The Significant Risk Test and OSHA's Attempts to Regulate Toxic Substances: *Industrial Union Department, AFL-CIO v. American Petroleum Institute*

I. INTRODUCTION

On July 2, 1980, the United States Supreme Court handed down a lengthy and confusing opinion in *Industrial Union Department, AFL-CIO v. American Petroleum Institute,*[1] marking a major setback for the Occupational Safety and Health Administration (OSHA). Affirming the decision of the Fifth Circuit Court of Appeals,[2] but for substantially different reasons, the Court struck down OSHA's attempted regulation of the toxic substance benzene, a known carcinogen.[3]

This Case Comment will examine the issues presented to the Court, the arguments of the parties and the Court's opinion, and then will attempt to expose some of the weaknesses in the decision. Following this analysis, this Comment will present a brief discussion of the impact the opinion may have on future regulatory efforts by OSHA and on certain aspects of administrative law.

II. BACKGROUND

A. *The Dangers Posed by Exposure to Benzene*

Benzene is an essential industrial compound used in the manufacture of pesticides, solvents, other organic chemicals, detergents, and paints, and is an important ingredient in many petroleum based fuels.[4] Unfortunately, as is the case with a growing number of industrial chemicals, the value of benzene for improving the quality of life cannot be separated from its capacity to destroy the lives of those who work with it.

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1. 448 U.S. 607 (1980).
2. American Petroleum Inst. v. OSHA, 581 F.2d 493 (5th Cir. 1978).
3. 29 C.F.R. § 1910.1028 (1978). The findings of fact and explanations relevant to the standard can be found at 43 Fed. Reg. 5918 (1978), *as amended by* 43 Fed. Reg. 27,962 (1978).
4. 581 F.2d 493, 497–98 (5th Cir. 1978); 43 Fed. Reg. 5918 (1978), *as amended by* 43 Fed. Reg. 27,962 (1978).

Exposure to airborne particles in concentrations of 20,000 parts benzene per million parts air (20,000 ppm) can cause death in minutes. Short term exposure at lower levels (250–500 ppm) can cause vertigo, nausea, headache, nervous excitation, and breathlessness. When exposure is halted, recovery from these symptoms is rapid. More insidious, however, is the harm caused by low exposure levels over long periods of time. Chronic exposure at levels as low as twenty-five ppm has been shown to cause both malignant and nonmalignant blood disorders and chromosomal aberrations.[5] Because of this, exposure standards have been set by different health organizations at different periods in time. In 1946, the American Conference of Governmental Industrial Hygenists recommended a peak exposure level of 100 ppm. This value was reduced to fifty ppm in 1947, thirty-five ppm in 1948, twenty-five ppm in 1963, and ten ppm in 1974.[6] This ten ppm standard also had been adopted earlier, in 1969, by the National Standards Institute and was adopted by OSHA in 1971 pursuant to procedures set out in section 6(a) of the Occupational Safety and Health Act of 1970 (OSH Act).[7]

B. *The Occupational Safety and Health Act of 1970*

The purpose of the OSH Act was to provide the Secretary of Labor with the proper tools to assure America's workers a safe and healthful working environment.[8] The rule making provisions[9] required the Secretary to adopt permissible exposure standards for toxic substances within two years of the time the Act became law and to set out general notice and comment procedures to be followed when evidence indicated a need for a more stringent standard.

The relevant provisions of the OSH Act at issue in *Industrial Union Department* are sections 3(8) and 6(b)(5). Section 3(8) provides, "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."[10] When toxic materials or harmful physical agents are of concern, section 6(b)(5) provides:

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5. 43 Fed. Reg. 5918, 5921 (1978).

6. *Id.*

7. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (1976). Section 6(a) of the Act provides:

> Without regard to chapter 5 of Title 5, or to the other subsections of this section, the Secretary shall, as soon as practible during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

Occupational Safety and Health Act of 1970, § 6(a), 29 U.S.C. § 655(a) (1976).

8. *See* note 20 *infra*.

9. Occupational Safety and Health Act of 1970, § 6, 29 U.S.C. § 655 (1976).

10. Occupational Safety and Health Act of 1970, § 3(8), 29 U.S.C. § 652(8) (1976) (emphasis added).

> 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.[11]

C. *OSHA's Actions*

In the 1970s, enough evidence was gathered to show conclusively that long-exposure to benzene at levels about twenty-five ppm could lead to leukemia, a cancerous blood disorder that normally causes death within six to fourteen months after discovery.[12] However, because of the limited amounts of accurate data on cancers and their causes, anyone attempting to establish a viable regulatory policy has been forced to address issues "on the frontiers of scientific and medical knowledge."[13] In the words of one commentator, "[A] regulator who is given the responsibility for establishing a safe level for human exposure to a carcinogen has been given an impossible task if this entails establishing that a threshold 'no effect' level [of exposure] exists."[14]

OSHA responded to this problem with a generic carcinogen policy. Once the carcinogenicity of a substance had been demonstrated qualitatively, OSHA assumed that *no* safe level of exposure exists in the absence of a showing to the contrary and accordingly set the exposure limit at the lowest feasible level.[15] Thus, in the absence of proof that a ten ppm level of exposure was safe, OSHA promulgated a regulation requiring employers to limit employee exposure to benzene to one ppm averaged over an eight hour day.[16] In so doing, the agency acted in reliance on its statutory mandate to 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."[17] Industry re-

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11. Occupational Safety and Health Act of 1970, § 6(b)(5), 29 U.S.C. § 655(b)(5) (1976).

