

## The “Benefits” of Non-Delegation: Using the Non-Delegation Doctrine to Bring More Rigor to Benefit-Cost Analysis

**Draft** (prepared for presentation at conference on “What We Can Do to Improve the Use of Benefit-Cost Analysis” – Talaris Center, Seattle, May 18-19)

**Abstract:** This article examines the problems of benefit-cost (or cost-benefit) analysis in our regulatory system and posits that a more nuanced version of the “non-delegation” doctrine (made famous in *Schechter Poultry*) could improve many of the problems associated with the use of benefit-cost analysis. In particular this article notes that many of the problems with benefit-cost analysis are its use by agencies to make large policy decisions, which could be characterized as legislative. The article also notes that though the “non-delegation” doctrine may appear to be dead or dormant, that a form of it, in separation of powers doctrine, exists in court review of agency action under *Chevron* analysis. The article notes how *Chevron* and non-delegation, though from different strands of analysis, can be seen as part of one separation of powers continuum.

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### I. A Law Professor and Benefit-Cost Analysis

Benefit-cost analysis (or cost-benefit analysis) is a discipline that tries to ascertain the benefits and costs of a particular (usually public or governmental) action to ensure that government expends resources in the best and most efficient way possible.<sup>2</sup> It is generally the province of economists and an attempt to improve its use will often be focused on the technical execution of the process itself.<sup>3</sup> Many pages of analysis have been devoted to how benefit-cost analysis can more accurately predict or describe information that we want to assist in government policy. But of course, the use of

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<sup>2</sup> Theodore Porter, *The Rise of Cost-Benefit Rationality as Solution to a Political Process of Distrust* 3, at <http://depts.washington.edu/econlaw/papers.php>, (on file with the author).

<sup>3</sup> See e.g. Jared C. Carbone and V. Kerry Smith, *Evaluating Policy Intervention with General Equilibrium Externalities*, and additional papers, at <http://depts.washington.edu/econlaw/papers.php>.

benefit-cost analysis for policy purposes rests within the framework of policy itself, and in the United States, government policy is dictated by laws and the execution of those laws. Therefore, in all of the economic studies that look at the effectiveness or improvement of benefit-cost analysis, there is the underlying given that such a policy must be consistent with law. But neither law nor its interpretation is static. Nor in its broadest sense is law predictive or formulaic, though parts of it have been subject to mathematical analysis, and much of its outcomes and goals can be explained by economic theory.<sup>4</sup> Therefore, one part of any discussion of benefit-cost analysis must lie outside the realm of empirical data, and instead in the realm of advocacy- wherein certain interpretations of the law are put forward as the “best” or correct ones because someone wishes the result that would come about from that interpretation. Executive Order 12866 recognizes this by mentioning qualitative as well as quantitative factors.<sup>5</sup>

In this paper, I plan to enter that realm and provide reasoned arguments for why I think that the law should be interpreted to restrain agencies from using benefit-cost analysis as a way to make major policy decisions. I am going to assert that an interpretation in this manner will provide a legal framework for benefit-cost analysis, that I believe will move us more toward the result that provides information for the best overall policy decisions based on that information.

## II. Introduction

The first step in this advocacy is to explain how benefit-cost analysis in policy is related to law. A brief civics lesson would note that all laws of the United States

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<sup>4</sup> Vetri, Levine, Vogel, & Finley, Tort Law and Practice 124 (3<sup>rd</sup> Edition 2006).

<sup>5</sup> Exec. Order 12866, \_\_\_ Fed. Reg. \_\_\_\_ .

government are to be made by a Congress, with presidential input.<sup>6</sup> Similar state constitutional doctrines underlie state lawmaking. Though many might wish our lawmakers to use a specific analytic process for lawmaking, the process of making law itself is not governed by benefit-cost analysis and is only limited by what powers and exercising of that power is allowed in the Constitution.<sup>7</sup> Although we may never know fully what decisions go into the making of actual law, even if on an individual basis legislators applied a rudimentary form of benefit-cost analysis, it would not necessarily be informed nor would its analysis necessarily encompass all of the persons that it would affect. Bismark's remarks about the making of laws and sausages ring as true today as they did 100 years ago.

According to certain theories of government and benefit-cost analysis, at least as meant in the utilitarian manner, such a procedure may not be consistent with appropriate government in any event.<sup>8</sup> Instead, benefit-cost analysis as a discipline for government action is a part of the Executive Branch, the branch that is charged with administering the laws that are passed.<sup>9</sup> Ideally, one would suppose that this means that whatever laws our legislators feel should govern our people based on whatever theory of government, that these laws should be administered in the best (i.e. most cost-beneficial) way possible.

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<sup>6</sup> United States Constitution, Article I. (A law can go into effect if passed by both houses of Congress and signed by the President, or by a 2/3 majority of both houses of Congress without Presidential approval.)

<sup>7</sup> *Id.*; See also Darren Bush, *A Framework for Policymakers to Analyze Proposed and Existing Antitrust Immunities and Exemptions: Report Prepared by Consultants to the Antitrust Modernization Commission* (co-written with Gregory K. Leonard and Stephen Ross) available at [http://www.amc.gov/commission/hearings/pdf/IE\\_Framework\\_Overview\\_Report.pdf](http://www.amc.gov/commission/hearings/pdf/IE_Framework_Overview_Report.pdf) (on file with the author).

