the suspicion is the high visibility of statutory barriers such as the Delaney Clause. That visibility may suggest to some that the phenomenon is epidemic, although the reality is that expansive administrative discretion is the norm.

It is at this juncture that devotees of cost/benefit analysis should proceed with some caution and pause to reflect if they are inclined to avoid logical inconsistency. As noted, it is difficult to oppose statutory barriers, embrace cost/benefit analysis at the agency level and espouse revival of the delegation doctrine at the same time. Of course, many persons would not attempt to subscribe to each of these three possibilities, but the author will venture his own suspicion that many persons presently concerned with the existence of statutory barriers to cost/benefit analysis might be equally uncomfortable with broad delegations of authority to administrative agencies. For such persons, if in fact they exist, the following analysis may be useful even if not consoling.

In those instances where a statute does inhibit cost/benefit analysis, it does not necessarily follow that cost/benefit analysis has been ignored. Rather, the statute itself will reflect resolution by Congress of the tension between costs and benefits in the course of enacting the statute. In this respect a barrier is not necessarily undesirable. As we have seen in a variety of settings, to the extent that the statute precludes cost/benefit analysis, it withholds discretion from an agency. The effect is greater congressional precision in the scope of its delegation of authority to the agency.

If one advocates precision in congressional delegation on the ground that elected institutions of government rather than unelected administrative bodies should make fundamental policy decisions, there is reason to be pleased with the statutory barrier. For such persons the dilemma, if any, is not the existence of the barrier, but rather the manner in which it was designed by Con-

gress and the way in which Congress resolved issues of costs versus benefits. Under these circumstances the statutory barrier need not be removed, but simply redesigned with a new balance struck between costs and benefits. The alternative is to eliminate the barrier and transfer the discretion for cost/benefit analysis to an administrative body. If one accepts the latter alternative, it must be recognized and accepted that this requires recognition and acceptance of broad grants of discretion to administrative officials who sometimes are lambasted as nameless and faceless and even headless. If this is not a palatable course, the matter comes full circle and the alternative is congressional resolution of the fundamental and competing policy interests. This is precisely what a statutory barrier to cost/benefit analysis represents.

V. *Conclusion*

A primary objective of the case studies[281] was to determine what, if any, general conclusions might be reached concerning the utility and desirability of statutory barriers to cost/benefit analysis. The ultimate objective of this study was to determine whether statutory barriers to the application of principles of cost/benefit analysis are useful and desirable.

Implicit in this statement of ultimate objective is the suggestion that they are not. Barriers inhibit and impede; principles are to be valued especially when they afford an opportunity to weigh pros and cons. The absence of a statutory barrier, thus, affords freedom from arbitrariness and freedom for reasoned decision making. In this light the statutory barrier deserves abolition; it is neither useful nor desirable. The reality of statutory barriers, however, does not support this breadth of generalization. Others might discern patterns or common themes which escape the author, but the case studies suggest that generalization is difficult if not impossible in either support or opposition to the statutory barrier.

Actually there may be little need to generalize concerning statutory barriers. First, it should be recalled that true statutory barriers, those where Congress clearly manifests an intention to bar cost/benefit analysis, are not widespread at the federal level. If they were, perhaps one would be compelled to address their utility and desirability in general terms. Their number alone would then be a factor requiring consideration. Yet since the true statutory barrier, as opposed to the partial barrier, is rather rare and the

281. *See generally supra* Part III.

impact of sheer numbers is not pertinent, evaluation of their merits on an individual basis is not only feasible, but also preferable. Whatever the perils of generalization, there is less need to face them in this instance.[282]

An examination of specific statutory barriers gives further reason to assess their desirability on an individual basis. One reason for this is the diversity of substantive areas in which the statutory barrier has been employed, notwithstanding their relative scarcity. The nature of a statutory barrier makes this even more pronounced. The specificity of the statutory barrier tends to make each unique and intimately tied to the substantive issues at hand. It is quite different in situations involving broad delegations of authority which, for example, charge agencies with the task of regulating "in the public interest, convenience and necessity."

Notwithstanding these substantial caveats, some modest generalizations do seem justified. They do not, however, support unqualified acceptance or rejection of statutory barriers.

This study began with a search for an acceptable definition of cost/benefit analysis; it ends with the even more illusive search for a definition of what constitutes a statutory barrier. The test employed was whether the cost/benefit analysis mandate of Executive Order 12291 would be precluded by virtue of statutory prescription.

As indicated in the case studies, there are few true or absolute statutory barriers to cost/benefit analysis. Most are only partial in nature in that they withdraw from consideration some, but not all alternative policy choices which are potential objects for analysis. And it seems that the best evidence of an absolute barrier is a strong indication that Congress itself has undertaken the task of weighing costs and benefits, done so in comprehensive fashion and made clear on the face of the statute or otherwise that its administrative delegate is not to restrike the balance.