12. 43 Fed. Reg. 5918, 5925, 5926 (1978).

13. 43 Fed. Reg. 5918, 5932 (1978).

14. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 734 (1979).

15. 43 Fed. Reg. 5918, 5932 (1978); American Petroleum Inst. v. OSHA, 581 F.2d 493, 507 (5th Cir. 1978).

16. The scope of the new standard would, by OSHA's estimates, affect 629,000 employees in various industries at an initial cost approaching $500 million, but would not apply to 795,000 service station employees who encounter benzene exposure on a daily basis at minimal levels. 43 Fed. Reg. 5918, 5935 (1978). *See also* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 618 n.6 (1980). OSHA's explanation of the costs of compliance shows that only 35,000 workers would actually derive any benefits from the standard requiring initial expenditures on a rough average of more than $14,000 per benefited employee.

17. Occupational Safety and Health Act of 1970, § 6(b)(5), 29 U.S.C. § 655(b)(5) (1976) (emphasis added).

sponded by challenging the regulations in the United States Court of Appeals for the Fifth Circuit.[18]

Industry representatives argued that substantial evidence[19] and the best available evidence did not show that the proposed standards were reasonably necessary or appropriate to provide safe or healthful employment and places of employment. OSHA responded that not only were the standards supported by substantial evidence, the best available evidence, feasibility considerations, and a statutory mandate to protect workers,[20] but also section 3(8), a definitional section, has no substantive effect, and, therefore, no requirement to promulgate only standards that are reasonably necessary or appropriate exists.[21]

D. *The Opinion of the Fifth Circuit*

The Court of Appeals for the Fifth Circuit, relying on its decision in *Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Commission,*[22] held that OSHA could not summarily dismiss the language of section 3(8): "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 in this definition, it is not one that OSHA is authorized to enact."[23] The court went on to say that the only way to evaluate whether a regulation was reasonably necessary or appropriate was to weigh the potential the standard had for reducing the severity or frequency of the risk of harm against the expected costs of compliance. In promulgating the benzene standard, OSHA acted on the assumption that since exposure to high levels of benzene posed a high risk of health impairment, the lower the level of exposure the lower the risk. However, in the appellate court's view, the agency could not show with substantial evidence that lowering the exposure limit from ten ppm to one ppm would provide any measurable benefits and could not, therefore, justify the 500 million dollar price tag.[24]

In striking down the benzene standard, the Fifth Circuit entered into open conflict with at least three other federal appellate courts. When faced

18. Section 6(f) of the OSH Act provides that the United States courts of appeals are the proper forum for anyone seeking judicial review of OSHA standards. Occupational Safety and Health Act of 1970, § 6(f), 29 U.S.C. § 655(f) (1976).

19. Section 11(a) requires that "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." Occupational Safety and Health Act of 1970, § 11(a), 29 U.S.C. § 660(a) (1976).

20. Section 2(b) of the OSH Act provides: "The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our natural resources . . . by providing for the development and promulgation of occupational safety and health standards." Occupational Safety and Health Act of 1970, § 2(b), 29 U.S.C. § 651(b) (1976).

21. 581 F.2d 493, 500 (5th Cir. 1978).

22. 569 F.2d 831 (5th Cir. 1978). The court found that the "Safety Standard for Swimming Pool Slides" adopted by the Consumer Products Safety Commission was improper. The court said that the standard was based on a finding that it was reasonably necessary to eliminate or reduce an unreasonable risk of injury, as required by statute, but that this finding was not supported by substantial evidence.

23. 581 F.2d 493, 502 (5th Cir. 1978).

24. *Id.*

with proposed OSHA exposure standards and similar fact patterns, the Courts of Appeals for the Second, Third, and District of Columbia Circuits had upheld the standards and refused to find any merit in industry arguments.[25]

III. The Supreme Court's Review of the Problem

A. *Questions Presented*

The questions presented to the Supreme Court were two-fold: first, when promulgating new exposure standards, must the Secretary of Labor obtain his own data from scientific tests that have not been, but could be, readily performed; and second, when issuing proposed standards for limiting exposure to toxic substances, must the Secretary weigh the benefits of such standards against the resultant cost?

While the impact of a resolution to the first issue would be relatively minor in the overall scheme of OSHA regulations, the impact of an affirmative answer to the second issue would have been tremendous. Requiring cost-benefit analysis for carcinogens, not to mention non-carcinogenic substances, would severely hamper OSHA's efforts.[26]

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25. Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974), perhaps the leading case in support of OSHA's position, involved the legality of a standard for exposure to asbestos dust, with the Union arguing that OSHA's proposed standard was not strict enough. Asbestos is known to cause asbestosis and is associated with cancers at high exposure levels. *Id.* at 471. In an opinion by Judge McGowan, the D.C. Circuit Court of Appeals upheld the proposed standard. In so doing, the court characterized the factual questions involved as being "on the frontiers of scientific knowledge," dependent "to a greater extent upon policy judgments and less upon purely factual analysis." *Id.* at 474. As a result, those facts that could be characterized as adjudicative would be subject to a substantial evidence standard of review, but those facts that could be characterized as legislative would be examined only to ensure that the findings were not arbitrary and capricious. (For a discussion of the distinction between legislative and adjudicative facts see K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 12:3 & 12:4 (2d ed. 1979)). The court also refused to bar the agency from considering economic feasibility when promulgating new standards, but did not say that the agency *must* consider such factors. 499 F.2d 467, 477 (D.C. Cir. 1974).

