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The Billion Dollar Benzene Blunder: Supreme Court Scrutinizes OSHA Standards in Industrial Union Department, AFL-CIO v. American Petroleum Institute

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THE BILLION DOLLAR BENZENE BLUNDER: SUPREME COURT SCRUTINIZES OSHA STANDARDS IN *INDUSTRIAL UNION DEPARTMENT, AFL-CIO v. AMERICAN PETROLEUM INSTITUTE*

> [W]hen discharging his duties under the [Occupational Safety and Health Act], the Secretary is well admonished to remember that a heavy responsibility burdens his authority. Inherent in this statutory scheme is authority to refrain from regulation of insignificant or *de minimis* risks. When the administrative record reveals only scant or minimal risk of material health impairment, responsible administration calls for avoidance of extravagant, comprehensive regulation. Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible.[1]

I. INTRODUCTION

Independent regulatory agencies,[2] such as the Occupational Safety and Health Administration,[3] are designed to promulgate safety standards[4] for the public's protection. Yet, for industry, public safety regulations have become overly burdensome.[5] The scope and impact of administrative regulations upon commercial enterprise have become

1. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 100 S. Ct. 2844, 2875 (1980) (Burger, C.J., concurring) (citation omitted), *aff'g in part sub nom.* American Petroleum Inst. v. OSHA, 581 F.2d 493 (5th Cir. 1978).

2. UNITED STATES GOV'T MANUAL, 495-705 (1980-1981), lists and describes 55 independent government agencies.

3. The Occupational Safety and Health Administration (OSHA) derives its authority from the Occupational Safety and Health Act. 29 U.S.C. §§ 651-678 (1976).

4. Such standards are accorded the force of law. Florida Peach Growers Ass'n v. United States Dep't of Labor, 489 F.2d 120, 123-24 (5th Cir. 1974). The Act imposes on every employer a duty to comply with occupational safety and health standards or face civil and criminal penalties under 29 U.S.C. § 666 (1976).

5. In order to effect its desired reach, Congress determined that job-related injury and illness imposed a substantial burden on interstate commerce and therefore the Act applies to all employment performed in a business affecting commerce among the several states. *See* 29 U.S.C. § 651 (1976). Current estimates place four million businesses and fifty-seven million employees within reach of the Act. Employees who are covered by other federal job safety programs are excluded. *E.g.*, The Coal Mines Health & Safety Act of 1969, 30 U.S.C. §§ 801, 811 (1976). *See* Cohen, *The Occupational Safety and Health Act: A Labor Lawyer's Overview*, 33 OHIO ST. L.J. 788 (1972).

the subject of serious inquiry on judicial review.[6]

This note analyzes the Supreme Court's recent precedential decision in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*.[7] For the first time, the Court scrutinized the type of standards OSHA is authorized to promulgate and intimated that reviewing courts should require OSHA to conduct a cost-effectiveness analysis prior to implementing regulatory action. Although the traditional scope of judicial review of an agency regulation may not have changed with this decision,[8] the Supreme Court has required greater scrutiny in assessing the propriety of OSHA's actions than ever before.

This note begins with an historical perspective of OSHA's rulemaking authority and the judiciary's intrusion upon it. Attention is directed to the Supreme Court's decision in *Industrial Union Department*, analyzing the Court's holding and demonstrating how the decision corresponds to and deviates from prior decisions. Finally, the future implications of *Industrial Union Department* are discussed.

II. PROCEDURAL DIRECTIVES

The Occupational Safety and Health Act of 1970[9] was designed to

6. *See, e.g.*, American Fed'n of Labor v. Marshall, 617 F.2d 636 (D.C. Cir. 1979), *cert. granted, judgment vacated, sub nom.* Cotton Warehouse Ass'n v. Marshall, 101 S. Ct. 56 (1981); American Iron & Steel Inst. v. OSHA, 577 F.2d 825 (3d Cir. 1978), *cert. dismissed*, 101 S. Ct. 38 (1980); Aqua Slide 'N' Dive Corp v. Consumer Product Safety Comm'n, 569 F.2d 831 (5th Cir. 1978); American Fed'n of Labor v. Brennan, 530 F.2d 109 (3d Cir. 1975); Synthetic Organic Chemical Mfrs. Ass'n v. Brennan, 503 F.2d 1155 (3d Cir. 1974); Florida Peach Growers Ass'n v. United States Dep't of Labor, 489 F.2d 120 (5th Cir. 1974); Associated Indus. Inc. v. United States Dep't of Labor, 487 F.2d 342 (2d Cir. 1973).

7. 100 S. Ct. 2844 (1980) (Per Justice Stevens, with three Justices joining and one Justice concurring in judgment), *aff'g in part sub nom.* American Petroleum Inst. v. OSHA, 581 F.2d 493 (5th Cir. 1978).

8. For comments on judicial review of agency rulemaking, see Handler, *A Rebuttal: The Need for a Scientific Base for Government Regulation*, 43 GEO. WASH. L. REV. 808 (1975); Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975); Wright, *New Judicial Requisites for Informal Rulemaking: Implications for the Environmental Impact Statement Process*, 29 ADMIN. L. REV. 59 (1977); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974); Comment, *Judicial Review of Informal Rulemaking Procedure: When May Something More Formal Be Required?* 27 AM. U.L. REV. 781 (1978); Note, *Judicial Review Under the Occupational Safety and Health Act: The Substantial Evidence Test as Applied to Informal Rulemaking*, 1974 DUKE L.J. 459; Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782 (1974).

9. 29 U.S.C. §§ 651-678 (1976). *See generally* B. FELLNER & D. SAVELSON, OCCUPATIONAL SAFETY AND HEALTH—LAW AND PRACTICE (1976); M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW (1978); R. SMITH, THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ACHIEVEMENTS (1976); Cohen, *supra* note 5; Spann, *The New Occupational Safety and Health Act*, 58 A.B.A.J. 255 (1972); Taylor, *Reasonable Rulemaking Under OSHA: Is it Feasible?*, 9 ST. MARY'S L.J. 215 (1977); White & Carney, *OSHA Comes of Age: The Law of the Work Place*

give the Secretary of Labor the authority to promulgate standards to ensure employee protection in the workplace.[10] In doing so, the Secretary was empowered to promulgate regulations using the process of "informal" or "notice-and-comment" rulemaking.[11]

In promulgating regulations, the Secretary of Labor must follow the procedural directives outlined in the Occupational Safety and Health Act.[12] On the basis of his own independent investigation, the Secretary must determine whether a regulation should be promulgated in order to ensure a safe place of employment.[13] He may receive the assistance and recommendations of an advisory committee in making this determination.[14] Once the determination is made, the proposed regulation must be published in the Federal Register and all interested persons allowed thirty days to comment in writing and to request a public hearing.[15] Upon receiving any objections to the regulation, the Secretary must set a date and place for a public hearing and publish this information in the Federal Register.[16] Within sixty days following the hearing, or within sixty days after the period for filing comments if no hearing is requested, the Secretary will promulgate the regulation by publishing it in the Federal Register accompanied by a statement of supporting reasons.[17]

Environment, 28 BUS. LAW. 1309 (1973); Comment, *The Occupational Safety and Health Act of 1970: An Overview*, 4 CUM.-SAM. L. REV. 525 (1974); Comment, *The Occupational Safety and Health Act*, 34 LA. L. REV. 102 (1973).

10. 29 U.S.C. § 652(8) (1976). "The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *Id.*

11. It has been widely assumed by legal scholars that "formal" or "on-the-record" rulemaking is inefficient, expensive and unduly burdensome to administrative agencies. Informal rulemaking is seen as efficient and inexpensive. *See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 6.01 to .01-1 (1976); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15 (Supp. 1970) [hereinafter cited as DAVIS TREATISE]; Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1315 (1972); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

12. 29 U.S.C. §§ 651-678 (1976).

13. *Id.* § 655(b)(1).

14. *Id.*

15. *Id.* § 655(b)(2)-(3). *See also* Pactra Indus. v. Consumer Product Safety Comm'n, 555 F.2d 677, 684-85 (9th Cir. 1977).

16. 29 U.S.C. § 655(b)(3) (1976).

17. *Id.* § 655(e).

This requirement is designed to serve several general functions: it provides an internal check on arbitrary agency action by insuring that prior to taking action an agency can clearly articulate the reasons for its decision; it makes possible informed public criticism

III. HISTORICAL PERSPECTIVE: THE STANDARD OF REVIEW

The federal courts have recently faced an onslaught of cases seeking judicial review of administrative determinations regarding the public's protection from hazardous substances.[18] Many times, the exposure effects from such substances are not precisely known, and the Secretary must formulate a regulation on the basis of a judgment call. The "substantial evidence" test[19] is easily applicable when the Secretary's record is subject to factual verification. The reviewing court merely ensures that he has not acted arbitrarily or capriciously. The test is more difficult to apply when the regulation is not based on empirically verifiable data but rather on speculative research and development from which a policy determination has, by necessity, been made.[20] History reveals that, in the latter case, the reviewing court's scope of intrusion is unclear.[21] Nevertheless, reviewing courts, using the substantial evi-

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of a decision by making known its underlying rationale; and it facilitates judicial review of agency action by providing an important part of the record of the decision.

Dry Color Mfrs. Ass'n v. Department of Labor, 486 F.2d 98, 105 (3d Cir. 1973). *But see id.* at 110 (McLaughlin J., dissenting). "If we were to try and force the Secretary to issue an exhaustive statement explaining and supporting his motives, the Emergency Temporary Standard would become an ineffective mechanism." *Id.*

The requirements of a statement of reasons were established in Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974).

> What we are entitled to at all events is a careful identification by the Secretary, when his proposed standards are challenged, of the reasons why he chooses to follow one course rather than another. Where that choice purports to be based on the existence of certain determinable facts, the Secretary must, in form as well as substance, find those facts from evidence in the record. By the same token, when the Secretary is obliged to make policy judgments where facts alone do not provide the answer, he should so state and go on to identify the considerations he found persuasive.

Id. at 475. *Cf.* Kennecott Copper Corp. v. Environmental Protection Agency, 462 F.2d 846 (D.C. Cir. 1972) (dealing with environmental regulations under the Clean Air Act).

18. American Fed'n of Labor v. Marshall, 617 F.2d 636 (D.C. Cir. 1979), *cert. granted, judgment vacated, sub nom.* Cotton Warehouse Ass'n v. Marshall, 101 S. Ct. 56 (1981); American Iron & Steel Inst. v. OSHA, 577 F.2d 825 (3d Cir. 1978); Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301 (2d Cir. 1975); Synthetic Organic Chemical Mfrs. Ass'n v. Brennan, 503 F.2d 1155 (3d Cir. 1974); Florida Peach Growers Ass'n v. United States Dep't of Labor, 489 F.2d 120 (5th Cir. 1974); Dry Color Mfrs. Ass'n v. Department of Labor, 486 F.2d 98 (3d Cir. 1973). *See generally* Bergin & Riskin, *Economic and Technological Feasibility in Regulating Toxic Substances under the Occupational Safety and Health Act*, 7 ECOL. L. QUARTERLY 285 (1978); McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729 (1979).