<sup>8</sup> See *infra*.

<sup>9</sup> United States Constitution, Article II.

Benefit-Cost analysis in this way has become entrenched in our modern administrative nation state.<sup>10</sup> Since the early 1970s, every president of this country has issued or followed an executive order requiring all agencies of the federal government to use cost-benefit analysis in agency action, unless prohibited by law from doing so.<sup>11</sup> Moreover, the Unfunded Mandates Reform Act of 1995 requires a cost-benefit analysis of any agency action over \$100 million, though it does not require the decision to be based on that analysis.<sup>12</sup>

Despite its wide acceptance and usage, criticisms of benefit-cost analysis are widespread.<sup>13</sup> These criticisms generally fall into two different categories: that there are certain things that cannot be properly valued in benefit-cost analysis<sup>14</sup>, and the related concern that certain things are not valued or considered at all.<sup>15</sup> Both of these are of particular concern in health, safety, and environmental regulation, where uncertainty dogs many of the assumptions.<sup>16</sup>

The uncertainty in these areas is closely related to the concern expressed by myself and others, that in its usage in dictating government policy, benefit-cost analysis can be used illegitimately to produce a pre-determined outcome, favored by a particular group or ideology, that may not actually be cost-beneficial, but can be justified because

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<sup>10</sup> Victor B. Flatt, *Saving the Lost Sheep: Bringing Environmental Values Back into The Fold With a New EPA Decisionmaking Paradigm*, 74 Wash. L. Rev. 1, 11 (1999) (hereinafter “*Sheep*”)

<sup>11</sup> President Jimmy Carter implemented Exec. Order 12,044, 43 Fed. Reg. 12,661 (1978). Presidents Reagan, Bush, and Clinton issued similar directives.

<sup>12</sup> 2 U.S.C. Sec. 1532(a).

<sup>13</sup> Frank Ackerman & Lisa Heinzerling, *Priceless* 8 (The New Press 2004); Victor B. Flatt, *Should the Circle Be Unbroken?: A Review of the Hon. Stephen Breyer’s Breaking the Vicious Circle: Toward Effective Risk Regulation*, 24 *Envtl. L.* 1707, 1714-16 (1994).

<sup>14</sup> Ackerman And Heinzerling, *supra* n. \_\_\_\_, at 8; See Flatt, *Sheep*, *supra*, n. 5 at 9.

<sup>15</sup> Victor B. Flatt, *Should the Circle Be Unbroken?: A Review of Steven Breyer’s Breaking the Vicious Circle*, 24 *Envtl. L.* 1707,1716 (1994).

<sup>16</sup> See Ackerman and Heinzerling, *supra* n. \_\_\_\_, at 8.

of measurement uncertainties.<sup>17</sup> In other words, policy decisions are ostensibly made using the uncertainties behind measurements needed for benefit-cost analysis.<sup>18</sup>

This concern has grown and enjoyed more widespread debate among academics due to the perceived partisan nature of many policies of the current presidential administration.<sup>19</sup> Indeed, many commentators, while hardly critiquing the broad concept of wanting the most beneficial outcomes possible in government action, would assert that benefit-cost analysis as currently practiced is beyond redemption, and should be scrapped or significantly replaced with other government decision making paradigms.<sup>20</sup> Although I will not dwell on these significant criticisms of benefit-cost analysis in this article, they are real, are related to underlying partisan desires, and should not be ignored because they do not fit neatly into the paradigm of benefit-cost analysis as an objective process. Several papers at the first major cross-disciplinary conference on improving the use of benefit-cost analysis (held at the University of Washington in May 2006) address this troubling issue, and I believe a rigorous enforcement of legal doctrine might help, but I believe it fair to say that any reforms or improvements suggested by supporters of benefit-cost analysis must still grapple with its inappropriate use in practice.

Even assuming that all measurements could be conducted properly and were not illegitimately swayed, there can still be fundamental questions about the role of

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<sup>17</sup> See Flatt, *Sheep*, *supra* n. \_\_, at \_\_\_\_; from this conference, see Robert Haveman, *The Chicago O'Hare Expansion: A Case Study of Administrative Manipulation of Benefit-Cost Principles* at <http://depts.washington.edu/econlaw/papers.php>, (on file with the author).

<sup>18</sup> *Id.*

<sup>19</sup> Ralph Vartabedian, *How Environmentalism Lost the Battle Over TCE*, Los Angeles Times, March 29, 2006, accessed at <http://www.latimes.com/news/science/environment/la-na-toxic29mar29.0,5610036> (copy on file with the author); Thomas O. McGarity, Sidney Shapiro, Rena I. Steinzor, Joanna Goger, and Margaret Clune, *Truth and Science Betrayed: The Case Against the Information Quality Act*, Center for Progressive Regulation Publication White Paper. #502, accessed at [www.progressivereform.org](http://www.progressivereform.org) (copy on file with the author).