In American Iron and Steel Inst. v. OSHA, 577 F.2d 825 (3rd Cir. 1978), the steel industry challenged the stringency of OSHA's proposed standards for exposure to carcinogenic coke oven emissions (benzene-based gases). Adhering to its policy that there is no safe level of exposure to a carcinogen, OSHA set a standard that it considered technologically and economically feasible (.15 milligrams of emissions per cubic meter of air). Making distinctions between factual (*i.e.*, adjudicative) issues and issues that were primarily legislative in nature, the Third Circuit held that OSHA's determination regarding the safe level of exposure was supported by substantial evidence. *Id.* at 832. The court also found that the determination of an acceptable exposure level was a legislative decision properly within the scope of the agency's congressionally delegated powers. *Id.* at 833. Relying on *Hodgson*, the court went on to hold that the agency must take into account economic factors, but only to ensure that the proposed standards do not cripple an industry or render it extinct. *Id.* at 835.

In Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301 (2d Cir. 1975), at issue was an exposure standard for vinyl chloride, a known carcinogen with no safe level of exposure. Like the courts in *Hodgson* and *American Iron and Steel Inst.*, the Second Circuit Court of Appeals drew a distinction between factual and policy issues, terming OSHA's proposed exposure limit a legislative policy subject only to an arbitrary and capricious standard of review. *Id.* at 1304. The court refused to strike down the proposed standards. In response to Industry arguments that the standard was not technologically or economically feasible, the court answered that they (Industry) "simply need more faith in their own technological potentialities," and that OSHA "is not restricted by the status quo" in the area of safety. *Id.* at 1309.

26. Recognizing this, the Supreme Court held in the first major case involving OSHA regulations since *Industrial Union Dep't* that such a balancing is unnecessary. American Textile Mfrs. Inst. v. Donovan, 101 S. Ct. 2478 (1981). For a brief discussion of the absolute safety versus cost-benefit approaches, *see* DeLong,

B. *OSHA's Argument*

OSHA argued that the Fifth Circuit improperly construed the statute and that section 3(8) of the Act imposed no limitations on section 6(b)(5):[27] "So long as the standard meets the other requirements of the Act, Section [3(8)] permits the Secretary to issue any standard that he rationally concludes is appropriate for the protection of the health and safety of employees under the substantive provisions of the Act."[28] And, with respect to these standards, OSHA argued that the language of section 6(b)(5) "is an unmistakable instruction from Congress that employee health is to be achieved even at great cost. The policy of Congress is that cost may be considered only to determine what is 'feasible.'"[29]

When construing the "reasonably necessary or appropriate" language of section 3(8), the Fifth Circuit relied on its opinion in *Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Commission*,[30] in which it construed similar language as requiring cost-benefit assessments by the Consumer Product Safety Commission when promulgating safety standards. OSHA, however, argued that *Aqua Slide* could be distinguished from the instant case since the language at issue in *Aqua Slide* came from the Consumer Product Safety Act and required only that standards be "reasonably necessary to eliminate or reduce *an unreasonable risk* of injury . . . ."[31] This language, said OSHA:

> recognizes that some products (*e.g.*, knives) pose a risk of harm that should be tolerated in light of their benefits; the Act permits regulation only of risks that are "unreasonable." In contrast, OSHA does not limit the Secretary to regulating only "unreasonable" health risks; it authorizes the Secretary to eliminate, if feasible, *all* risks of material impairment that toxic substances pose to employees' health."[32]

The agency went on to argue that the legislative history of the OSH Act contains no mention of cost-benefit assessments and that Congress made the determination that part of the reasonable cost of doing business was providing a safe and healthful working environment.[33] Any balancing of life and health against the cost of their preservation was done by Congress, with the balance being struck "in favor of maximum health protection, subject only to the requirement of feasibility."[34] The word "feasibility," said the government,

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Benzene Exposes Workers to Unresolved Issues, Legal Times of Wash., Sept. 8, 1980, at 40. *See generally* Rhoads & Singer, *What is Life Worth?*, 51 PUB. INTEREST 74 (1978); Fried, *The Value of Life*, 82 HARV. L. REV. 1415 (1965).

27. The discussion relating to OSHA's arguments is based primarily on the Brief for the Federal Parties, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980). The arguments presented by the Brief for Petitioner Industrial Union Dep't, AFL-CIO, are substantially the same, although much more emphasis is placed by the latter on the legislative history of the OSH Act.

28. Brief for the Federal Parties, *supra* note 27, at 46.

29. *Id.* at 41–42.

30. 569 F.2d 831 (5th Cir. 1978).

31. 15 U.S.C. § 2058(c)(2)(A) (1976) (emphasis added).

32. Brief for the Federal Parties, *supra* note 27, at 47 (emphasis added).

33. *Id.* at 50–51.

34. *Id.* at 55.

does not require a cost-benefit test. The ordinary meaning of the word is "capable of being done," not the "desirability or benefit of doing something."[35]

OSHA also took issue with the Fifth Circuit's reason for rejecting the proposed standard banning dermal contact with benzene,[36] namely that there was evidence of a simple test available for determining the dangers of such contact, but that this test had not been performed.[37] OSHA argued that this position was improper for several reasons, including the court's failure to recognize the provision of section 6(b)(5) limiting decisions to the "available" evidence:

> There is always more evidence just around the corner. Congress intended the "best available evidence" approach to free the Secretary from the grip of claims that he should wait for just one more study, sure to be conclusive.[38]
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> . . . .
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> . . . If the Secretary were required to wait until the evidence had been supplied—however long that might take—the power to control the timing of new regulations would be effectively transferred from the Secretary to the affected parties, who would have every incentive to delay.[39]

In sum, the basis of OSHA's arguments was that the Fifth Circuit's decision imposed on the agency the kind of paralysis that Congress sought to avoid. The requirement that the Secretary first quantify the cancer risk posed by a given exposure level and the benefits of adopting a lower standard and then demonstrate that these benefits bear a reasonable relationship to the costs of achieving them is unduly harsh. It is enough, said OSHA, that "[t]he Secretary, who has a substantial scientific staff and a decade's experience in the administration of toxic substances regulation,"[40] find that *some* risk is presented by a given exposure level, and that reducing that level will diminish the risk, however slight it may be.