19. 29 U.S.C. § 655(f) (1976). "The determinations of the Secretary shall be conclusive if supported by substantial evidence on the record considered as a whole." *Id. See also* Verkuil, *supra* note 11, at 185.

20. "How a reviewing court applies the substantial evidence test in reviewing quasi-legislative informal rule making is an intriguing problem which is just beginning to generate what will prove to be . . . an extensive literature." Synthetic Organic Chemical Mfrs. Ass'n v. Brennan, 503 F.2d 1155, 1158 (3d Cir. 1974).

21. See notes 146-52 *infra* and accompanying text.

dence standard of review, have looked into two principal areas. First, the courts have examined the nature of the risk involved to ensure that the Secretary of Labor has identified a socially unacceptable, or unreasonable health or safety risk prior to proposing any regulatory action.[22] The Secretary is not authorized to promulgate a standard unless it would result in improved health or safety.[23] Second, even if the regulation appears to be an effective way to reduce the identified risk, the courts have asked whether the regulation is both technologically and economically feasible.[24]

A. *The Substantial Evidence Test*

1. Application to Cases Involving Verifiable Facts

In *Pacific States Box & Basket Co. v. White*,[25] Justice Brandeis set out the presumption theory of administrative review. "Where the regulation is within the scope of authority legally delegated, the *presumption* of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies."[26] The Fifth Circuit Court of Appeals in *Associated Industries, Inc. v. United States Department of Labor*,[27] rejected the presumption theory, and adopted the substantial evidence standard of review for OSHA regulations. The court concluded that, "when the Department [of Labor] imposes a standard . . . it has an obligation to produce some evidence justifying its action."[28]

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22. See notes 59-72 *infra* and accompanying text.

23. 29 U.S.C. § 655(a) (1976). *See also* American Fed'n of Labor v. Brennan, 530 F.2d 109 (3d cir. 1975).

24. See notes 73-89 *infra* and accompanying text.

> The Occupational Safety and Health Act envisions a two-step process to set standards. First, the agency must ascertain whether a risk to employees from a toxic chemical exists. If such a risk exists the industry must reduce that risk to the extent economically and technologically feasible regardless of the marginal health benefits of risk reduction. This standard of action implies that OSHA should only be concerned with costs to the employer when the cost of compliance is likely to drive a substantial number of employers out of business. Except for this outer limit, Congress was more concerned with employee safety than it was with employer expense.

McGarity, *supra* note 18, at 787.

25. 296 U.S. 176 (1935). *See also* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972); United States v. George S. Bush & Co., 310 U.S. 371 (1940); Assigned Car Cases, 274 U.S. 564 (1927). One of the first attempts to develop higher standards for informal rulemaking can be seen in International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) (dealing with E.P.A. denial of application under the Clean Air Act). *See also* Verkuil, *supra* note 11, at 206.

26. 296 U.S. at 186 (emphasis added).

27. 487 F.2d 342 (2d Cir. 1973).

28. *Id.* at 352-53.

In quantifying the amount of evidence needed to sustain the standard, the court referred to the test established in an earlier case, *Universal Camera Corp. v. National Labor Relations Board*.[29]

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.[30]

In justifying the departure from Justice Brandeis's view in *Pacific States Box*, the Fifth Circuit Court of Appeals in *Associated Industries* recounted the historical background of the substantial evidence standard of review for OSHA regulations.[31] The original senate bill containing the informal rulemaking provisions, now a part of the Occupational Safety and Health Act, was silent on the scope of judicial review. The House amended the bill to provide for formal, rather than informal rulemaking. The Senate then agreed to incorporate the substantial evidence standard of review as a tradeoff for the House's abandoning its insistence on formal rulemaking which would automatically have invoked this test.[32] The result was an anomalous, informal rulemaking procedure triggering a formal standard of review.[33] Yet, the substantial evidence standard of review was intended to be an important safeguard against arbitrariness or irrationality in informal rulemaking. As the court in *Associated Industries* articulated, such a standard of review would ensure that an agency would act with discriminating awareness of the consequences of its action.[34]

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29. 179 F.2d 749 (2d Cir. 1950), *rev'd*, 340 U.S. 474 (1951). *See also* National Labor Relations Bd. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939); Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938); Corn Products Co. v. Department of Health, Education & Welfare, F.D.A., 427 F.2d 511 (3d Cir. 1970).

30. 340 U.S. 474, 477 (1951). Professor Jaffe equated the concept of substantial evidence with the concept of fairness.

> I would suggest . . . that underlying the vexed word "substantial," . . . coming as it does from a spectrum of words such as "scintilla," "preponderance" and "weight," connotes the mechanics of judging. . . . I would say then, that the judge may—indeed must—reverse if as he conscientiously sees it the finding is not fairly supported by the record; or to phrase it more sharply, the judge must reverse if he cannot conscientiously escape the conclusion that the finding is unfair.

Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233, 1239 (1951).

31. 487 F.2d 342, 348-51 (2d Cir. 1973).

32. *Id.* at 348-49.

33. See note 40 *infra* and accompanying text.

34. 487 F.2d at 354 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 174 (1962)).

Although the court in *Associated Industries* adopted the "substantial evidence" standard of review for OSHA regulations, it concluded that this review entailed no more or less than assessing whether the Secretary of Labor, in promulgating an OSHA regulation, acted arbitrarily or capriciously.[35] The court pointed out that there is really only a semantic difference between the "substantial evidence" standard and the traditional "arbitrary and capricious" standard of review of an agency action. If a regulation is not supported by substantial evidence, it is arbitrary and capricious.[36]

2. Application to Cases Involving Policy Considerations

Associated Industries is illustrative of the application of the substantial evidence test to the promulgation of standards concerning identified hazards, "the evidence [being] such that the task consisted primarily of evaluating the data and drawing conclusions from it."[37] The courts, however, have had difficulty applying this test to OSHA regulations predicated on legislative-type policy decisions.[38] The difficulty, as Judge McGowan addressed it in *Industrial Union Department, AFL-CIO v. Hodgson*,[39] has stemmed from the legislative compromise that ultimately led to the statutory scope of review of OSHA actions.[40]

35. 487 F.2d at 349.

36. *Id.* at 349-50. *Contra*, Charlton v. United States, 412 F.2d 390 (3d Cir. 1969), where the court concluded:

> While the agency action which is arbitrary and capricious, or which constitutes an abuse of discretion, would no doubt be action which is "unsupported by substantial evidence," the reverse is not true. In other words, even where the agency action is not arbitrary and capricious or an abuse of discretion, there may still not be "substantial evidence" in the accepted use of that test to justify the agency action. The very listing of the substantial evidence as a separate and alternative ground for reviewing agency action indicates a legislative intent that it be a different standard from that permitting the setting aside of the findings or conclusions of an agency as arbitrary, capricious or an abuse of discretion.

Id. at 398. In American Fed'n of Labor v. Marshall, 617 F.2d 636 (D.C. Cir. 1979), the court held that the substantial evidence test "provides for more rigorous scrutiny than the usual 'arbitrary and capricious' test. . . ." *Id.* at 649. *See also* WBEN, Inc. v. United States, 396 F.2d 601 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968); DAVIS TREATISE, *supra* note 11, § 29.02; Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. REV. 899, 935 (1973).

37. Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474 (D.C. Cir. 1974).

38. *E.g.*, Synthetic Organic Chemical Mfgs. Ass'n v. Brennan, 503 F.2d 1155, 1158-60 (3d Cir. 1974); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 472-73 (D.C. Cir. 1974); Florida Peach Growers Ass'n v. United States Dep't of Labor, 489 F.2d 120, 127-29 (5th Cir. 1974); Associated Indus. Inc. v. United States Dep't of Labor, 487 F.2d 342, 347-50 (2d Cir. 1973).

39. 499 F.2d 467 (D.C. Cir. 1974).

40. *Id.* at 469-70.

> This direct review proceeding presents a classic case of what Judge Friendly has aptly termed "a new form of uneasy partnership" between agency and court that results whenever Congress delegates decision making of a legislative character to the one, sub-

This has forced the courts to use the substantial evidence standard, a test created for the review of formal rulemaking, to review legislative-like determinations made in informal agency proceedings. In many instances, the courts have been ill-equipped to deal with this task.

Hodgson involved a challenge to the Secretary's promulgation of complex scientific standards lacking sufficient quantitative data to support them. The court concluded that in a case involving complex scientific standards such as this, "[D]ecision making must . . . depend to a greater extent upon policy judgments and less upon purely factual analysis."[41] Thus, the court held that where the reliability of research and data in a new area was questionable, the agency had to employ broad discretion to formulate appropriate regulations to the best of its ability on the basis of the available data.[42] The court further stated that in cases where legislative determinations were involved, the scope of review, although no less exacting in scrutiny, ensured that the agency had not acted arbitrarily or irrationally.[43]

Many cases seeking judicial review of policy decisions resulted from promulgation of OSHA regulations based on the results of tests of laboratory animals.[44] The court in *Dry Color Manufacturers Association v. Department of Labor*[45] noted that "substantial evidence" must necessarily be determined by the facts and circumstances of the particular case.[46] In *Dry Color*, a temporary emergency standard regulating human exposure to suspected chemical carcinogens was vacated for lack of substantial evidence. The Secretary of Labor, in setting the human exposure limits, had extrapolated data from animal experiments to establish a sufficient probability of a cancer hazard to man.

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ject to review by the other. . . . The angularity of this relationship is only sharpened when, as here, Congress—with no apparent awareness of anomaly—has explicitly combined an informal agency procedure with a standard of review traditionally conceived of as suited to formal adjudication or rulemaking. The federal courts, hard pressed as they are by the flood of new tasks imposed upon them by Congress, surely have some claim to be spared additional burdens deriving from the illogic of legislative compromise.

Id. at 469.

41. *Id.* at 474. *See also* Permian Basin Area Rate Cases, 390 U.S. 747, 811 (1968).

42. In *Hodgson*, the court felt that judicial restraint should be exercised. "We think it equally the part of wisdom and restraint on our part to show a comparable flexibility, and to be always mindful that at least some legislative judgments cannot be anchored securely and solely in demonstrable fact." 499 F.2d at 476.

43. *Id.* at 475 (quoting Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968)).

44. *E.g.*, Synthetic Organic Chemical Mfgs. Ass'n v. Brennan, 503 F.2d 1155 (3d Cir. 1974); Dry Color Mfgs. Ass'n v. Department of Labor, 486 F.2d 98 (3d Cir. 1973).

45. 486 F.2d 98 (3d Cir. 1973).

46. "The amount and quality of the evidence necessary to provide 'substantial' support for such a finding will necessarily vary depending on the facts of each case." *Id.* at 104.