<sup>20</sup> Flatt, *Sheep*, *supra* n. \_\_, at \_\_\_\_; Ackerman and Heinzerling, *supra* n. \_\_\_\_, at 9-10.

government, and thus the role of benefit-cost analysis, in people's lives. Much of this debate centers around 2 core divides among policy makers and analysts: whether it is possible, or even desirable, for government to make decisions rationally in a logical way that is not beholden to partisan, group, or individual desires<sup>21</sup>, or whether the proper role of government is to indulge the wishes and desires of the public as opposed to the government doing the one, obviously, correct, and rational choice.<sup>22</sup> The labeling of something as a cost or a benefit may require ethical considerations. As pointed out by my colleague Darren Bush, we generally define "efficiency" as a desirable result. But efficiency means the lowering of production costs, which include wages. So by determining to maximize some benefit may also require that we fail to maximize another.

Both of these come into play with the supposed tasks of administrative agencies and the answers to these have much to say about the use of benefit-cost analysis.

### III. What do administrative agencies really do and what should they do?

It may seem like a trick question on an administrative law exam, but the question of what administrative agencies do is not completely settled, and is germane to the use of benefit-cost analysis. Do administrative agencies merely execute the law passed by Congress or do they in some sense "create" the law themselves. In the recent case of *Whitman v. American Trucking Ass'n*,<sup>23</sup> seven justices of the Supreme Court made clear that administrative agencies were empowered only to execute the law, not make it, but in a separate concurrence, Justices Stevens and Souter proclaimed that it was a fiction to

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<sup>21</sup> Daniel Farber and Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 Michigan L. Rev. 875, 879-881 (1991).

<sup>22</sup> See e.g. Gary Lawson, *Federal Administrative Law* 27 (Third ed. 2004, citations omitted).

<sup>23</sup> 531 U.S. 457, 121 S.Ct. 903.

state that agency rulemaking power was executive rather than legislative.<sup>24</sup> Moreover, everyone recognizes that any executive action may have some policy effects and that Congress explicitly tasks agencies with legitimate policy responsibilities.<sup>25</sup>

The question is important because the validity of benefit-cost analysis in agency action depends on it. Critically, legitimate benefit-cost analysis assumes that an agency can make an objective benefit-cost determination given specific facts, or apply the process in a way that is value neutral.<sup>26</sup> But what if the agency is asked to do more than apply technical formulae to facts? What if it is asked to or seeks to answer basic policy questions instead? While benefit-cost analysis might guide policy, it becomes much more problematic if it is expected to create policy. This is because administrative agencies are not directly subject to democratic control and popular will. While many might think that non-democratic control is a good thing, it is not our system of government, at least with value laden decisions.<sup>27</sup>

When an agency creates policy is when the most serious criticisms of benefit-cost analysis come into play. What values will be considered? How do we decide those values? How will they be measured? What kind of guidance from Congress is sufficient to answer these questions but also accommodate the legitimate need and use of flexibility in agency action without giving the power to make fundamental decisions that should be made by Congress to agencies? The U.S. Constitution attempted to answer this question

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<sup>24</sup> *Id.* at 487, 121 S.Ct. at 921 (Stevens, J. concurring in part and concurring in the judgment).

<sup>25</sup> *Industrial Union Dept, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 673, 100 S.Ct. 2844, 2880 (1980) (Rehnquist, J., concurring) (Hereinafter the “AFL-CIO” or “OSHA” case)(“The Framers of the Constitution were practical statesmen . . . James Madison . . . recognized that while the division of authority between the various branches of government was a useful principle, ‘the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.’”).

<sup>26</sup> See Haveman, *supra* n. \_\_\_, at 1; Theodore Porter, *The Rise of Cost-Benefit Rationality as Solution to a Political Process of Distrust* 3, at <http://depts.washington.edu/econlaw/papers.php>, (on file with the author).

<sup>27</sup> *AFL-CIO*, *supra* n. \_\_\_, at 672-73 (Rehnquist, J. concurring).

and it continues to be debated to this day. Nevertheless, I believe that a legal standard can be articulated that can guide benefit-cost analysis and prevent some of its abuses.

A debate over the process of government raged at the time of our republic's founding as to what type of government we should have: that of popular will (the "democrats") or that of knowledgeable government agents (the "federalists") which grew out of the enlightenment thought. The broad disagreement at the founding of the republic between the federalists and the democrats has been variously described as one concerning the role of centralized power, and the appropriate role of the common man in governance. In broad terms, those favoring more centralized power, believed in the modern ideas of government by enlightened and educated individuals, and that centralizing government meant that the best minds could be brought to bear on more issues, whereas the democrats trusted the instincts of the common man, felt that the process of democracy was morally uplifting and transformative, and believed that central government was to be distrusted and limited.<sup>28</sup> Echoes of this debate are part of the benefit-cost discussion of today, where Professor Louis Wolcher notes that:

"CBA[cost benefit analysis] fails to consider the possibility that the coming-and-being-together of political discussion and mutual learning in the context of policy problems might be part of the good life itself, not to mention a catalyst that can reshape the problems and the people's feelings about them."<sup>29</sup>

What is remarkable is that in a series of sophisticated policy debates through media of the time and at the Constitutional Convention, our founders came to a

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<sup>28</sup> Stone, Seidman, Sunstein, and Tushnet, *Constitutional* 5-18 (4<sup>th</sup> Ed. 2001).