The result is a spectrum ranging from total to partial to no barrier at all. Where a particular statute falls on this spectrum is a function of legislative intent and the specificity of the statute. Specificity in this context means the extent to which the statute precludes consideration of alternatives which the analyst otherwise would consider.

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282. Broad delegations of authority and discretion to administrative agencies, in contrast, provide an example of a statutory phenomenon which is susceptible to and even requires generalization. The frequency with which Congress grants such authority in itself demands an assessment of its desirability and utility.

If one assumes, as many do, that cost/benefit analysis is a useful and effective adjunct to effective decision making, the true statutory barrier has a probable and important advantage over the partial barrier. In the case of a total barrier it is likely that conscious cost/benefit analysis of a sort has been employed by Congress. When Congress expressly prohibits the process at the administrative level it presumably has conducted its own weighing of costs and benefits. Certainly that is what it did in the case of the Delaney Clause.

The case studies suggest, however, that the rigor of congressional cost/benefit analysis would not always measure up to the rigor required under Executive Order 12291. This suggests further that when Congress does impose a barrier to agency cost/benefit analysis and also feels that it is germane and useful to analyzing the matter under consideration, it should voluntarily impose on itself a rigorous brand of cost/benefit analysis in designing the statute.

The partial barrier is another matter. To the extent it eliminates alternatives from consideration under cost/benefit analysis it is improbable that Congress itself has engaged in such analysis in eliminating the alternative. Even if it has, it is unlikely it will have been rigorous. Partial barriers seldom seem to be the product of intentional cost/benefit analysis. What Congress might do is pay greater attention to the partial barrier and, if inclined, insure that cost/benefit analysis is conducted at its level when it precludes such analysis of one or more but not all alternative policy choices at the agency level.

If one accepts, as suggested, that the merits of individual statutory barriers depend primarily on the specifics of the factual environment in which they arise and are applied, further analysis may be helpful in determining their desirability. If the issues are relatively simple and within the competence of Congress, the barrier may be desirable and certainly not harmful. However, its overall desirability must depend on some other factor. Rarely will a matter be within the competence of Congress and beyond the competence of an agency created by Congress.

If the issues are complex, technical and in a constant state of change, the need for agency expertise and continuing supervision suggests that a statutory barrier is undesirable. If a matter is realistically beyond the competence of Congress, any barrier created by it can only prove counterproductive. For example, if a matter can be addressed only with an appreciation of complex scientific and technical issues, an expert agency may be the only effective

institution for weighing costs versus benefits. This problem is aggravated if the area is one in which scientific knowledge and technology are changing at a rapid pace. In such cases a statutory barrier created by Congress at best may reflect an adequate assessment at the time of enactment, but it may become outdated and an unreasonable burden not long thereafter.

The politics of statutory barriers offers similarly mixed conclusions. If there is substantial concern that agencies will be subject to external pressure which they will not be able to withstand, the statutory barrier will protect the agency from itself. It also may assure that the balance struck between costs and benefits in the mind of Congress is not undermined by a reluctant agency, and this may spare Congress the ire of constituents who support the decision reflected in the barrier. Yet statutory barriers are visible in ways in which agency exercises of discretion may not be; thus, agencies sometimes may be better able to resist or disperse external pressures than Congress. In the latter case a statutory barrier would be less desirable than a barrier created by an agency. And in another case that same visibility of the statutory barrier may be politically useful because Congress will be in a better position to take credit for a danger thwarted or benefit conferred.

Furthermore and beyond political considerations, statutory barriers are useful as a means of controlling administrative action. Yet they are undesirable if administrative discretion is required to deal with a matter effectively and intelligently.

It is apparent that even these most modest generalizations concerning the desirability and utility of statutory barriers to the application of principles of cost/benefit analysis tend themselves to prove the initial point—that the question is best answered in the context of individual barriers. This list of variations on the pros and cons of statutory barriers could go on, but for present purposes it should be sufficient to illustrate the point that whether or not they are useful and desirable depends on the circumstances.

There does, however, appear to be one basis for generalizing about statutory barriers which is a function of matters independent of the specifics of any individual barrier. If one has a working majority in Congress and no effective control over administrative agencies, statutory barriers may be perceived as worthwhile. If one is on the other side in this distribution of power, then one's assessment of statutory barriers will vary accordingly. And if one has working control in both Congress and the agencies, there would be less reason to care.

The obvious advantage of this approach in evaluating the merits of statutory barriers is that it produces a consistent and comprehensive position on the subject. The disadvantages are equally obvious. It draws upon a simplistic view of political control in Congress and in the agencies, and even if one accepts its basic premises, the fluidity of political relationships and power guarantees that before long it will be necessary to change one's position on statutory barriers. Thus, as the case studies indicate, the merits of statutory barriers can best be addressed on a case-by-case basis.