Although the court acknowledged that the Secretary had no affirmative obligation under the substantial evidence test to promulgate a standard based on "absolute certainty" of a chemical causing human cancer, the court did state that the substantial evidence test required "more than some possibility" of the chemical producing this result.[47]

Synthetic Organic Chemical Manufacturers Association v. Brennan[48] provides a further illustration of the substantial evidence test's applicability to cases involving policy considerations. In this case, the only available evidence demonstrated that the chemical ethyleneimine caused cancer in rats and mice. Yet, the court held that the Secretary of Labor properly weighed this evidence in determining the limits of safe human exposure.[49] The court reasoned that once a chemical is found to be carcinogenic in experimental animals, the Secretary has two alternatives: either find the chemical carcinogenic to man, or find it non-carcinogenic to man, until contrary evidence is produced.[50] In *Chemical Manufacturers*, the court concluded that it would be "improper to afford less protection to workers when exposed to substances found to be carcinogenic only in experimental animals," and it opted for the second alternative.[51] The court believed that the Secretary's determination in such a case was a quasi-legislative one which did not require absolute judicial deference but which did demand some consistency between the standard and OSHA's enabling legislation.[52]

Chemical Manufacturers summarized previous holdings and established the following seemingly algebraic five-step standard of judicial review:

> (1) [Determine] whether the Secretary's notice of proposed rulemaking adequately informed interested persons of the action taken;
>
> (2) [Determine] whether the Secretary's promulgation adequately sets forth reasons for his action;

47. *Id.*

48. 503 F.2d 1155 (3d Cir. 1974).

49. The court acknowledged the difficulty of attempting to measure a legislative policy decision against a factual yardstick, and indicated that in such cases deference should be granted to the Secretary's decision. "We hold that there does exist substantial evidence in the record as a whole to support the Secretary's finding that EI is carcinogenic in rats and mice and in the absence of evidence of carcinogenicity in humans, the Secretary properly weighed the only available alternatives." *Id.* at 1158, 1160-61.

50. *Id.* at 1159.

51. *Id.* (quoting the Secretary's statement of reasons for the regulation).

52. *Id. See* Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 475-76 (D.C. Cir. 1974).

(3) [Determine] whether the statement of reasons reflects consideration of factors relevant under the statute;

(4) [Determine] whether presently available alternatives were at least considered; and

(5) [Determine] *if the Secretary's determination is based* in whole or in part on *factual matters* subject to evidentiary development, whether substantial evidence in the record as a whole supports the determination.[53]

B. *The Nature of the Risk to be Remedied*

The most recent case dealing with the review of an OSHA regulation governing the handling of a toxic substance is *American Iron & Steel Institute v. OSHA*.[54] This case dealt with a rule promulgated by the Secretary of Labor which limited human exposure to a suspected carcinogen in the absence of supporting scientific data. The court distinguished determinations based on fact from those, as in the present case, based on non-factual, legislative-type policy decisions.[55] While the former determinations were reviewable under the substantial evidence test, the latter determinations were reviewable under a "reasoned decision" standard,[56] one which was "free from nagging doubt" about the rationale of the Secretary's decision.[57]

The scope of judicial review in cases involving the Secretary of Labor's policy determinations must be broad enough to ensure that the determination reflects a "reasoned decision."[58] This necessitates an assessment of the nature of the risk involved, for the Secretary lacks the authority to promulgate a regulation in the absence of a reasonable risk

53. 503 F.2d at 1160 (emphasis added). This five step test for review was expressly followed in American Iron & Steel Inst. v. OSHA, 577 F.2d 825, 830-31 (3d Cir. 1978).

54. 577 F.2d 825 (3d Cir. 1978).

55. *Id.* at 831. *See also* International Harvestor Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973); Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841, 850 (D.C. Cir. 1970).

56. 577 F.2d at 835. This test is somewhat analogous to a constitutional analysis of "rational basis." The substantial evidence test, on the other hand, would parallel "strict scrutiny." *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 994, 1000 (1978).

57. Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 488 (D.C. Cir. 1974).

58. American Iron & Steel Inst. v. OSHA, 577 F.2d 825, 835 (3d Cir. 1978). *See* Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 475-76 (D.C. Cir. 1974). "What we are entitled to at all events is a careful identification by the Secretary . . . of the reasons why he chooses to follow one course rather than another." *Id.* at 475.

"[O]ur review basically must determine whether the Secretary carried out his essentially legislative task in a manner reasonable under the state of the record before him." Florida Peach Growers Ass'n v. United States Dep't of Labor, 489 F.2d 120, 129 (5th Cir. 1974).

of harm to employees.[59] In *Florida Peach Growers Association v. United States Department of Labor*,[60] the fifth circuit reviewed an emergency OSHA regulation limiting human exposure to residues of organophosphorous pesticides.[61] Under the auspices of the Occupational Safety and Health Act, the court concluded that the Secretary could promulgate emergency regulations to deal with situations involving grave danger.[62] Nevertheless, the court qualified its holding by noting that danger alone did not always trigger the authority to promulgate regulations.[63] The court held that reasoned decisionmaking might justify promulgating a standard when the risk involved death, but not if the risk involved a curable malady.[64] Similarly, the court in *United Parcel Service, Inc. v. OSHA*[65] examined the risk of foot injury to members of the parcel-handling industry in regard to an OSHA standard which required steel-toed safety shoes. Although acknowledging that the risk involved was not a de minimis one, the court held:

> [I]n view of the nature of petitioner's business, the small sizes of the vast majority of parcels handled, the extremely low incidence of injuries resulting from falling parcels, and the high rate of turnover among the affected employees, we think it unreasonable and an abuse of discretion to require . . . [that all employees be equipped with] steel-toed safety shoes.[66]

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59. The Occupational Safety and Health Act specifically states that the Secretary of Labor may not promulgate a standard unless it would result in improved health and safety. If no health or safety risk exists, the Secretary would not be warranted in taking protective measures. 29 U.S.C. § 655(a) (1976).

60. 489 F.2d 120 (5th Cir. 1974).

61. The Secretary's regulation of twelve named pesticides is published at 38 Fed. Reg. 17,216 (1973).

62. 489 F.2d at 130. *See* 29 U.S.C. § 655(c)(1)(A) (1976).

63. 489 F.2d at 130.

> The need for a serious emergency upon which to ground temporary standards is reflected in words of the Act which require the Secretary to determine "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." The Act requires determination of danger *from* exposure to harmful substances, not just a danger *of* exposure; and not exposure to just a danger, but to a *grave* danger; and, not the necessity of just a temporary standard, but that an emergency standard is necessary.

Id. (emphasis in original).

64. We reject any suggestion that deaths must occur before health and safety standards may be adopted. Nevertheless, the danger of incurable, permanent or fatal consequences to workers, as opposed to easily curable and fleeting effects on their health, becomes important in the consideration of the necessity for emergency measures to meet a grave danger.

Id. at 132.

65. 570 F.2d 806 (8th Cir. 1978).

66. *Id.* at 812.

In cases dealing with hazardous substances whose effects are not precisely known, the courts have exhibited great deference to the Secretary's statement of the risk involved.[67] *American Iron & Steel Institute v. OSHA*[68] acknowledged the concept of a "socially acceptable risk," when elimination of any risk was impossible.[69] In that case, the Secretary determined that coke oven emissions caused human cancer and that there was no known safe exposure level. Therefore, "the Secretary's effort to meet a perceived health need by establishing an exposure limit to coke oven emissions was proper."[70] The court reasoned that in cases where a risk cannot be eliminated, it is up to the Secretary to make a policy judgment on the basis of the best available evidence.[71] In other words, it was the Secretary's duty to determine a socially acceptable risk. The court noted that even though it may have "drawn different inferences from the information before the Secretary," as long as his conclusion reflected a reasoned decision, the court must defer to it.[72]

C. *The Feasibility Issue*

Once the Secretary has identified a grave, socially unacceptable, or unreasonable risk, he must then show that his proposed risk-reducing regulation is both technologically and economically feasible.[73] Technological feasibility has not generally been an issue before the courts. In *Society of Plastics, Inc. v. OSHA*[74] the court noted that OSHA was to be viewed as a technology-forcing agency dispelling any question of

67. *See, e.g.*, notes 48-52 *supra* and accompanying text.
68. 577 F.2d 825 (3d Cir. 1978).
69. *Id.* at 832.
70. *Id.*
71. *Id.* at 833.
72. *Id.*
73. Although courts have concluded that technological feasibility may be a consideration, OSHA is to be viewed as technology forcing. American Fed'n of Labor v. Brennan, 530 F.2d 109, 121 (3d Cir. 1975); Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301, 1308 (2d Cir. 1975); *cf.* Natural Resources Defense Council, Inc. v. E.P.A., 489 F.2d 390, 401 (5th Cir. 1974) (construing the 1970 amendment to the Clean Air Act); Chrysler Corp. v. Department of Transp., 472 F.2d 659, 674 (6th Cir. 1972) (construing the Clean Air Act). The courts appear to have concluded that costs short of "massive economic dislocation" do not make a standard economically infeasible. American Iron & Steel Inst. v. OSHA, 577 F.2d 825, 835 (3d Cir. 1978); American Fed'n of Labor v. Brennan, 530 F.2d 109, 123 (3d Cir. 1975); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 477-78 (D.C. Cir. 1974). "[I]t may become evident that a particular safety and health standard is economically or technically infeasible . . . but only *after* employers have made a good faith effort to comply." Atlantic & Gulf Stevedores v. OSHA, 534 F.2d 541, 550 (3d Cir. 1976) (emphasis added).
74. 509 F.2d 1301 (2d Cir. 1975).

present technological capabilities.[75] Similarly, in *American Federation of Labor v. Brennan*,[76] the court concluded, "the Secretary would not be justified in dismissing an alternative to a proposed health and safety standard as infeasible when the necessary technology looms on today's horizon."[77]

The Occupational Safety and Health Act and its legislative history is cloudy on the issue of economic feasibility although this issue has been frequently presented to the courts.[78] In *Florida Peach Growers Association v. United States Department of Labor*,[79] the court expressed its uneasiness with the broad authority delegated to the Secretary of Labor by the Act. It concluded that Congress intended that the Secretary "delicately exercise" his authority, employing a balancing approach between the protection afforded by the regulation and the regulation's effect upon "economic and market conditions in the industry."[80] As the Chairman of the Subcommittee on Pesticides[81] stated, "it is essential that employees be protected against exposure to highly toxic materials, but this should be done without eliminating the agricultural enterprise and the associated jobs."[82]

Industrial Union Department, AFL-CIO v. Hodgson[83] also addressed the issue of economic feasibility and concluded that "practical considerations can temper protective requirements. Congress does not appear to have intended to protect employees by putting their employers out of business . . . ."[84] Nevertheless, the court cautioned that a regulation designed to protect employee health could substantially increase production costs and adversely affect profit margins and still be feasible.[85]

[T]he concept of economic feasibility [does not] necessarily

75. *Id.* at 1308. See note 73 *supra*.
76. 530 F.2d 109 (3d Cir. 1975).
77. *Id.* at 121.
78. *Id.* at 122.
79. 489 F.2d 120 (5th Cir. 1974).
80. *Id.* at 129-30.
81. The Subcommittee was one of several investigative groups convened by the Government in the 1970's to study the problem of occupational exposure to pesticides. The Subcommittee concluded, in *Florida Peach Growers*, that the Secretary's standard regulating pesticide exposure was not justified since no emergency condition existed. The Chairman of the Subcommittee resigned following the Secretary's promulgation of the emergency standards, despite the Subcommittee's contrary recommendation. *Id.* at 129-30.
82. *Id.* at 130.
83. 499 F.2d 467 (D.C. Cir. 1974).
84. *Id.* at 477-78.
85. *Id.* at 477.