<sup>29</sup> Louis Wolcher, *Senseless Kindness: The Politics of Benefit-Cost Analysis*, p. 13 (2006), draft paper for conference on "What Can We Do to Improve the Use of Benefit-Cost Analysis," at <http://depts.washington.edu/econlaw/papers.php> (on file with the author).



compromise between the two ideals, and created a central government with strong powers but only in certain areas, and in which three branches of government were to ensure that the rights of persons were to not be trampled by the central government.<sup>30</sup> The individual was to be protected by breaking up the power of the central government into three distinct spheres: legislative, executive, and judicial, each with different roles.<sup>31</sup> Checks and balances mean that the government must be accountable to the public, and this is accomplished by having laws made only by those that are elected, and having that process watched over by the judiciary.<sup>32</sup> As stated by Rebecca Brown, “the principle of political accountability can be understood as a way for people to protect their own liberty.”<sup>33</sup> A textbook answer to the role of administrative agencies would say how administrative agencies are authorized under the power of the executive to “execute”, and that this is how administrative agencies are supposed to work – in an executive capacity.<sup>34</sup> Policy and value decisions should be made in a public forum with inputs that can affect results, such as a legislature.

In this framework, Congress creates basic policy and the executive branch agencies “execute” it, because of the agencies’ expertise and the complexity and volume of the tasks.<sup>35</sup> Though the legislature can always make a statute very specific and thus control the exercise of the agency in its “execution,” in order to preserve efficiency, Congress must often cede some discretion for policy implementation to the agency, and thus the executive branch.<sup>36</sup>

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<sup>30</sup> William Cohen, Jonathan D. Varat, *Constitutional Law 408* (10<sup>th</sup> Edition 1997).

<sup>31</sup> Stone, Seidman, *et al.*, *supra*, n. \_\_\_\_.

<sup>32</sup> Rebecca Brown, *Accountability, Liberty, and the Constitution*, 98 *Colum. L. Rev.* 531 (1998).

<sup>33</sup> *Id.*

<sup>34</sup> Stone, Seidman, *supra*, n. 31.

<sup>35</sup> Craig Johnston, William Funk, and Victor Flatt, *Legal Protection of the Environment* 279 (West 2005).

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

But the “textbook” answer and such compartmentalized roles are not always accomplished in practice. This variance from the ideal is so great, many have suggested that the “textbook” breakdown of power between the legislative branch and the executive branch is a fiction.<sup>37</sup>

But assuming for the moment that we can make this distinction, it is in this power sharing model that our founders actually addressed the questions of the appropriate role of benefit-cost analysis in our government – in a constitutional law idea that has come to be known as the non-delegation doctrine.

#### IV. The Non-Delegation Doctrine

The non-delegation doctrine derives from the Constitutional requirement that all laws be made by the Congress and President and not by any other basis.<sup>38</sup> The principle derives from the separation of powers issues described above and is based on the Constitutional requirement that all “legislation” be promulgated by the legislative process detailed therein.<sup>39</sup>

The first articulation of this in modern times as applied to administrative agency powers occurred during the new deal era in a pair of cases: *Schechter Poultry* and *Panama Refining*.<sup>40</sup> In both of these cases, the U.S. Supreme Court ruled that the Congress and President had gone too far in giving power and discretion to the executive

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<sup>37</sup> *Whitman*, supra n. \_\_\_\_, at 487-90, 920-21 (Justice Stevens and Justice Souter concurring in the judgment)(“Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not ‘legislative power.’”)

<sup>38</sup> U.S. Constitution, Article I.

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

<sup>40</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935).

branch.<sup>41</sup> The ruling was based on the fact that there was no intelligible principle to guide agency discretion in the statutes at issue in the cases.<sup>42</sup> In recalling the holding of those cases, the Supreme Court recently noted:

“one of [the statutes] provided literally no guidance for the exercise of discretion, and the other . . . conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’”<sup>43</sup>

Though many interpret these decisions as simply a rejection of the Roosevelt’s administration expanded power, they also hearken back to the theoretical underpinnings of the Separation of Powers doctrine - only the legislature should be the one to make legislative policy. What are the dangers in legislation by other means? In his famous concurrence in the OSHA regulation case, Justice Rehnquist noted that allowing policy making power in the executive branch agencies made it nearly impossible for there to be any democratic control on policy.<sup>44</sup> “The Constitutional doctrine prohibiting delegation of legislative power rests on the premise that the legislature may not abdicate its responsibility to resolve the truly fundamental issues by delegating that function to others or by failing to provide adequate directions for the implementation of its declared policies.”<sup>45</sup> The people do not directly elect the decision-makers in an administrative agency, and if they have been given power by Congress to exercise all discretion, the

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

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

<sup>43</sup> *Whitman, supra n. \_\_\_\_*, at 474, 913.