C. *Industry's Response*

Industry's response[41] was to characterize OSHA's position as biased, illogical, and unfair:

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35. *Id.* at 56.

36. OSHA's reasons for the dermal contact ban were similar to those used for lowering the exposure standard for airborne benzene: "This requirement is based on OSHA's policy that, in dealing with a carcinogen, all potential routes of exposure . . . be limited to the extent feasible." 43 Fed. Reg. 5918, 5948 (1978). The agency was not concerned as much with the possibility that benzene could be absorbed into the body through intact skin as it was with absorption through damaged skin. *Id.* at 5948–49.

37. 581 F.2d 493, 493 (5th Cir. 1978).

38. Brief for the Federal Parties, *supra* note 27, at 75.

39. *Id.* at 81.

40. *Id.* at 66–67.

41. The discussion relating to Industry's position on the exposure limit for airborne benzene is based on the Brief for Respondents, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980). The discussion concerning Industry's position on the dermal contact standard is based on a second brief, Brief for Respondents the Rubber Manufacturers Association, Inc., Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980).

> Common sense alone suggests that OSHA's interpretation goes too far. Surely, Congress did not intend industry, and ultimately the public, to expend vast sums at OSHA's command to eliminate even the most miniscule risk presented by a single substance so long as the industry could bear the cost and still survive.[42]

OSHA's argument was characterized as relying almost exclusively on the first sentence of section 6(b)(5), which provides that health standards "shall . . . [assure] . . . that no employee will suffer . . . impairment of health." Industry claimed this was an unfair and out-of-context reading of the Act and that a "reading of the Act as a coherent whole refutes this absolutist interpretation."[43] that risks and benefits are, for the most part, irrelevant. For example, the general purpose statement in section 2(b) provides that the purpose of the Act is to "assure *so far as possible* every working man and woman in the Nation safe and healthful employment and places of employment." This, Industry said, was nothing if not a mandate to allocate society's limited resources wisely.[44]

There was also a refutation of OSHA's claims that the Secretary's findings on questions of law should be given substantial deference by the Court and that its findings of fact were supported by substantial evidence. The agency, Industry argued, had "not articulated a long-standing and consistent interpretation of the statutory provisions at issue"[45] and in fact had interpreted the provisions inconsistently in various cases, including the present one. For example, Industry noted that OSHA's brief approved the use of cost-benefit analysis in the promulgation of regulations, with the agency arguing that such assessments are permitted by the Act. All this was in spite of the fact that OSHA's case was centered on the denial of the need or requirement of such assessments.[46]

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42. Brief for Respondents, *supra* note 41, at 32.

43. *Id.* at 35.

44. *Id.* at 35–36. Industry also provided an analysis of other health and safety acts passed by Congress. As one of several examples, the language of the Delaney Clause of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 348(c)(3)(A) (1976), was set out as a statute requiring absolute protection by an agency. These statutes were then compared with the Occupational Safety and Health Act in an attempt to show that it should be read in relative rather than in absolute terms.

45. Brief for Respondents, *supra* note 41, at 57.

46. *Id.* at 55–57. Industry also argued that OSHA's reading of the Act's legislative history was erroneous. A close reading of the Act, it argued, would show that the words "feasible" and "material" were included to assure OSHA's adoption of "reasonable" and "practical" health standards that would not squander vast resources on speculative or insignificant risks:

> For each type of standard, the question that should properly be asked is whether the limits and conditions that OSHA proposes are "reasonable" and "practical" and provide *real* benefits to workers—not whether the affected industry can bear the costs and still survive. When the regulatory issue is framed in this manner, the relevance of evidence on risks, benefits and cost . . . is undeniable.

Id. at 51 (emphasis added).

Industry argued further that OSHA was unable to show, by substantial evidence on the record as a whole, what benefits, if any, would be derived by reducing the permissible exposure limit. It urged that "OSHA simply chose a number (1 ppm) and then set about showing that the affected industries could achieve that limit and still survive financially . . . . [OSHA] did no more than proclaim summarily that its standard would produce 'appreciable benefits' without citing a shred of evidence in support of its determination" and without convincingly refuting substantial evidence to the contrary. *Id.* at 71.

The Industry argument with respect to the dermal contact issue was aimed primarily at refuting OSHA's claim that it acted on the basis of the "best available evidence" as required by the Act. Industry noted that even the District of Columbia Circuit, a leader in supporting OSHA standards, had said that while some questions may be "'on the frontiers of scientific knowledge,'. . . when the facts underlying the Secretary's determination are susceptible of being found in the usual sense, that must be done, and the reviewing court will weigh them by the substantial evidence standard."[47] Industry then went on to show that OSHA's own statement of its reasons for the ban on dermal contact was "startling for its lack of any significant scientific or factual basis."[48] It was argued that in fact OSHA itself had admitted that when it proposed the benzene standard in 1977 its studies showed that benzene is not readily absorbed through intact skin. Further, Industry pointed out that except for the evidence that a simple test was available for resolving the issue the agency had failed to produce any such data since then.[49]

D. *The Supreme Court's Opinion*

1. *The Plurality*

The plurality opinion[50] of the Supreme Court, written by Justice Stevens, responded to the elaborate elucidations of the cost-benefit issue by refusing to address it, choosing instead to resolve it at a later date.[51] The Fifth Circuit, said Justice Stevens, properly held that section 3(8) of the Occupational Safety and Health Act imposes a substantive limitation on section 6(b)(5). This limitation "requires the Secretary to find, *as a threshold matter*, that the toxic substance in question poses a *significant* health risk in the workplace and that a new, lower standard is therefore 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'"[52] Because the agency failed to find the presence of a significant health risk, the plurality disposed of the case without reaching the cost-benefit issue.