> guarantee the continued existence of individual employers. It would appear to be consistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees. . . ."[86]

This landmark decision effectively eliminated the chance of any successful economic defense to a regulation.

Numerous courts have concluded that substantial costs to an industry—short of massive dislocation—are justifiable in light of the hazards which OSHA regulations are designed to eliminate.[87] In addressing the industry's contention of a regulation's heavy financial burden, the court in *American Iron & Steel Institute v. OSHA*[88] concluded, "although we are very sensitive to the financial implications of the standard and have endeavored to carefully weigh its effect upon the well-being of the industry, we are not persuaded that its implementation would precipitate anything approaching the 'massive dislocation,' which would characterize an economically infeasible standard."[89]

III. *INDUSTRIAL UNION DEPARTMENT, AFL-CIO V. AMERICAN PETROLEUM INSTITUTE*: THE BILLION DOLLAR BENZENE BLUNDER

The United States Supreme Court recently scrutinized OSHA's regulation of toxic emissions to ensure that the agency acted within the confines of its enabling legislation.[90] In doing so, the Court looked to the Secretary of Labor's rationale for imposing the regulation as well as the Occupational Safety and Health Act and its legislative history to examine the congressional parameters of the Secretary's authority. The Court struck down the regulation holding that OSHA had exceeded its

86. *Id.* at 478. *See also* American Fed'n of Labor v. Brennan, 530 F.2d 109 (3d Cir. 1975). "An economically impossible standard would in all likelihood prove unenforceable, inducing employers faced with going out of business to evade rather than comply with the regulation." *Id.* at 123.

87. American Iron & Steel Inst. v. OSHA, 577 F.2d 825, 836 (3d Cir. 1978); American Fed'n of Labor v. Brennan, 530 F.2d 109, 123 (3d Cir. 1975); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 478 (D.C. Cir. 1974).

88. 577 F.2d 825 (3d Cir. 1978), *cert. dismissed*, 101 S. Ct. 38 (1980).

89. 577 F.2d at 836. OSHA has consistently taken the position, regarding toxic substances, that no cost-benefit analysis is required. 41 Fed. Reg. 46,742, 46,750-51 (1976), 29 C.F.R. § 1910.1029 (1980) (coke oven emission standard); 39 Fed. Reg. 35,890, 35,892 (1974), 29 C.F.R. § 1910.1017 (1980) (vinyl chloride standard); 37 Fed. Reg. 11,318 (1972), 29 C.F.R. § 1910.1001 (1980) (asbestos dust standard).

90. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 100 S. Ct. 2844 (1980) (Per Justice Stevens, with three Justices joining and one Justice concurring in judgment), *aff'g in part sub nom.* American Petroleum Inst. v. OSHA, 581 F.2d 493 (5th Cir. 1978).

regulatory authority.[91]

Industrial Union Department, the first OSHA standards case to reach the Supreme Court, dealt with the validity of an occupational safety and health administration regulation limiting worker exposure to benzene,[92] a hydrocarbon compound suspected of causing leukemia.[93] Benzene had been recognized since 1900 as a toxic substance and its history had been riddled with regulation.[94] OSHA's past regulatory scheme was aimed at the non-malignant toxic effects of the substance.[95] In 1977, based upon a leukemia hazard, OSHA severely reduced the 10 ppm[96] standard set in 1971 to 1 ppm effective March 13, 1978.[97] This reduction, referred to as a billion dollar decision,[98] was challenged by

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91. In this case the record makes it perfectly clear that the Secretary relied squarely on a special policy for carcinogens that imposed the burden on industry of proving the existence of a safe level of exposure, thereby avoiding the Secretary's threshold responsibility of establishing the need for more stringent standards. In so interpreting his statutory authority, the Secretary exceeded his power.

100 S. Ct. at 2873.

92. Benzene (C_6H_6) is a ubiquitous hydrocarbon compound which occurs naturally in small quantities and is primarily produced by the petroleum and steel industries. Its production in the United States is rapidly increasing and at present only 11 other chemicals and only one other hydrocarbon are produced in greater quantities. 43 Fed. Reg. 5918 (1978).

The primary use of benzene is as a feedstock in the manufacture of other organic chemicals; it is also used in the manufacture of detergents, pesticides, solvents, and paint, and as a solvent and reactant in chemical laboratories. Industries currently using benzene include the chemical, printing, lithograph, rubber cements, rubber fabricating, paint, varnish, stain removers, adhesives, and petroleum industries.

American Petroleum Inst. v. OSHA, 581 F.2d 493, 498 (5th Cir. 1978).

93. During the 1970's various studies revealed statistically significant greater risks of leukemia for workers exposed to resins containing the compound, than for the general population. One study, on which OSHA principally relied, pinpointed exposure to benzene at around 100 ppm (parts per million parts air averaged over an eight hour work day), and found that the risk of death from leukemia, among those exposed, was five times greater than the general population. 581 F.2d at 499 n.13. For results of various benzene studies see Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 100 S. Ct. 2844, 2852-54 & nn. 8, 9, 12, 15 & 16. For various studies on the effects of benzene exposure see Infant, *Leukemia Among Workers Exposed to Benzene*, 37 TEX. REP. BIOL. MED. 153 (1978); Krekel, *Benzene Cancer Risk Demands Cancer Control*, 37 TEX. REP. BIOL. MED., 162 (1978).

94. 581 F.2d at 498. For a history of the regulation of benzene see Industrial Union Dep't AFL-CIO v. American Petroleum Inst., 100 S. Ct. 2844, 2851-55 (1980).

95. Such nonmalignant toxic effects include headaches, nausea, breathlessness and nervous excitation. 581 F.2d at 498. In 1946, the American Conference of Governmental Industrial Hygienists recommended a maximum exposure limit for benzene of 100 ppm which resulted in a reduction to 50 ppm in 1947, to 35 ppm in 1948, to 25 ppm in 1963 and to 10 ppm in 1974. OSHA adopted a 10 ppm standard in 1971 without rulemaking under the authority of 29 U.S.C. § 655(a) (1976). This standard is codified at 29 C.F.R. § 1910.1000 Table A-2 (1977).

96. Parts per million parts air averaged over an eight hour work day. 29 C.F.R. § 1910.1028 (1980).

97. 43 Fed. Reg. 5918 (1978).

98. OSHA estimated compliance costs for those affected to include: $187-205 million first year operating costs, $266 million engineering control costs, and $34 million recurring annual costs. Although not seriously challenged by the affected industry, petitioners refer to the

producers and users of benzene alike. This challenge resulted from allegations that the need for the proposed reduction was not supported by substantial evidence in light of OSHA's failure to conduct a cost-benefit analysis to show that the regulation was reasonably related to its goals.[99] The Fifth Circuit, under its decision in *Aqua Slide 'N' Dive v. Consumer Product Safety Commission*,[100] vacated the regulation "in absence of substantial evidence indicating that measurable benefits to be achieved by the reduction . . . bore a reasonable relationship to the one-half billion dollar cost of such regulation for affected industries."[101]

In a precedential five to four decision,[102] the United States Supreme Court affirmed in part the Fifth Circuit's decision, striking down the benzene standard.[103] The Court determined that pursuant to the Occupational Safety and Health Act, the Secretary of Labor is only authorized to promulgate regulations which are "reasonably necessary or appropriate to provide safe or healthful employment or places of employment."[104] The Supreme Court construed this provision as placing an affirmative obligation on the Secretary of Labor to make a

promulgation of this standard as a billion dollar decision. 581 F.2d at 503 & n.22. *See also* Brief for Respondents at 17 & n.40, *id.*, where this cost estimate is challenged as being significantly underestimated by as much as $4 billion.

99. The Fifth Circuit concluded that OSHA must assess the expected benefits in light of the burdens to be imposed by the standard. Although the agency does not have to conduct an elaborate cost-benefit analysis, it does have to determine whether the benefits expected from the standard bear a reasonable relationship to the costs imposed by the standard.

Id. at 503 (citations omitted). *Accord*, Texas Independent Ginners Ass'n v. Marshall, 630 F.2d 398 (5th Cir. 1980).

100. 569 F.2d 831 (5th Cir. 1978).

101. 581 F.2d at 493, *aff'd in part sub nom.* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 100 S. Ct. 2844 (1980) (the Supreme Court never expressly reached a decision on the issue of a cost-benefit analysis).

102. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 100 S. Ct. 2844 (1980). Chief Justice Burger, Justices Stevens, Stewart and Powell concluded that the benzene standard was invalid. Although siding with the plurality, Justice Rehnquist felt the nondelegation doctrine should be invoked in this case, "[i]f we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions. . . ." *Id.* at 2886 (Rehnquist, J., dissenting). Justices Marshall, Brennan, White and Blackmun dissented, believing the benzene standard valid.

103. The Supreme Court never expressly reached the question whether a reasonable correlation must exist between cost and benefits. It vacated the benzene standard owing to OSHA's failure to identify a "significant health risk." *Id.* at 2850. The nation's textile industry recently raised this unanswered question in a case currently awaiting the Court's decision. American Fed'n of Labor v. Marshall, 617 F.2d 636 (D.C. Cir. 1979), *cert. granted, judgment vacated, sub nom.* Cotton Warehouse Ass'n v. Marshall, 101 S. Ct. 56 (1981).

104. 29 U.S.C. § 652(8) (1976), provides that "[t]he term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *Id.*

threshold finding that a workplace is not safe, in that it threatens workers with a "significant risk of harm."[105] Because OSHA failed to produce substantial evidence to show that "it is at least more likely than not that long-term exposure to 10 ppm of benzene [the old standard uncontested by the users and producers of benzene] presents a significant risk of material health impairment,"[106] the Secretary of Labor exceeded his authority under the Occupational Safety and Health Act in promulgating the reduction of benzene exposure from 10 ppm to 1 ppm. The Supreme Court, perhaps under an outcome determinative theory,[107] ended its inquiry there, concluding:

> Unless and until . . . a finding [of a significant health risk] is made, it is not necessary to address the further question whether the Court of Appeals correctly held that there must be a reasonable correlation between costs and benefits, or whether, as the Government argues, the Secretary is then required [by the Occupational Safety and Health Act] to promulgate a standard that goes as far as technologically and economically possible to eliminate the risk.[108]

105. 100 S. Ct. 2844, 2864 (1980). The Court noted that the identification of a significant health risk was consistent with the scope of regulatory power delegated to the Secretary in the toxic substances section, "which empowers the Secretary to promulgate standards, not for chemicals and physical agents generally, but for *'toxic* chemicals' and *'harmful* physical agents.'" *Id.* (emphasis in original). The requirement of the identification of a significant risk is supported by other sections in the Occupational Safety and Health Act. § 655(a) dealing with OSHA standards states "the Secretary shall . . . by rule promulgate a standard . . . unless he determines that the promulgation of such a standard would not result in improved safety. . . ." 29 U.S.C. § 655(a) (1976). By negative implication, this language requires that the Secretary make the determination that his standard will result in improved safety.