<sup>44</sup> *AFL-CIO, supra n. \_\_\_\_*, at 672-73, 2879 (Rehnquist, J. concurring).

<sup>45</sup> Benjamin M. McGovern, *Re-examining the Massachusetts Non-delegation Doctrine: . . .*, 31 B. Coll. Env. Aff. L. Rev. 103, 108 (2004).

action cannot be challenged on statutory grounds. Thus, the non-delegation doctrine is critical to maintaining the democratic balance created by the framers that ensure the role of the public in government. Professor Krotoszynski stated it more directly by noting that the non-delegation doctrine prevents Congress from attempting “to escape responsibility for making hard choices.”<sup>46</sup>

Despite its importance, the non-delegation doctrine has rarely been invoked to invalidate administrative action since the pair of Supreme Court cases noted above. But the principle is still honored. In the most recent pronouncement by the Supreme Court on the issue, the court noted that Congress can give wide discretion to an administrative agency, but still articulated the non-delegation doctrine as a valid limit on government:

“Article I, sec. 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers, *Loving v. United States*, 517 U.S. 748, 771, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996), and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’”<sup>47</sup>

Because it has only been used sparingly in overturning Congressional delegations of power, many commentators declare the non-delegation doctrine to be dead.<sup>48</sup> It is true that in the modern administrative state, many of the delegations to executive branch

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<sup>46</sup> Ronald Krotoszynski, *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 Ind. L. J. 239, 243 (2005).

<sup>47</sup> *Whitman*, *supra* n. \_\_\_\_, at 472, 912.

<sup>48</sup> Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274, 1302 (2006).

agencies seem extraordinarily broad, and in many ways this is not necessarily bad. The theory of administrative agencies posits that their purpose is to carry out all of the “detail work” that elected officials cannot do, and that they possess more institutional expertise than the Congress.<sup>49</sup> In a highly complex system, a broad grant of power may be necessary to accomplish the task efficiently.<sup>50</sup> So a broad grant of power can still be consistent with the vision of government as having an impartial central government that works on expertise and a democratically elected government that makes policy decisions. But even with broad discretion, the limit remains:

“Congress may wish to exercise its authority in a particular field, but because the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the area in which they choose to legislate, the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, “fill in the blanks,” or apply the standards to particular cases.”<sup>51</sup>

So what does this have to do with benefit-cost analysis? If agencies are to only execute laws, not create them, and only have flexibility to allow for an impartial application of expertise (or to exert policy in only a limited and defined circumstance), then the exercise of benefit-cost analysis would have nothing to do with major “policy decisions.” Instead, benefit-cost analysis would be in the technical nature that its proponents suggest, muting many of the criticisms of benefit-cost analysis that are based

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<sup>49</sup> *AFL-CIO*, *supra* n. \_\_\_\_, at 675, 2880-81 (Rehnquist, J. concurring).

<sup>50</sup> *Id.*

<sup>51</sup> *AFL/CIO*, *supra* n. \_\_\_\_, at 675, 2880-81 (Rehnquist, J. concurring in the judgment).

on the belief that it *does* involve significant policy decisions.<sup>52</sup> By bringing rigor to the Constitutional ideal of power sharing between the executive and the legislative branches, and better enforcement of the respective roles of these branches set forth in the Constitution, the judiciary, our third branch, could ensure a proper role of benefit-cost analysis through a re-invigoration of the non-delegation doctrine.

Thus, however little it has been used, I do not believe that the non-delegation doctrine is without meaning. Indeed, I believe that the concepts of non-delegation limit agency discretion in such a way so as to address many of the concerns about the agency use of benefit-cost analysis.

We start with the most recent statement of the doctrine as set out by the Supreme Court:

It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. See [\*Loving v. United States\*, 517 U.S., at 772-773, 116 S.Ct. 1737](#); [\*United States v. Mazurie\*, 419 U.S. 544, 556-557, 95 S.Ct. 710, 42 L.Ed.2d 706 \(1975\)](#). While Congress need not provide any direction to the EPA regarding the manner in which it is to define “country elevators,” which are to be exempt from new-stationary-source regulations governing grain elevators, see [42 U.S.C. § 7411\(i\)](#), it must provide substantial guidance on setting air standards that affect the entire national economy. But even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a “determinate criterion” for saying “how much [of the regulated harm] is too much.”<sup>53</sup>

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<sup>52</sup> Flatt, *Sheep*, *supra* n. \_\_\_\_ at 15-16.

<sup>53</sup> *Whitman*, *supra*, n. \_\_\_\_ at 475, 913.