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47. Brief for Respondents the Rubber Manufacturers Association, *supra* note 41, at 23 (quoting Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474 (D.C. Cir. 1974)).

48. *Id.* at 33.

49. *Id.* at 34. OSHA's argument that it was not required to seek out the data that the expert's test could have provided and that industry had the burden of presenting any such evidence was countered with a reading of § 6(b)(5) of the OSH Act. Industry representatives said that this section "requires *the Agency* to act on the basis of 'research, demonstrations, [and] experiments,' and the Act's 'research' provisions give OSHA the means of doing so." *Id.* at 38. OSHA, Industry said, cannot be heard to complain that the expert's study was not "available" to it when it could have (and should have) performed the study itself. The requirement that the agency regulate on the basis of substantial evidence puts the burden of proof on OSHA, and it cannot shift the burden of establishing a negative averment to industry. *Id.* at 38–41.

50. 448 U.S. 607 (1980). Justices Burger and Stewart joined Justice Stevens in the plurality opinion and Justice Powell concurred in part. Justice Rehnquist concurred in the judgment but wrote a separate opinion. Justice Marshall was joined in his dissenting opinion by Justices Brennan, White, and Blackmun.

51. Since the decision in *Industrial Union Dep't* was handed down, the Court has resolved the cost-benefit issue. In American Textile Mfrs. Inst. v. Donovan, 101 S.Ct. 2478 (1981), the Court held that the OSH Act contains no such requirement. *See* text accompanying notes 134–36 *infra*.

52. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 614–15 (1980) (emphasis added).

Having thus eliminated the issue of whether OSHA should perform cost-benefit assessments, Justice Stevens characterized the remaining issue as "whether the Court of Appeals was correct in refusing to enforce the one ppm exposure limit on the ground that it was not supported by appropriate findings."[53] He proceeded to resolve this question by construing sections 3(8) and 6(b)(5) as "requir[ing] the elimination, as far as feasible, of *significant* risks of harm."[54]

Justice Stevens argued that to read the Act as OSHA desired—that there was no requirement for the Secretary to characterize the risk as significant—would be to construe the agency's mandate to "provide absolutely risk-free workplaces whenever it is technologically feasible to do so."[55] If OSHA's construction of the Act was indeed the correct one, he said, "the statute would make such a 'sweeping delegation of legislative power'" as to be an unconstitutional violation of the nondelegation doctrine.[56] Thus, the plurality saw itself faced with a choice: it could strike down as unconstitutional an Act so broad as to "give the Secretary . . . unprecedented power over American industry,"[57] a statute that "would give OSHA power to impose enormous costs that might produce little . . . discernible benefit,"[58] or it could strictly construe the Act, limiting OSHA's power in order to save it.

Justice Stevens then went on to show that even OSHA had not followed its interpretation of section 6(b)(5).[59] If the only no-risk level of exposure to benzene is zero, then the exposure limit should have been set as close to zero as technologically possible. Justice Stevens characterized the election of the one ppm standard as being grounded in administrative convenience and in the fact that a lower standard could not be justified in terms of the substantial cost of achieving it.[60] Reliance on these grounds does serious harm to OSHA's argument that it must eliminate *any* risk of harm, no matter what the cost.

Perhaps the most significant aspect of the opinion was its placement of the burden of proof. OSHA argued that there was substantial evidence to support a finding of no absolutely safe exposure level for a carcinogen. Because of this, the agency placed the burden on Industry to prove, "apparently beyond a shadow of a doubt," that a safe level of exposure *does* exist.[61]

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53. *Id.* at 630. The plurality also set out as an issue whether the Fifth Circuit's refusal to enforce the dermal contact ban was appropriate.

54. *Id.* at 641 (emphasis added).

55. *Id.*

56. *Id.* at 646 (quoting Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935), and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)). While the cited cases established the nondelegation doctrine as a means for the courts to control government agencies, the doctrine has not been used successfully to attack agency action since *Schechter Poultry*.

57. 448 U.S. 607, 645 (1980).

58. *Id.*

59. Justice Stevens said that, according to OSHA's argument, even if the Secretary is not required to eliminate threats of insignificant harm, "§ 6(b)(5) still requires the Secretary to set standards that ensure that not even one employee will be subject to any risk of serious harm—no matter how small that risk may be." *Id.* at 649.

60. *Id.* at 650, 651.

61. *Id.* at 652.