Similarly, § 655(g) of the Act, dealing with priority for establishment of standards, states that "the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards." 29 U.S.C. § 655(g) (1976). Clearly, then, the Secretary is not authorized to promulgate a standard unless it is needed.

Most supportive of the requirement of significant risk identification is the language of § 655(b)(8) of the Act dealing with the procedure for modifying standards. "Whenever a rule promulgated by the Secretary differs substantially from an existing . . . standard, the Secretary shall . . . publish . . . a statement of the reasons why the rule as adopted will better effectuate the purposes [of the Act] . . . than the [existing] standard." 29 U.S.C. § 655(b)(8) (1976). The intent of Congress is clear. If the Secretary changes an existing standard he must demonstrate how the new standard will improve health and safety. *Accord*, Texas Independent Ginners Ass'n v. Marshall, 630 F.2d 398 (5th Cir. 1980); *cf.* Federal Insecticide, Fungicide, & Rodenticide Act, 7 U.S.C. § 136-136y, 136(bb) (1976) (containing a reasonably necessary and appropriate clause which is treated as a substantive obligation); Consumer Product Safety Act, 15 U.S.C. §§ 2056(a), 2058(c)(2)(A) (1976) (containing a reasonably necessary and appropriate clause which is treated as a substantive obligation).

106. 100 S. Ct. 2844, 2869 (1980).

107. *See id.* at 2900 (Marshall, J., dissenting). "[T]he plurality is obviously more interested in the consequences of its decision than in discerning the intention of Congress." *Id.*

108. *Id.* at 2850. *See also* Texas Independent Ginners Ass'n v. Marshall, 630 F.2d 398 (5th Cir. 1980).

A. *Secretary's Rationale for Imposing Reduction in Benzene Exposure*

In order to fully understand the Supreme Court's difficult decision in this complex case, one must first examine the Secretary of Labor's rationale for imposing the benzene reduction.

> OSHA's rationale for lowering the permissible exposure limit to 1 ppm was based, not on any finding that leukemia has ever been caused by exposure to 10 ppm of benzene and that it will *not* be caused by exposure to 1 ppm, but rather on a *series of assumptions* indicating that some leukemias *might* result from exposure to 10 ppm and that the number of cases *might* be reduced by reducing the exposure level to 1 ppm.[109]

In promulgating the reduction in benzene exposure, OSHA first unequivocally concluded that benzene caused human cancer.[110] Second, OSHA determined, despite industry studies,[111] that the industry "had failed to prove that there is a safe threshold level of exposure to benzene below which no excess leukemia cases would occur."[112] Third, and most importantly, OSHA relied on its standard cancer policy,

109. 100 S. Ct. at 2860 (emphasis added). *See also* Texas Independent Ginners Ass'n v. Marshall, 630 F.2d 398, 409 (5th Cir. 1980).

There are two interpretations of OSHA's actions in promulgating the benzene standard on the basis of a "lesser exposure is better" rationale. The Fifth Circuit appeared almost outraged that OSHA would exercise such "unbridled discretion," feeling that the agency had far exceeded its Congressional mandate. 581 F.2d at 502. The court made the following observations. "[M]ere rationality is not equivalent to substantial evidence." *Id.* at 503. "Congress provided that OSHA regulate on the basis of knowledge rather than on the unknown." *Id.* at 504. "Congress intended for OSHA to regulate on the basis of . . . fewer assumptions than this record reflects." *Id.* at 505. Although the Fifth Circuit has been severely criticized for requiring OSHA to precisely quantify the risk prior to taking regulatory action, 100 S. Ct. at 2876; McGarity, *supra* note 18, at 805-06, it may merely have been "fighting fire with fire." See note 157 *infra*.

A more charitable view of OSHA's actions is taken by Professor McGarity. Rather than deceiving itself and the public by suggesting a non-existant accuracy for a carcinogenic risk assessment, OSHA took a straight forward, honest approach by refusing to play a "numbers game." McGarity, *supra* note 18, at 806.

110. 100 S. Ct. at 2860; 43 Fed. Reg. at 5931.

> The determination of benzene's leukemogenicity is derived from the evaluation of all the evidence in totality and is not based on any one particular study. OSHA recognizes . . . that individual reports vary considerably in quality, and that some investigations have significant methodological deficiencies. While recognizing the strengths and weaknesses in individual studies, OSHA nevertheless concludes that the benzene record as a whole clearly establishes a causal relationship between benzene and leukemia.

Id.

111. Studies made by the industry revealed no excessive risk of cancer among workers exposed to benzene below levels of 10 ppm. 43 Fed. Reg. at 5930-32. In rejecting the industry studies OSHA stated that the epidemiological method was "by its very nature relatively crude and an insensitive measure." Furthermore, OSHA stated that its policy was to hold negative studies to a higher standard of methodological accuracy. *Id.* at 5931-32.

112. 100 S. Ct. at 2860.

> The agency's position is that there is substantial evidence in the record to support its conclusion that there is no absolute safe level for a carcinogen and that, therefore, the

"concluding that, in the absence of definitive proof of a safe [exposure] level, it must be assumed that *any* level above zero presents *some* increased risk of cancer."[113] Fourth, OSHA maintained that, under the auspices of the Occupational Safety and Health Act, it was mandated to set a health standard at either a demonstrably safe level or the lowest feasible level, whichever was higher.[114]

> There is no doubt that benzene is a carcinogen and must, for the protection and safety of workers, be regulated as such. Given the inability [of the opponent industry] to demonstrate a threshold or establish a safe level, it is appropriate that OSHA prescribe that the permissible exposure to benzene be reduced to the lowest level feasible.[115]

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burden is properly on industry to prove, apparently beyond the shadow of a doubt, that there *is* a safe level for benzene exposure.

Id. at 2869 (emphasis in original). The Court rejected this position noting that the Administrative Procedure Act placed the burden of proof on the proponent of a rule. *See* 5 U.S.C. § 556(d) (1976); U.S. Steel Corp. v. Train, 556 F.2d 822 (1977).

Congress had shifted the burden of proving a toxic substance unsafe in some cases. *See, e.g.*, Environmental Defense Fund, Inc. v. Environmental Protection Agency, 548 F.2d 998, 1012-18 (1977). Because Congress did not shift the burden of proof when enacting OSHA, the Court concluded that Congress intended OSHA to bear the normal burden of establishing the need for a standard. 100 S. Ct. at 2870.

113. 100 S. Ct. at 2861 (emphasis in original). The Court noted that in OSHA's published statement giving notice of the proposed standard, the agency did not ask for comments on whether an exposure limit of 10 ppm presented a significant health risk. Rather, OSHA asked for comments regarding the feasibility of the 1 ppm limit. *Id.* at 2855.

OSHA's Deputy Director articulated the agency's no-risk cancer policy: "Whenever a carcinogen is involved, OSHA will presume that no safe level of exposure exists in the absence of clear proof establishing such a level and will accordingly set the exposure limit at the lowest level feasible." *Id.*

> The proposed 1 ppm exposure limit in this case thus was established not on the basis of a proven hazard at 10 ppm, but rather on the basis of "OSHA's best judgment at the time of the proposal of the feasibility of compliance with the proposed standard by the affected industries." Given OSHA's cancer policy, it was in fact irrelevant whether there was any evidence at all of a leukemia risk at 10 ppm. The important point was that there was no evidence that there was *not* some risk, however small, at that level.

Id. (emphasis in original). *See also* American Iron & Steel Inst. v. OSHA, 577 F.2d 825, 831-32 (3d Cir. 1978).

114. 100 S. Ct. at 2861. The Court noted that if OSHA was correct that no safe benzene exposure level exists, it should have set the exposure level at zero which was feasible for some industries. But, OSHA set the exposure at 1 ppm, largely as a matter of administrative convenience. This would appear at odds with OSHA's firm stand that its empowering legislation prescribes that it "assure so far as possible" the health and safety of the American worker. *Id.* at 2868.

115. 43 Fed. Reg. 5932 (1978).

> There is general agreement that even in the absence of the ability to establish a "threshold" or "safe" level for benzene and other carcinogens, a dose response relationship is likely to exist; that is, exposure to higher doses carries with it a higher risk of cancer, and conversely, exposure to lower levels is accompanied by a reduced risk, even though a precise quantitative relationship cannot be established.

Id. at 5940.

OSHA determined that 1 ppm was the lowest workable exposure level,[116] and then determined that such a standard was both technologically and economically feasible.[117]

Finally, although OSHA maintained it was under no mandate to conduct any analysis of the benefit to be gained from the proposed reduction in the level of benzene exposure, it did conclude "that benefits from the reduction 'may be appreciable.' "[118] Nowhere in its findings did OSHA acknowledge any duty to promulgate a standard which was "reasonably necessary or appropriate" to provide a safe place of employment.[119] This formed the basic legal issue before the Supreme Court.

B. *The Occupational Safety and Health Act*

The decision in *Industrial Union Department* resulted from judicial review of intricate policy questions[120] construing the Secretary's statutory authority under the Occupational Safety and Health Act. The controversy focused on the meaning of and relationship between two key provisions of the Act.[121] Section 652(8) of the Occupational Safety and Health Act defines the type of standard that OSHA is authorized to promuglate as one which is "reasonably necessary or appropriate" to assure safe places of employment.[122] Section 655(b)(5) of the Act directs the Secretary to provide safety and health standards for toxic materials. In doing so, the Secretary 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

116. "Because of benzene's importance to the economy, no one has ever suggested that it would be feasible to eliminate its use entirely, or to try to limit exposures to the small amounts that are omnipresent." 100 S. Ct. at 2861-62.

117. OSHA has consistently taken the position regarding economic feasibility that anything short of financial ruination of the affected industry is feasible. *Id.* at 2877; 43 Fed. Reg. 5939-41 (1978). The Secretary has consistently taken the position that a toxic substance will be regulated at the lowest feasible level and that he is not required to conduct a cost-benefit analysis. *See, e.g.*, 41 Fed. Reg. 46,742, 46,750-51 (1976) (coke oven emission standard); 39 Fed. Reg. 35,890, 35,892 (1974) (vinyl chloride standard); 37 Fed. Reg. 11,318 (1972) (asbestos dust standard).

118. 43 Fed. Reg. 5939, 5941 (1978).

119. 100 S. Ct. at 2862.

120. Justice Marshall pointed out the factors that make judicial review in this case so difficult. First, the issues involved in the federal regulation of benzene are both technical and highly complex. Second, the factual issues involved are not, at this time, subject to definitive, quantifiable resolution. Third, the issues involved the determination of "an acceptable risk," a decision which out of necessity must be based on policy considerations. *Id.* at 2896 (Marshall, J., dissenting).