While this quote illustrates the broad depth of discretion that can be granted to an agency, it also implies that certain critical decisions should not be made by an agency. Even those justices who expressed the opinion that agencies actually exercise legislative power noted that there must still be a limiting doctrine on the power of the agency.<sup>54</sup> And in his concurrence in the *American Trucking* judgment, Justice Thomas notes that there are times that even with an intelligible principle, “the significance of the delegated decision is simply too great” to be Constitutional.<sup>55</sup> Though applied in different ways, all of these positions from the Supreme Court’s most recent case on non-delegation have one thing in common: they seem to recognize that critical policy decisions are to be made by Congress. This connection of policy direction and the non-delegation doctrine was explored at length in the famous Rehnquist concurrence in the “OSHA” case:

This uncertainty, I would suggest, is eminently justified, since I believe that this litigation presents the Court with what has to be one of the most difficult issues that could confront a decisionmaker: whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths. I would also suggest that the widely varying positions advanced in the briefs of the parties and in the opinions of Mr. Justice STEVENS, THE CHIEF JUSTICE, Mr. Justice POWELL, and Mr. Justice MARSHALL demonstrate, perhaps better than any other fact, that Congress, the governmental body best suited and most obligated to make the choice confronting us in this

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<sup>54</sup> *Id.* at 489-90, 921 (Souter, J. and Stephens, J., concurring)..

<sup>55</sup> *Id.* at 487, 920 (Thomas, J., concurring).

litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court.<sup>56</sup>

Though Justice Rehnquist's explicit connection between the granting of too much discretion garnered much interest as to whether there might be a revival of the non-delegation doctrine, and though it is consistent with the court's most recent pronouncement in *American Trucking*, there does not seem to be a realistic belief that the non-delegation doctrine is useful in controlling agency action.<sup>57</sup> However, I believe that some of this commentary misses the mark, for in my opinion, the importance of non-delegation has been seen in cases that generally are not described as non-delegation cases, but more described as cases that deal with an agency going beyond powers given it by Congress.

Thus, the restriction on non-delegation as a manifestation of the separation of powers could be seen as being addressed by common law and statutory restrictions on agency discretion.<sup>58</sup> This is more commonly known as the *Chevron* doctrine, which allows agency discretion to be exercised only to the extent that it does not conflict with Congressional direction.<sup>59</sup>

*Chevron* posits that agency actions that are not disallowed explicitly by Congress can be upheld by a court on the assumption that it was a Congressional decision to give

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<sup>56</sup> *AFL-CIO*, *supra* n. \_\_\_\_, at 672, 2879.

<sup>57</sup> Fallon, *supra*, n. \_\_\_\_.

<sup>58</sup> United States Constitution, Art. I, sec. 1 ("All legislative Powers granted herein shall be vested in a Congress of the United States") .*AFL-CIO*, *supra*, n. \_\_\_\_, at 646, 2866 (Agency's power to dictate policy is constrained; otherwise it "might be unconstitutional."); *Chevron U.S.A, Inc. v. NRDC*, 467 U.S. 837, 845 (1984) (Implementation of a statute by the agency will not be upheld under the Administrative Procedures Act if it is "one that Congress would not have sanctioned.")

<sup>59</sup> *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984).



the agency the discretion to make this decision.<sup>60</sup> But the exact parameters of *Chevron*, particularly whether the court should always assume that Congress intended to grant an agency broad authority, remain under debate.<sup>61</sup> One of the Supreme Court's experts in administrative law, Justice Breyer, has suggested that rejections of agency interpretation of statutes "might be rooted in the nondelegation principles, reflecting a reluctance to take ambiguous provisions as grants of 'enormous' discretion to agencies."<sup>62</sup> Other commentators have suggested a relationship between judicial scrutiny of agency exercise of power and the non-delegation doctrine.<sup>63</sup> I would agree with this assertion and further argue that any analysis of agency authority involves the concept of separation of powers, and in some cases is an explicit non-delegation question.

Although in our current legal environment, we tend to think of these as different concepts, they are really two expressions of the same idea, the idea that major policy decisions, whatever that means, are the province of the legislature, not the executive branch.<sup>64</sup> Whether an agency is following the grant of power from Congress in implementing policy may thus be considered a question of non-delegation, for what is the exercise of legislative power if it is not the agency's exercise of power that it has not been given by Congress. In this way, the analysis of whether an agency has followed Congressional direction is the flip-side of the question of whether Congress has tried to give the agency too much legislative power. The difference is that instead of it being Congress that tried to force legislative power on the agency, it is the agency that has

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<sup>60</sup> Cass Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 190-92 (2006).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 241.

<sup>63</sup> Scott Baker and Kimberly B. Krawiec, *The Penalty Default Canon*, 72 Geo. Wash. L. Rev. 663, 715 (2005).

<sup>64</sup> *Panama Refining Co. v. Ryan*, 293 U.S.388, 431, 55 S.Ct. 241 (1935).

usurped legislative power. But *both* instances represent a violation of the separation of powers, and thus a violation of the first principles of the non-delegation doctrine.

The court in *American Trucking* implies some connection between the two, putting Congressional granting of power at issue in its application of the second step of Chevron in that case:

“If the statute is *silent* or ambiguous *with respect to that issue*, then we must defer to a *reasonable* interpretation . . . [w]e conclude however that the agency’s interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear.”<sup>65</sup>[Emphasis added].

What does it mean to do something “unreasonable” on something that a statute is silent upon? It cannot be judged by the terms of the statute because the statute is silent on that issue. It can only mean going beyond the appropriate bounds of agency authority generally, the non-delegation issue.