Justice Stevens responded that *OSHA* had the burden of showing that more likely than not the current exposure standard presented a *significant* risk of material harm to workers.[62] OSHA, he said, had never even attempted to carry this burden. The best it could do was claim that lowering the permissible exposure standard from ten ppm to one ppm would produce benefits that were "'likely' to be 'appreciable.'"[63]

The plurality disposed of the dermal contact issue[64] on the same grounds as the airborne exposure standard. The agency, said Justice Stevens, was required to find that the ban on dermal contact with benzene was "'reasonably necessary and appropriate' to remove a significant risk of harm from such contact. The agency did not make such a finding, but rather acted on the basis of the absolute, no-risk policy that it applies to carcinogens."[65] This policy, he said, was not a "proper substitute for the findings of a significant risk of harm required by the Act."[66]

2. *Chief Justice Burger's Opinion*

Chief Justice Burger concurred in the plurality opinion, but wrote a short opinion of his own[67] emphasizing the distinction between the functions of the judiciary and of the administrative agencies. The plurality opinion, he said, was not to be taken as a restriction on the exercise of legitimate agency discretion. While the courts may require the agency to consider carefully all the facts and opinions in its factfinding efforts, the determination of whether a specific risk of health impairment is significant is a policy decision to be made by the Secretary. In this area, "[t]he judicial function does not extend to substantive revision of regulatory policy"[68] so long as the policy judgment is within the scheme of the statute. Here, the statutory scheme "calls for avoidance of extravagant, comprehensive regulation. Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible."[69]

3. *Justice Powell's Concurring Opinion*

Justice Powell wrote a separate opinion[70] concurring in part with the plurality. He agreed that section 3(8) imposes limitations on section 6(b)(5) of the Act, and that the Secretary, when reducing existing exposure standards, must find both that the current exposure standard presents a significant risk of

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62. *Id.* at 653. Justice Stevens then went on to cite a rule of statutory construction: "Ordinarily, it is the proponent of a rule or order who has the burden of proof in administrative proceedings." *Id.*

63. *Id.*

64. *See* note 36 *supra.*

65. 448 U.S. 607, 662 (1980).

66. *Id.*

67. 448 U.S. 607, 662 (1980) (Burger, C.J., concurring).

68. *Id.* at 663.

69. *Id.* at 664.

70. 448 U.S. 607, 664 (1980) (Powell, J., concurring).

material harm and that a lower standard would substantially reduce that risk.[71] He would not, however, go so far as to hold that the agency "'did not even *attempt* to carry its burden of proof' on the threshold question of whether exposure to benzene at ten ppm presents a significant risk to human health."[72] While Justice Powell agreed that OSHA had attempted to carry its burden by finding that anticipated benefits of a reduced level of exposure could not be quantified, he found that the agency had failed to carry the burden with substantial evidence.

Where Justice Powell's opinion differs significantly from that of the plurality is on the issue of whether the OSH Act requires the agency to perform cost-benefit assessments. He agreed with the Fifth Circuit that the Act requires the Secretary to demonstrate that the costs of the proposed standard are reasonably related to the expected benefits.[73] Thus, he would not agree that a mere showing of a significant risk of material harm by OSHA could support the validity of a proposed exposure level.

4. *Justice Rehnquist's Opinion*

Justice Rehnquist concurred in the result[74] reached by the plurality, but refused to concur in the opinion. In a separate opinion, he expressed the view that the legislation at issue represented an unconstitutional delegation of authority by Congress to the agency. First, he argued that resolution of important social policy issues, such as whether "the law of diminishing returns should have any place in the regulation of toxic substances,"[75] was a task belonging to Congress. In his view, delegation of this decision to the Secretary of Labor violates John Locke's caveat: "[L]egislatures are to make laws, not legislators."[76] Second, he said that the Act fails to provide the Secretary with any intelligible principles or guidelines to aid him in the exercise of the delegated discretion. Finally, he argued that the standard of "feasibility" set out in section 6(b)(5) is so broad that it "renders meaningful judicial review impossible."[77] The standard provides no help in determining what amount of safety is enough. The language contained in section 6(b)(5) expresses nothing more than wishful thinking; it requires the Secretary to adopt the best, most protective standard if possible, but excuses him from doing so if not.[78]

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71. *Id.* at 664–65.
72. *Id.* at 667 (emphasis added).
73. *Id.*
74. 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring in the judgment).
75. *Id.* at 686.
76. *Id.*
77. *Id.*
78. "Read literally, the relevant portion of § 6(b)(5) is completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he can't." *Id.* at 675.

5. *Justice Marshall's Dissenting Opinion*

In a lengthy and biting dissent,[79] Justice Marshall characterized the plurality opinion as being "extraordinarily arrogant," "extraordinarily unfair,"[80] and in flagrant disregard of restrictions on judicial authority. He characterized the decision as an attempt to "bring the authority of the Secretary of Labor in line with the plurality's own views of regulatory policy."[81] When the impact of exposure to a toxic substance involves issues of scientific uncertainty, he argued, it may well be impossible for OSHA to make the threshold finding that a risk is "significant." When this is the case, the result of the plurality's approach will be to expose the American labor force to an ongoing risk of cancer and other occupational diseases and, at the same time, make the federal government powerless to protect them.[82]

Justice Marshall was convinced that the Secretary did indeed support his findings and conclusions with substantial evidence and that the plurality improperly engaged in an "independent review of adequately supported findings made by a technically expert agency."[83] To support this conclusion, Justice Marshall himself engaged in a substantial review of the medical and statistical evidence in the record. Based on this review, he said that "the Secretary could conclude that regular exposure above the one ppm level would pose a definite risk resulting in material impairment to some indeterminate but possibly substantial number of employees."[84]