121. *Id.* at 2862.

122. See note 10 *supra*.

health. . . ."[123] OSHA argued that section 652(8) of the Act merely required that a regulation bear a reasonable relationship to the purpose set out in the substantive provisions of the Act.[124] OSHA maintained that section 652(8) was reasonably related to the purpose of section 655(b)(5) which requires "OSHA to promulgate a standard that either gives an absolute assurance of safety for each and every worker or that reduces exposures to the lowest level feasible."[125] OSHA argued, again supported by case law, that the "feasibility" language of this section merely required it to stop short of financial ruination of the affected industry.[126]

The respondent industry placed foremost emphasis on the definitional section of the Occupational Safety and Health Act. "The Act imposes on OSHA the obligation to enact only standards that are reasonably necessary or appropriate to provide safe or healthful workplaces. If a standard does not fit this definition, it is not one that OSHA is authorized to enact."[127] The industry argued that the "reasonably necessary or appropriate" language of the definitional section of the Act was incorporated by reference into the toxic substances section of the Act, and that the two sections must be read conjunctively.[128] Furthermore, the industry viewed the "reasonably necessary or appropriate language" coupled with the "feasibility" requirement of the toxic substances section of the Act to require "the Agency to quantify both the costs and the benefits of a proposed rule and to conclude that they are

123. 29 U.S.C. § 655(b)(5) (1976).

> 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 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.

Id.

124. 100 S. Ct. at 2862-63, 2897.

125. *Id.* at 2863.

126. *Id.* See notes 85-86 *supra* and accompanying text.

127. American Petroleum Inst. v. OSHA, 581 F.2d 493, 502 (5th Cir. 1978). *Accord*, Texas Independent Ginners Ass'n v. Marshall, 630 F.2d 398 (5th Cir. 1980); Aqua Slide 'N' Dive v. Consumer Product Safety Comm'n, 569 F.2d 831 (5th Cir. 1978). *But see* American Fed'n of Labor v. Marshall, 617 F.2d 636 (D.C. Cir. 1979), *cert. granted, judgment vacated sub nom.* Cotton Warehouse Ass'n v. Marshall, 101 S. Ct. 56 (1981).

128. 100 S. Ct. at 2864.

roughly commensurate."[129] "[W]ithout an estimate of benefits supported by substantial evidence, OSHA is unable to justify a finding that the benefits to be realized from the standard bear a reasonable relationship to its one-half billion dollar price tag."[130]

1. Legislative History

Both OSHA and the users and producers of benzene cited extensively to the legislative history of the Occupational Safety and Health Act in support of their respective positions. Justice Marshall in his eloquent dissent stated that the legislative history of the Occupational Safety and Health Act[131] "reveals Congress' particular concern for health hazards of 'unprecedented complexity' that had resulted from chemicals whose toxic effects 'are only now being discovered.' "[132] Justice Marshall further stated that one of the primary purposes of the Act "was to ensure regulation of . . . insidious silent killers" such as benzene.[133] Accordingly, it was Congress' special concern which culminated in the enactment of the toxic substances section of the Occupational Safety and Health Act.[134] Furthermore, the overall purpose and aim of the Occupational Safety and Health Act was clearly "to assure *so far as possible* every working man and woman in the Nation

129. *Id.* at 2863. *But see* Vermont Yankee Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978), where the Court stressed the limited nature of judicial intrusion upon an agency action on review.

130. 581 F.2d at 503.

131. The on-the-job health and safety crisis is the worst problem confronting American workers, because each year, as a result of their jobs, over 14,500 workers die. In only four years' time, as many people have died because of their employment as have been killed in almost a decade of American involvement in Vietnam. Over two million workers are disabled annually through job-related accidents.

The economic impact of occupational accidents and diseases is overwhelming. Over $1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is over $8 billion. Ten times as many man-days are lost from job-related disabilities as from strikes, and days of lost productivity through accidents, and illnesses are ten times greater than the loss from strikes.

FELLNER & SAVELSON, *supra* note 9, at 3 (quoting H.R. REP. No. 1291, 91st Cong., 2d Sess. 14-15 (1970)).

132. 100 S. Ct. at 2889 (Marshall, J., dissenting) (quoting S. REP. No. 91-1282, 91st Const., 2d Sess., 2 (1970)).

133. 100 S. Ct. at 2889 (Marshall, J., dissenting).

134. *Id.* The toxic substances section was designed to implement three legislative purposes. First, Congress desired to provide protection from substances that become dangerous only upon repeated or frequent exposure. Second, by the use of the term "best available," Congress intended to ensure that the Secretary could promulgate standards even in the absence of specific, quantifiable evidence. Third, "Congress' special concern for the 'silent killers' was felt to justify an especially strong directive to the Secretary in the standard-setting process." *Id.* at 2889-90 (Marshall, J., dissenting).

safe and healthful working conditions."[135]

The affected industry took a less emotionally laden view of the legislative history of the provisions at issue. For example, the industry noted that the original version of the toxic substances section provided that the Secretary promulgate standards to ensure that "no employee will suffer *any* impairment."[136] This section was amended from "*any* impairment" to "*material* impairment."[137] The industry concluded that the amendment reflected Congress' cognizance of the futility of rendering all workplaces absolutely riskfree.[138]

In contrast to OSHA's emphasis on its congressional mandate to ensure safe places of employment,[139] the industry emphasized Congress' repeated concern over allowing the Secretary of Labor too much power over American industry.[140]

> Congress refused to give the Secretary the power to shut down plants unilaterally because of imminent danger . . . and narrowly circumscribed the Secretary's power to issue temporary emergency standards. This effort by Congress to limit the Secretary's power is not consistent with a view that the mere possibility that some employee somewhere in the country may confront some risk of cancer is a sufficient basis for the exercise of the Secretary's power to require the expenditure of hundreds of millions of dollars to minimize that risk.[141]

IV. ANALYSIS

The United States Supreme Court in *Industrial Union Department* confronted a very difficult and delicate issue: "whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths."[142] The Court addressed

135. 29 U.S.C. § 651(b) (1976) (emphasis added).
136. S. REP. No. 91-2193, 91st Cong., 2d Sess., at 40 (1970).
137. 100 S. Ct. at 2867. OSHA argued that this change merely meant that it is not required to promulgate standards dealing with immaterial or insignificant risks. However, OSHA is still required by 29 U.S.C. § 655(b)(5) (1976) to promulgate standards ensuring "that not even one employee will be subject to any risk of serious harm—no matter how small that risk may be." 100 S. Ct. at 2864.
138. 100 S. Ct. at 2867.
139. 29 U.S.C. § 651(b) (1976).
140. 100 S. Ct. at 2869.
141. *Id.* (citations omitted).
142. *Id.* at 2879. Recent reports indicate that the cancer rate in the United States is rising following thirty years of stability, and toxic chemicals may be a factor in one-fifth of all cases. The incidence of cancer rose 10% between 1970 and 1976 and it now ranks as the number 2 cause of death in the United States causing 400,000 deaths annually. REPORT TO THE PRESIDENT BY

this issue by holding that the Secretary of Labor must identify a significant health risk, one which the reasonable person would find unacceptable, as a condition precedent to regulatory action.[143] But, is this a satisfactory answer[144] and does the holding in *Industrial Union Department* provide appropriate guidance for future judicial challenges to agency regulatory policies regarding risks looming on the frontiers of scientific knowledge? Or, was the decision in this case outcome determinative with the Court balancing the possibility of death against the extravagant cost to prevent death and concluding that the costs did not justify the benefits?[145]

Precedent reveals a trend away from the substantial evidence test on judicial review of an agency's actions when research and data are necessarily lacking in an area.[146] The "test" applied where the Secretary's actions have been, by necessity, based on policy considerations has been termed "the reasonableness test,"[147] "the arbitrariness test,"[148] the "some consistency between the standard and the Act test,"[149] or the "free from nagging doubt test."[150] It should be noted that although the courts agree that the substantial evidence test is inapplicable where policy decisions are involved,[151] each court which has faced the issue has developed a test of its own based on the facts and circumstances before it. Yet, a review of the case law would reveal that, in each case, the court has really applied a "rational basis test" merely to ensure that the Secretary has not acted arbitrarily or irrationally.[152] Indeed, one might

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THE TOXIC SUBSTANCES STRATEGY COMMITTEE ON TOXIC CHEMICALS AND PUBLIC PROTECTION, xiii, xxxvii, 149-151 (1980) (report on file in TULSA LAW JOURNAL offices).

OSHA generic cancer regulations are estimated to cost affected industries as much as $88 billion and they are expected to increase inflation by up to one percent. 1 CHEM. REG. REP. 2020 (1978) (copy on file in TULSA LAW JOURNAL offices).

143. See notes 104-06 *supra* and accompanying text.

144. See notes 181-82 *infra* and accompanying text.

145. See note 191 *infra* and accompanying text.

146. See note 38 *supra* and accompanying text.

147. Florida Peach Growers Ass'n v. United States Dep't of Labor, 489 F.2d 120 (5th Cir. 1974); Colonial Stores v. FTC, 450 F.2d 733 (5th Cir. 1971); Cusson v. Policemen's Civil Serv. Comm'n, 524 S.W.2d 88 (Tex. Civ. App. 1975, *no writ*).

148. Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974). See notes 42-43 *supra* and accompanying text.

149. Synthetic Organic Chemical Mfgs. Ass'n v. Brennan, 503 F.2d 1155 (3d Cir. 1974). See notes 51-52 *supra* and accompanying text.

150. American Iron & Steel Inst. v. OSHA, 577 F.2d 825, 834 (3d Cir. 1978).

151. See notes 55-56 *supra* and accompanying text. "The traditional 'substantial evidence' test is almost impossible of application where . . . the Secretary's decision-making is essentially legislative in character." Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301, 1304 (2d Cir. 1975). *See also* Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474-75 (D.C. Cir. 1974).

152. Elevating the substantial evidence standard beyond its rational basis interpretation, the Fifth Circuit, in a recent decision following *Industrial Union Dep't*, clarified the appropriate scope

argue that this is all the so-called "substantial evidence" test entails.[153]

At first glance it appears that the Court in *Industrial Union Department* departed from this prior level of scrutiny where deference was granted to the Secretary's decision as long as it was rationally base.[154] The Supreme Court most certainly departed from prior precedent[155]—perhaps to the point of engaging in judicial legislation—by interpreting the "reasonably necessary or appropriate clause" as imposing upon the Secretary of Labor an affirmative duty to identify a "significant health risk" as a condition precedent to regulatory action.[156] The Court

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of judicial intrusion. "The reasonably necessary or appropriate clause does not merely require that OSHA standards must be *rational*, because Congress added the limitation that standards must be 'necessary or appropriate' to the reasonableness limitation." Texas Independent Ginners Ass'n v. Marshall, 630 F.2d 398, 409 (5th Cir. 1980) (emphasis added).