It is true that the different labels have given rise to distinctive judicial analyses of the doctrines. For instance, the Supreme Court unanimously rejected the idea that an agency could “cure” a non-delegation problem by generating a self-imposed limit on its discretion neither contained in the statute itself or discernable from the statute, but in *Chevron* analysis, when Congress is unclear in an area, the constitutionality is determined by the agency’s reasonableness in interpretation.<sup>66</sup> However, analysis of both non-delegation and agency discretion are not uniform, and in the particular case noted above,

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<sup>65</sup> *Whitman*, *supra* n. \_\_\_\_, at 481, 916 (emphasis added).

<sup>66</sup> *American Trucking*, *supra* n. \_\_\_\_\_, at \_\_\_\_\_.

the analyses can be reconciled by the notion of how much discretion and agency can act within.

What is the lesson then from seeing the non-delegation doctrine as not only Congressional thrusting of legislative power on an agency, but also an agency taking legislative power? It means that our courts have been far more active in recognizing that agencies engage in such behavior and are willing to police limits on the zone of discretion. Since they are part of the same issue, what kind of standard does this create, and how do we apply it to the problems of benefit-cost analysis?

In terms of a standard, it means that only Congress has the right and obligation to set certain kinds of federal policy.<sup>67</sup> Thus, the determination of overall governing policy, as opposed to execution of policy, is not to occur in the executive branch. Though *Chevron* recognizes that the agency may exercise discretionary choices when Congress wishes it to do so, the deference to an agency ends there, and the non-delegation doctrine ensures that there will be limits on how much discretion Congress can confer.

If this could be applied perfectly, it would mean of course that benefit-cost analysis as a screen for policy decisions, or benefit-cost analysis that puts values on things more properly considered in a policy forum would not be allowed at an agency level, especially if the Congress has set out another metric to guide the administration of the statute. Even if a statute ostensibly gives an agency the power to consider big issues, if framed as the important question of policy, it probably should not be subject to benefit-cost analysis. As noted by Rehnquist:

[T]he most difficult issue[s] that could confront a decisionmaker [is] whether the

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<sup>67</sup> *Field v. Clark*, 143 U.S. 649, 692-93, 12 S.Ct. 495, 504 (1892).

statistical possibility of future deaths should ever be disregarded in light of economic costs of preventing those deaths. . .Congress [is] the governmental body best suited and most obligated to make the choice . . .<sup>68</sup>

The court in *American Trucking* in reiterating the reach of the non-delegation doctrine notes that Congress must provide “substantial guidance” on large or important issues (such as regulations that affect the national economy).<sup>69</sup> If we take this statement at face value, and assume that life and death and human well-being must be the most important issues of all, it seems that an agency cannot simply be making benefit-cost decisions on these issues without significant input from Congress over what values must be considered or how they are to be valued and weighed.

V. But how can it be done?

Applying such a standard would still require a court to determine what Congress had directed, what was major policy, and what was a legitimate exercise of benefit-cost analysis by an agency, but putting it in this framework does direct a court as to what it should be looking for and considering.

If it is true, as some claim, that there is empirical evidence of a bias of benefit-cost application to routinely overprice agency actions implementing statutes to protect human health and the environment, then a court should be able to take that as evidence of a mis-use of the benefit-cost analysis to make a policy decision not legitimately given it by Congress and thus to be engaging in the exercise of legislative power in violation of

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<sup>68</sup> *AFL-CIO*, *supra* n. \_\_\_\_, at 672, 2879 (Rehnquist, J. concurring in the judgment).

<sup>69</sup> *Whitman*, *supra* n. \_\_\_\_, at 475, 913.

the non-delegation doctrine.

For instance, there is excellent evidence of routine over-estimation of costs of environmental regulation. Frank Ackerman has methodically dismantled many of the arguments that are used to oppose environmental protection on a benefit-cost basis.<sup>70</sup> David Driesen's empirical analysis of the use of benefit-cost analysis in health, safety, and environmental regulation found that in no instances in the study data did the application of benefit-cost analysis result in making a regulation *more* protective of human health and the environment.<sup>71</sup> Some economists claim that this is a benign bias caused by a problem with measurement or assumptions, possibly because of the failure to assume technological innovation in environmental protection.<sup>72</sup> But this is not a problem that is technically insurmountable. Several of the papers at the University of Washington conference explore the impact that changes in policy can have on measurement variables. Moreover, the very fact of its application always causing less regulation suggests a bias. As Professor Driesen notes, "if [CBA] moves regulation toward lesser stringency almost all of the time, it cannot be neutral."<sup>73</sup>

Therefore, one must assume that environmental costs are over-estimated because decision makers are applying it in a policy-biased manner, something outside the scope of power given by Congress, and in dealing with issues that concern how many lives to save, a policy choice that should be made in Congress.

To cite another example, Robert Haveman's paper on administrative manipulation

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<sup>70</sup> Frank Ackerman, *The Unbearable Lightness of Regulatory Costs*, Global Development and Environment Institute Working Paper, No. 06-02, at <http://ase.tufts.edu/gdae> (on file with the author).

<sup>71</sup> David Driesen, *Is Cost-Benefit Analysis Neutral*, 77 Univ. of Colo. L. Rev. 335, 368-69 (Spring 2006).