The plurality, argued Justice Marshall, ignored three factors crucial to judicial review of occupational safety and health standards under the substantial evidence test. First, the issues reviewed often involve a high degree of technical complexity with which the courts are not prepared to deal. Second, the issues often are not capable of definitive resolution. Third, when the question involves determining an acceptable level of risk, policy can have as much of a bearing on the outcome as the facts. In short, Justice Marshall said that the substantial evidence test requires that judicial review of agency action should be, in the long run, deferential. Because of this, the decisions of the agency are entitled to a presumption of validity, and the courts should be careful not to substitute their own judgment for that of the agency.[85]

Justice Marshall also was concerned with the plurality's finding that the OSH Act requires a threshold finding of a significant risk of material impairment of health before any standards can be promulgated. He characterized

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79. 448 U.S. 607, 688 (1980) (Marshall, J., dissenting).
80. *Id.* at 695.
81. *Id.* at 688.
82. *Id.* at 714.
83. *Id.* at 695.
84. *Id.* at 707.
85. *Id.* at 705. In other words, what Justice Marshall wanted was substantial evidence that the agency's decisions were procedurally correct; examination of the substance of the decision, in his view, was not the job of the Court. *See* text accompanying note 139 *infra*.

the requirement as an invention of the plurality, having "no relationship to the acts or intentions of Congress"[86] and requiring the Secretary to "do the impossible."[87] The only saving grace that he could find was an indication in Justice Powell's opinion that the Court's judgment might not be as drastic as he anticipated. Justice Powell and the plurality, said Justice Marshall, indicated that the Secretary might not be prohibited from promulgating safety standards when quantifying benefits is impossible.[88] This interpretation would allow the agency to set safety standards with only a rough quantification of the risks posed by a carcinogen and would allow the courts to defer to the Secretary's finding that the risk was significant.

Justice Marshall concluded by saying that the plurality's approach will not stand the test of time. "In all likelihood," he said, the "decision will come to be regarded as an extreme reaction to a regulatory scheme that, as the Members of the plurality perceived, imposed an unduly harsh burden on regulated industries."[89] If the result is otherwise, he argued, the American worker will be forced "to return to the political arena . . . to win a victory that he won once before in 1970."[90]

IV. Analysis of the Court's Decision

A. *The Plurality Opinion*

The plurality derived its threshold significant risk requirement by construing section 3(8) of the Act as imposing substantive limits on section 6(b)(5). The two provisions accordingly can be read together:

> The Secretary, in promoting standards dealing with toxic materials or harmful physical agents under this subsection, shall set as a standard one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment. Said standard shall be one that 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.[91]

This reading leads to two questions. First, can this hybridized reading of section 3(8) and section 6(b)(5) be fairly interpreted to require a showing of a *significant* risk of material impairment of health? Second, even if such an interpretation can be made, what impact will it have on the way OSHA regulates toxic substances?

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86. 448 U.S. 607, 713 (1980) (Marshall, J., dissenting).
87. *Id.* at 714.
88. *Id.* at 715.
89. *Id.* at 723.
90. *Id.* at 717.
91. This is simply a combined reading of §§ 3(8) and 6(b)(5) of the OSH Act. *See* text accompanying notes 10 and 11 *supra*.

The plurality answered the first question by posing its converse and then combining it with the second question: what would be the impact of a statute that allows OSHA to eliminate by regulation *any* risk of material harm, no matter how minute? The plurality, joined by Justices Powell and Rehnquist, feared that a grant of such power to OSHA was a grant of almost total control over America's industry and economy. Nonetheless, section 6(b)(5) mandates among other considerations "the attainment of the highest degree of health and safety protection for the employee."[92] Congress, in section 2(b), provided that "its purpose and policy [was] . . . to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ."[93] A standard shall be promulgated such that it is the one "which *most* adequately assures . . . that *no* employee will suffer material impairment of health or functional capacity . . . ."[94] With such language, it is hard to find a limitation to the effect that OSHA can regulate only *significant* risks of material impairment.

As previously mentioned,[95] however, it was the plurality's concern with the broad sweep of power that OSHA would have should its mandate be to eliminate *any* risk, no matter how insignificant, that caused it to read in the threshold requirement. The number of toxic substances currently in use in industry today is staggering, with a new substance being introduced at the rate of approximately one every twenty minutes.[96] The data on the dangers of these substances is understandably scarce in many situations. This dearth of information is especially true of carcinogens, for which the latency periods are such that the effects of exposure may not appear until years after exposure has ceased. In industries for which the costs of reducing exposure to acceptable levels can run into the billions of dollars,[97] allowing OSHA to carry out a no-risk, absolute safety standard could be disasterous.

The potential impact of such power is apparently what caused the plurality and Justice Rehnquist to resurrect the nondelegation doctrine, last used in *Panama Refining Co. v. Ryan* and *Schechter Poultry Co. v. United States*.[98] Justice Harlan once wrote that the reasons for not allowing the Congress to delegate the legislative power completely are two-fold:

> *First*, it ensures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.[99]

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92. Occupational Safety and Health Act of 1970, § 6(b)(5), 29 U.S.C. § 655(b)(5) (1976).

93. *Id.* at § 2(b), 29 U.S.C. § 651(b) (1976) (emphasis added).

94. *Id.* at § 6(b)(5), 29 U.S.C. § 655(b)(5) (1976) (emphasis added).

95. *See* text accompanying note 92 *supra*.

96. Brief for the Federal Parties, *supra* note 27, at 60–61 n.51.

97. *See, e.g.*, United Steelworkers of Am., AFL-CIO v. Marshall, No. 79–1048 (D.C. Cir. Aug. 15, 1980), *as amended*, 647 F.2d 1189 (D.C. Cir. 1981); AFL-CIO v. Marshall, 617 F.2d 636 (D.C. Cir. 1979); American Iron and Steel Inst. v. OSHA, 577 F.2d 825 (3d Cir. 1978).