153. Professor McGarity would draw a somewhat different conclusion:

> Standards of judicial review for agency decisionmaking have ranged from "rational basis," when the reviewing court essentially accepts as true whatever facts are necessary to support an agency decision, to "de novo," when the reviewing court decides all facts anew. Recent legislative and scholarly interest has concentrated upon the difficult distinction between two middle-range standards: "arbitrary, capricious, and abuse of discretion," and "unsupported by substantial evidence . . . on the record." Commentators have argued forcefully that the true distinction between these two standards lies in the procedures utilized in compiling the administrative record.

McGarity, *supra* note 18, at 791. See notes 35-36 *supra* and accompanying text. *See also* Scalia & Goodman, *supra* note 36, at 934-35.

154. *See* Consolo v. Federal Maritime Comm'n, 383 U.S. 607 (1966), where the Court concluded that substantial evidence

> is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing evidence, it gives proper respect to the expertise of the administrative tribunal.

Id. at 620-21. *Accord*, American Fed'n of Labor v. Marshall, 617 F.2d 636, 651 n.66 (D.C. Cir. 1979). Most recently, in Whirlpool Corp. v. Marshall, 100 S. Ct. 883 (1980), the Supreme Court concluded that any inquiry into statutory purposes should be "informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." *Id.* at 890. *See also* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524 (1978).

155. *See, e.g.*, FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 796-97 (1978); Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1976); Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 280-81 (1969). *But see* Texas Independent Ginners Ass'n v. Marshall, 630 F.2d 398 (5th Cir. 1980); D.D. Bean & Sons v. Consumer Product Safety Comm'n, 574 F.2d 643 (1st Cir. 1978); Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Comm'n, 569 F.2d 831 (5th Cir. 1978).

156. [T]oday's decision represents a usurpation of decisionmaking authority that has been exercised by and properly belongs with Congress and its authorized representatives. The plurality's construction has no support in the statute's language, structure, or legislative history. The threshold finding that the plurality requires is the plurality's own invention. It bears no relationship to the acts or intentions of Congress, and it can be understood only as reflecting the personal views of the plurality as to the proper allocation of resources for safety in the American workplace.

100 S. Ct. at 2899-2900 (Marshall, J., dissenting).

appears to have done so, in part, in direct response to OSHA's having promulgated the benzene regulation on the basis of its special carcinogen policy.[157] This policy is not without logical appeal. In the absence of conclusive, quantifiable data or a showing to the contrary, lesser exposure to a carcinogen is better.[158] As a result, in this case, benzene will be regulated at the lowest technologically feasible level which will not result in the affected industry's financial ruination.[159] OSHA's carcinogen policy was not formally adopted and it is not statutorily mandated.[160] But, as the Supreme Court in this case has clearly concluded, a regulation supported merely by assumptions and logical appeal exceeds OSHA's regulatory authority.

A. *The "Significant Health Risk" Threshold Requirement*

1. Creation

Close examination of the plurality's interpretation that section 652(8) of the Occupational Safety and Health Act requires the Secretary of Labor to make a threshold finding of a "significant health risk" as a condition precedent to regulatory action[161] reveals that this finding has little practical effect. Its value may lie, however, in the process by which it was reached.

The plurality derived its requirement of the identification of a significant health risk from the definitional clause of the Occupational Safety and Health Act which describes an OSHA standard as one "which requires conditions . . . reasonably necessary or appropriate to provide safe or healthful employment . . . ."[162] The plurality construed this to imply that "before promulgating any standard the Secretary must make a finding that the workplaces in question are not safe."[163] Further, a workplace cannot be considered unsafe unless it

157. See notes 109-118 *supra* and accompanying text. It may be said that the Court was "fighting fire with fire." Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301, 1310 (2d Cir. 1975). By imposing the requirement of a "significant health risk," the Court brought to the agency's attention its rejection of the "special carcinogen policy." 100 S. Ct. at 2861.

158. "The general agreement in the scientific community that exposure to carcinogens at low levels is safer than exposure at higher levels permits the further factual deduction that reducing the permissible exposure limit from 10 ppm to 1 ppm will result in some benefit." American Petroleum Inst. v. OSHA, 581 F.2d 493, 503 (5th Cir. 1978).

159. See notes 110-15 *supra* and accompanying text.

160. 100 S. Ct. at 2865. OSHA has adopted a formal policy for regulating carcinogens effective April 21, 1980. 45 Fed. Reg. 5002 (1980). *See also* McGarity, *supra* note 18, at 754-59.

161. See notes 104-06 *supra* and accompanying text.

162. 29 U.S.C. § 652(8) (1976).

163. 100 S. Ct. at 2864. The plurality noted that " 'safe' is not the equivalent of 'risk-free,' " and that the Occupational Safety and Health Act "was not designed to require employers to pro-

threatens workers with a significant risk of harm.[164]

Justice Stevens writing for the plurality concluded that "there is no reason why § 3(8)'s definition of a standard should not be deemed incorporated by reference into § 6(b)(5)," the toxic substances section of the Act.[165] Justice Stevens noted that the toxic substances section uses the term "standard" without suggesting any deviation from, or qualification of, the general definition of a standard.[166] Thus, the plurality concluded that the Secretary of Labor must identify a significant health risk when promulgating regulations dealing with toxic substances.

"Reasonably necessary or appropriate" clauses have been routinely inserted in regulatory legislation and they have, in the past, been considered to be general provisos merely evidencing Congress' intent that a regulation be reasonably related to the objective of the Act.[167] For example, while OSHA could regulate farm worker contact with pesticides as being reasonably necessary to public health, it could not regulate the price of grain as being so related.

Justice Marshall, in dissent, noted the plurality's apparent reversal of the traditional rules of construction.[168] He noted that the plurality inserted a threshold requirement into a general definitional clause which effectively superseded the specific language of a substantive provision.[169] "The plurality's interpretation renders utterly superfluous the first sentence . . . of [the toxic substances section] which . . . requires the Secretary to set the standard 'which most adequately assures . . .

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vide absolutely risk-free workplaces . . . [r]ather, both the language and structure of the Act, as well as its legislative history, indicate that it was intended to require the elimination, as far as feasible, of significant risks of harm." *Id.*

164. The Court noted that "[t]here are many activities that we engage in every day—such as driving a car or even breathing city air—that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities 'unsafe.'" *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 2897. See note 155 *supra* and accompanying text. *See generally* United States v. Bacto-Unidisk, 394 U.S. 784 (1969).

168. *See, e.g.*, Federal Power Comm'n v. Texaco, Inc., 417 U.S. 381, 394-95 (1974) where the Court held that a "necessary and appropriate" clause did not authorize the FPC "to set at naught an explicit provision of the Act," or "ignore the specific mandates" of a substantive provision of the Natural Gas Act. *Id. See also* Clark v. Uebersee Finanz-Korp., 332 U.S. 480, 488-89 (1947). The Court, in other cases has stated that statutory ambiguities should be resolved in favor of safety rather than costs. *E.g.*, E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 133 (1977); Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 469 (1972).

169. "The Court has never—until today—interpreted a 'reasonably necessary or appropriate' clause as having a substantive content that supersedes a specific congressional directive embodied in a provision that is focused more particularly on an agency's authority." 100 S. Ct. at 2897 (Marshall, J., dissenting).

that no employee will suffer material impairment of health.' "[170] In contravention of congressional intent, the plurality had in effect, according to Justice Marshall, supplanted the test for standards regulating toxic substances with the test for standards generally.[171]

Engaging in judicial legislation, it would appear that, in this case, the Supreme Court deviated from precendent in finding that a significant health risk is a condition precedent to regulatory action. Indeed, it is the Court's method of arriving at the significant health risk threshold requirement that has caused the greatest fervor. This may evidence a new advent of judicial activisim in OSHA rulemaking.

2. The Effect of a "Significant Health Risk"

The threshold requirement of a significant health risk means that the Secretary must rationally demonstrate on the basis of the best available evidence that it is "more likely than not" that a risk is significant.[172] It is the agency's responsibility, however, to determine what it considers significant.[173] This requirement is not to be seen as a "mathematical straightjacket" requiring precise quantification of a risk.[174] The Secretary is not prevented from taking regulatory action when quantification of the benefits is impossible.[175]

The threshold finding of a significant health risk is not an absolute theory, but a comparative one.[176] As the Court pointed out:

> Some risks are plainly acceptable and others plainly unacceptable. If, for example, the odds are one in a billion that a person will die from cancer by taking a drink of chlorinated water, the risk clearly could not be considered significant. On the other hand, if the odds are one in a thousand that regular inhalation of gasoline vapors that are two percent benzene will be fatal, a reasonable person might well consider the risk significant and take appropriate steps to decrease or eliminate it. Although the agency has no duty to calculate the exact probability of harm, it does have an obligation to find that a significant risk is present before it can characterize a place of

170. *Id.* at 2898 (Marshall, J., dissenting).
171. *Id.* (Marshall, J., dissenting).
172. *Id.* at 2869, 2871.
173. *Id.* at 2871.
174. *Id.*
175. *Id.* at 2901 (Powell, J., concurring).
176. Justice Powell noted, "[t]housands of toxic substances present risks that fairly could be characterized as 'significant.' " *Id.* at 2878 (Powell, J., concurring).

employment as "unsafe."[177]

The fact that the Secretary is to regulate on the basis of "the best available evidence,"[178] requires judicial deference to his findings when they are made on the frontiers of scientific knowledge.[179] Justice Stevens concluded that, as long as OSHA's findings "are suported by a body of reputable scientific thought, the Agency is free to use conservative assumptions in interpreting the data with respect to carcinogens, risking error on the side of over-protection rather than under-protection."[180]

Upon close scrutiny, the significant health risk threshold requirement has little practical effect. The Court appears to be saying that while OSHA cannot withstand judicial scrutiny when it promulgates standards using a "lesser exposure is better" rationale,[181] it may do so by reviewing the best available evidence and concluding on the basis of conservative assumptions that the same standard is necessary.[182] Justice Marshall exposed the effect of the Court's significant health risk threshold requirement.

> The Court might thus allow the Secretary to attempt to make a very rough quantification of the risk imposed by a carcinogen substance, and give considerable deference to his finding that the risk was significant. If so, the Court would permit the Secretary to promulgate *precisely the same regulation* involved in this case if he had not relied on a carcinogen "policy," but undertaken a review of the evidence and the expert testimony and concluded, on the basis of conservative assumptions, that the risk addressed is a significant one.[183]

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177. *Id.* at 2871.

178. 29 U.S.C. § 655(b)(5) (1976).

179. *See* Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301, 1308 (2d Cir. 1975); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 475-77 (D.C. Cir. 1974). *See also* Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453 (1972) where the Court stated that "well-reasoned expert testimony—based on what is known and uncontradicted by empirical evidence—may in and of itself be 'substantial evidence' when firsthand evidence on the question . . . is unavailable." *Id.* at 464-65.

180. 100 S. Ct. at 2871.

181. *Id.* at 2901.