<sup>72</sup> Frank Ackerman and Lisa Heinzerling, *Cost-benefit analysis, a CPR Perspective*, at [www.progressivereform.org/perspectives/costbenefit.cfm](http://www.progressivereform.org/perspectives/costbenefit.cfm). (Copy on file with the author).

<sup>73</sup> Driesen, *supra* n. \_\_\_\_\_, at 336.

of benefit-cost principles provides specific quantifiable ways in which the City of Chicago's proposed benefit-cost analyses submitted to the FAA for the O'Hare Airport expansion project, violate minimal standards of economic analysis, and thus are inherently suspect as correct or objective information.<sup>74</sup>

The problem in getting this kind of review, however, may be the attitude of the courts themselves. Our courts may reflexively shy away from judging an application or administration of a statute where numerical calculations are involved.<sup>75</sup> Partly, this is due to deference to an agency's expertise. "Agency determinations based upon highly complex and technical matters are 'entitled to great deference.'"<sup>76</sup>

Moreover, in the application of the non-delegation doctrine the courts seem reluctant to intervene and particularly loath to draw boundaries, perhaps because it seems to shift too much power to the hands of the courts and risks the court's imposition of its own biases. As professor Krotoszynski has noted, the court's reluctance to enforce the nondelegation doctrine may be caused by doubts in its own capacity to make principled judgments.<sup>77</sup>

The combination of these factors would seem to create skepticism at best that our courts could start applying the non-delegation doctrine to limit the use of benefit-cost analysis. However, there are positive signs that this could work. First, the application of benefit-cost analysis is not in any particular agency's expertise, and should not be given deference because of this issue, which itself is based on a deference to supposed

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<sup>74</sup> Robert Haveman, *The Chicago O'Hare Expansion: A Case Study of Administrative Manipulation of Benefit-Cost Principles*, at <http://depts.washington.edu/econlaw.papers.php> (on file with the author).

<sup>75</sup> Victor B. Flatt, *OSHA Regulation of Low-Exposure Carcinogens: A New Approach to Judicial Analysis of Scientific Evidence*, 14 U. Puget Sound L. Rev. (now Seattle University Law Review) 283 (1991).

<sup>76</sup> *Appalachian Power Company v. EPA*, 249 F.3d 1032 (2001) (citations omitted).

<sup>77</sup> Ronald Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 Ind. L. J. 239, 267 (2005).

Congressional preference. In determining whether evidentiary numbers are accurately used, a Court has as much expertise as an agency, and is called on to render such judgments routinely.<sup>78</sup>

Haveman notes that the federal courts in the O'Hare example, when presented with accurate data displaying flaws in the FAA's application of benefit cost analysis, did not hesitate to overturn the agency's decisions based on those analyses.<sup>79</sup> Moreover, the *American Trucking* court's discussion and reiteration of the non-delegation doctrine does seem to create guiding standards which should not raise too many red flags when it is used to overturn flawed or biased agency application. Merely defining a standard and raising the issue means that a court could be made aware of this possibility. A skepticism to benefit-cost analysis that demonstrates bias or less than best practices, would allow a court to see when an agency is going beyond objective application of a statute and into the arena of legislative policy, in violation of the non-delegation doctrine. Even if a court doesn't conceptualize the control of agency discretion in the APA as another version of non-delegation, such bias in a particular direction would also indicate acting outside of agency discretion contrary to law.

The courts could also fashion a simple judicial review that would allow the agency to have deference on the use of cost-benefit analysis when Congress orders it, but only as applied to the particular issue addressed by Congress; and generally *not* allow decisions to be dictated by formalistic application of benefit-cost analysis when Congress has been silent on a method of decision making or has specified another way to do so. We have seen such examples in the application of many environmental laws, where

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<sup>78</sup> Flatt, *OSHA Regulation*, *supra*, n. \_\_\_\_.

<sup>79</sup> Haveman, *supra*, n. \_\_\_\_.

Congress explicitly required particular kinds of technology or complete protection of health, regardless of cost. In those cases, the courts have not been reluctant to prohibit agency utilization of benefit-cost analysis in that realm.<sup>80</sup>

So courts have this power; they must just use it. Obviously, the courts themselves may also have bias (whether intentional or not), but they do not have a structural incentive to take power from the legislative branch to give to the executive branch. Perhaps Congress could create “best practices” for benefit-cost analysis which could help guide a court’s determination of whether an agency has overstepped the proper bounds in application.

## VI. Conclusion

There is some hope for benefit-cost analysis as a tool if it is to be used in a precise way. The criticism of benefit-cost analysis being manipulated and inadequate for certain kinds of analyses is correct. What is striking is that agencies should not be engaged in this kind of manipulation of policy making in the first place. It is a violation of the separation of powers doctrine in our Constitution, and this determination could be made by a rigorous application of the non-delegation doctrine to such agency action. All it requires is for our court to recognize the proper standard that governs what an agency can and should be engaged in when applying benefit-cost analysis and then a willingness to examine so-called “objective” evidence for accuracy. Doing this might go a good ways in curbing abuses of benefit-cost analysis and improve its use in practice.

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<sup>80</sup> *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984).