182. See notes 172-76 *supra* and accompanying text.

183. 100 S. Ct. at 2901 (emphasis added) (Marshall, J., dissenting). Also see Chief Justice Burger's concurring opinion where he states:

> Our holding that the Secretary must retrace his steps with greater care and consideration is not to be taken in derogation of the scope of legitimate agency discretion. When the facts and arguments have been presented and duly considered, the Secretary must make a policy judgment as to whether a specific risk of health impairment is significant in terms of the policy objectives of the statute. When he acts in this capacity, pursuant to the legislative authority delegated by Congress, he exercises the prerogatives of the

This may be largely an exercise in semantics. The significance of this decision, however, may lie not in what the Court said but in what it did.

B. *The Significant Risk Strawman: Is it a Front for Requiring a Cost-Benefit Analysis?*

Although the Supreme Court refused to go on record as requiring OSHA to conduct a cost-benefit analysis,[184] its lengthy opinion reveals that the Court, in fact, conducted such an analysis.[185] Regarding costs, the Court concluded, "as presently formulated, the benzene standard is an expensive way of providing some additional protection for a relatively small number of employees."[186] OSHA's own figures revealed that only 35,000 employees would gain any "benefit" from a reduction in benzene exposure at a compliance cost of one-half billion dollars.[187] Regarding benefits, the Court concluded that OSHA's evidence "demonstrated . . . ample justification for regulating occupational exposure to benzene and that the prior limit of 10 ppm . . . was reasonable. It does not, however, provide direct support for the agency's conclusion that the limit should be reduced from 10 ppm to 1 ppm."[188] Furthermore, although OSHA rejected its findings,[189] the industry produced testimony that "a dose-response curve could be constructed on the basis of the reported epidemiological studies and that this curve indicated that reducing the permissible exposure limit from 10 to 1 ppm would prevent at most one leukemia and one other cancer death

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legislature . . . to promulgate regulations that, to some, may appear as imprudent policy or inefficient allocation of resources.

Id. at 2875 (Burger, C.J., concurring). *See also* note 203 *infra*.

184. See note 108 *supra* and accompanying text. "Because the Secretary did not make the required threshold finding [of significant health risk] in this case, we have no occasion to determine whether costs must be weighed against benefits. . . ." 100 S. Ct. at 2863. *See also id.* at 2903.

185. Justice Marshall noted that "the responsibility to scrutinize federal administrative action does not authorize this Court to strike its own balance between the costs and benefits of occupational safety standards." *Id.* at 2905 (Marshall, J., dissenting).

186. *Id.* at 2857.

187. *Id.*

188. *Id.*

189. The Court acknowledged three possible reasons for OSHA's refusal to accept industry findings: OSHA thought it probable that more lives would actually be saved; OSHA thought that saving two lives every six years alone justified the adoption of a new standard; or even if the two lives were not considered significant, OSHA thought it was under a statutory duty to set the most protective standard that is technologically and economically feasible. The Court further noted that OSHA, in this case, appeared to rely on the third "drastic" theory which was not supported by any express findings of fact. *Id.* at 2870.

every six years."[190] The Supreme Court may have come to the conclusion that OSHA sought to require expenditures totaling one-half billion dollars to prevent the *possibility* of two cancer deaths every six years in its quest for utopian workplaces.[191]

Justice Powell went on record, in his concurring opinion, as requiring OSHA to conduct a cost-benefit analysis.[192]

> I conclude that the statute also requires the agency to determine that the economic effects of its standard bear a reasonable relationship to the expected benefits. An occupational health standard is neither "reasonably necessary" nor "feasible," as required by statute, if it calls for expenditures wholly disproportionate to the expected health and safety benefits.[193]

The plurality may have actually agreed with Justice Powell.

Inflation in this country is a top priority concern.[194] The effect of

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190. *Id.* at 2860.

191. This may have been precisely what Chief Justice Burger had in mind when he concluded: "When the administrative record reveals only scant or minimal risk of material health impairment, responsible administration calls for avoidance of extravagant, comprehensive regulation. Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible." *Id.* at 2875 (Burger, C.J., concurring).

192. *Id.* at 2877 (Powell, J., concurring). *But see* American Fed'n of Labor v. Marshall, 617 F.2d 636 (D.C. Cir. 1979) (where the court specifically stated that no cost-benefit analysis was required), *cert. granted, judgment vacated, sub nom.* Cotton Warehouse Ass'n v. Marshall, 101 S. Ct. 56 (1981).

> OSHA contends that a [cost-benefit] analysis is not *required*. OSHA argues that the OSH Act constrains its regulation of dangerous substances "only by the limits of feasibility." We agree. We also find that no additional constraint is imposed by the Act's definition of a health or safety standard as "reasonably necessary or appropriate to provide safe or healthful employment." The language of the Act and the clear intention of Congress permit no other conclusion.

Id. at 663 (emphasis in original). The court went on to state that Congress, itself, struck the balance between costs and benefits when it added the toxic substances provision to the Act which specifically provides that the Secretary set a standard which ensures that no employee will suffer material impairment of health. Congress concluded that health protection benefits warranted any expense in providing an "effective standard." *Id.* at 663-64. *See also* South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 655-57, 676 n.33 (1st Cir. 1974).

193. 100 S. Ct. at 2877 (Powell, J., concurring). Justice Powell expressed concern that he felt the plurality in this case did not go far enough.

> OSHA contends that § 6(b)(5) not only permits but actually requires it to promulgate standards that reduce health risks without regard to economic effects, unless those effects would cause widespread dislocation throughout an entire industry. Under the threshold test adopted by the plurality today, this authority will exist only with respect to "significant" risks. But the plurality does not reject OSHA's claim that it must reduce such risks without considering economic consequences less serious than massive dislocation. In my view, that claim is untenable.

Id.

194. It is of interest to note that when Congress enacted the Occupational Safety and Health Act inflation was not a problem of the magnitude that it is today. Rather, Congress was preeminently concerned with worker health and safety. See note 131 *supra*. It may well be that if the Act were considered today, Congress would expressly provide for a balancing approach. But, as the Court in Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978), cautioned, "[i]t is not for us to

inflationary regulations on the viability of American industry and the national economy might have reached such a critical position that the Court felt compelled to balance the value of a human life against the cost to protect that life. As Justice Powell expressed it,

> [t]he economic health of our highly industrialized society requires a high rate of employment and an adequate response to increasingly vigorous foreign competition. There can be little doubt that Congress intended OSHA to balance reasonably the societal interest in health and safety with the often conflicting goal of maintaining a strong national economy.[195]

Close examination of the Court's extensive opinion reveals that the Court conducted a cost-benefit analysis[196] and concluded that the benefits to be gained by the reduction in benzene exposure did not justify the costs involved.[197] Yet, the court may have felt compelled by inevitable unfavorable public opinion to avoid going on record with its results.[198] Instead, it created a significant risk strawman[199] to camouflage its actions while achieving its desired objective.[200] But, the message remains clear: the statistical possibility of loss of human life has been balanced against the cost of preventing the loss of that life.

V. CONCLUSION

The Supreme Court in *Industrial Union Department* faced an admittedly difficult task in its review of OSHA's benzene regulation. The effects of benzene exposure on humans are presently indefinable due to an absence of empirically verifiable data. OSHA promulgated the benzene regulation on the basis of a complex, scientific policy

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speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *Id.* at 185. *See also* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), where the Court stated:

> The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.

Id. at 558 (emphasis in original).

195. 100 S. Ct. at 2878 n.6 (Powell, J., concurring).

196. See notes 186-190 *supra* and accompanying text.

197. See notes 191 *supra* and accompanying text.

198. The Court may have felt bound by its decision in *Vermont Yankee* where it concluded that if neither Congress nor an administrative agency formally required a cost-benefit analysis, it had no authority to do so. See note 194 *supra*. *See also* Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

199. See notes 181-83 *supra* and accompanying text.

200. See note 107 *supra* and accompanying text.

determination. Such policy decisions are exceedingly difficult for a court to review.[201]

The Supreme Court boldly agreed for the first time to scrutinize the type of standard OSHA is authorized to promulgate in uncertain, scientific areas. Its decision in this case was bound to be unpopular. Its holding and rationale had to be worded carefully and skillfully to enable astute litigants to ascertain the outcome of future challenges of this kind.

The Court, in a five-four decision, held that the benzene standard was unenforceable. It purported to do so because the standard was based on OSHA's unadopted carcinogen policy, espousing a "lesser exposure is better" rationale. The Court concluded that this was arbitrary and capricious action and not "the stuff of which substantial evidence is made."[202]

It appears that the decision reached in *Industrial Union Department* was outcome determinative. The Supreme Court conducted an independent cost-benefit analysis and gave greater deference to concerns of economic feasibility than had ever been evidenced before. It concluded that the benzene reduction was an expensive way of possibly saving a few lives. Yet, the highest court in this nation may have felt bound by the inevitable likelihood of unfavorable public opinion to veil its actual findings. By camouflaging its true decision, it created a strawman in its requirement of the threshold identification of a significant health risk. Upon close analysis this requirement has little practical effect. It undoubtedly will make OSHA appear more responsible because the agency will have to explicitly reveal its data and conclusions. Manipulating numbers, however, is not a difficult task.[203]

The true significance of this decision may lie in what the Court actually did, not in what it said. The Court's cost-benefit analysis implies a higher standard of intrusion that may signal a new advent in judicial activism in administrative rulemaking.

Were the Supreme Court's actions really indicative of a willingness to more actively intrude in OSHA rulemaking? Or were they re-

201. *See* McGarity, *supra* note 18, at 749.

202. Aqua Slide 'N' Dive v. Consumer Product Safety Comm'n, 569 F.2d 831, 843 (5th Cir. 1978).

203. See Justice Marshall's comment that to require the Secretary to make a quantitative showing of a "significant risk" would force "him to deceive the public by acting on the basis of assumptions that must be considered too speculative to support any realistic assessment of the relevant risk." 100 S. Ct. at 2901 (Marshall, J., dissenting). *See also* McGarity, *supra* note 18, at 806.

flective of judicial restraint, as evidenced by the Court's imposition of a requirement that may have little practical effect? Ultimately, the question is whether the sepulchral "significant risk" strawman will be pierced to reveal a palpable cost-benefit condition precedent to OSHA rulemaking.[204]

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204. Interestingly enough, the requirement and efficacy of a cost-benefit analysis was presented to the Court following the *Industrial Union Dep't* decision, however *certiorari* was dismissed on the issue, leaving its interpretation to the circuits. American Iron & Steel Inst. v. OSHA, 577 F.2d 825 (3d Cir. 1978), *cert. dismissed*, 101 S. Ct. 38 (1980). Recently, the nation's textile industry again presented this issue to the Court challenging the extraordinarily severe and costly cotton dust standard. American Fed'n of Labor v. Marshall, 617 F.2d 636 (D.C. Cir. 1979), *cert. granted, judgment vacated sub nom.* Cotton Warehouse Ass'n v. Marshall, 101 S. Ct. 56 (1981).