98. *See* note 56 *supra*. The source of the doctrine is U.S. CONST. art I, § 1, which provides that "all legislative powers . . . shall be vested in a Congress of the United States."

99. Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting).

Allowing the Secretary to provide for absolute safety would violate Harlan's first tenet in the eyes of the plurality, which believed that such a decision should be made by Congress. Requiring only standards that are "feasible" violated the second tenet in the eyes of Justice Rehnquist, who believed that such a limitation on the agency was not a limitation at all.

Whether this decision marks the resurrection of the doctrine against delegation of legislative power remains to be seen, but most likely it does not. Since the last use of the doctrine in the days of the New Deal, administrative agencies have become an accepted part of American government, performing both legislative and judicial functions. It is not likely that the Court will be willing to challenge Congress by striking down whole statutory schemes and eliminating well-entrenched agencies because the power delegated to them is too broad.[100] Nevertheless, the doctrine's use here may indicate that the discretion agencies have enjoyed in making policy decisions is going to be somewhat curtailed. When an existing statute is capable of being construed either narrowly or broadly, the Court may find the nondelegation doctrine a convenient reason for choosing the narrow construction.

Even if the requirement of a threshold test was created where none existed before, and the nondelegation doctrine was used as an excuse for doing so, the effect may not be as great as that feared by Justice Marshall. In a footnote to his opinion, Justice Stevens acknowledged that determining whether a given level of risk is significant is largely a policy decision within OSHA's scope of authority.[101] Thus, while Justice Stevens argued that the agency is not empowered to eliminate de minimus risks, he also said that the agency has the power to define what constitutes such risks.

This power cannot, however, be used to circumvent the problem caused by requiring OSHA to demonstrate with substantial evidence that there is a risk. Requiring the agency to draw a distinction demands by necessity a rough quantification of the risk posed by a toxic substance. This is something that OSHA said it was not capable of doing for purposes of the benzene standards and is something it claims cannot be done for many toxic substances, especially carcinogens.

Requiring a quantification of risk marks an end to generic rule making such as the agency's issuance of an exposure policy with regard to carcinogens. OSHA's efforts to regulate on policy grounds, when the factual issues

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100. It should be noted here that only Justice Rehnquist felt that the OSH Act was an overbroad delegation of power. The plurality opinion considered the possibility that the nondelegation doctrine had been violated, but refused to so hold. *See also* the decision in American Textile Mfrs. Inst. v. Donovan, 101 S.Ct. 2478 (1981), where the Court finally ruled that the Occupational Safety and Health Act does not require cost-benefit analysis While Chief Justice Burger joined in a dissent by Justice Rehnquist on nondelegation doctrine grounds, a five-to-three majority (which included Justice Stevens, the author of the plurality opinion in *Industrial Union Dep't*) upheld the broad regulatory powers of OSHA so long as the requisite "significant risk" test was satisfied. *See* text accompanying notes 134–136 *infra*.

101. 448 U.S. 607, 655–56 n.62 (1980).

are "on the frontiers of science and medicine,"[102] have been dealt a severe blow by this decision.[103]

The plurality opinion also referred to the assignment of the burden of proof. In placing upon OSHA the burden of proving "that it is at least more likely than not that long-term exposure to ten ppm of benzene presents a significant risk of material health impairment,"[104] the Court cited the formal rule making provisions of the Administrative Procedure Act (APA).[105] The problem is that these provisions do not apply to OSHA rule making. Even if they did, the applicable provision would not be section 7, as indicated by the Court, but section 4 (pertaining to informal notice and comment rule making procedures).[106] While section 7(d) places the burden of proof on the proponent of the proposed rule, section 4 has no such provision, and neither does the OSH Act. Although most appellate courts nonetheless have placed the burden on the proponent of the rule when informal procedures are required, the decisions are not in complete agreement.[107]

The Court's reliance on the APA is particularly curious in light of the fact that such reliance is unnecessary. While the OSH Act does not expressly place the burden of proof on the agency, a reading of its provisions makes it clear that this was the intent of Congress. Section 11(a) of the Act requires agency findings to be supported by substantial evidence. Section 3(8) requires standards to be "reasonably necessary or appropriate." Section 6(b)(5) requires OSHA to support its findings with "the best available evidence," using "research, demonstrations, experiments, and such other information as may be appropriate." In addition, when Congress has wanted to shift the burden of proof away from an agency and onto industry in other regulatory efforts, it has said so in the appropriate enabling statutes.[108]

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102. *Id.* at 662 (Burger, C.J., concurring).

103. For a thorough discussion of the advantages that generic policies can have when resolving issues such as the benzene problem, *see* McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729 (1979).

104. 448 U.S. 607, 653 (1980).

105. Administrative Procedure Act, § 7(d), 5 U.S.C. § 556(d) (1976). This section provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

106. The Administrative Procedure Act sets out general procedures that government agencies must follow when promulgating rules or adjudicating disputes. Section 556 sets out formal procedures to be followed when an agency's enabling statutes require rules to be made "on the record after opportunity for an agency hearing." Administrative Procedure Act, § 7, 5 U.S.C. § 556 (1976). Section 553 applies to all other agency rule making procedures, which typically are defined as notice and comment, or informal, proceedings. The Act applies, however, only where the agency's enabling statutes do not provide for their own procedures. *Id.* at § 4, 5 U.S.C. § 553 (1976). Section 6 of the Occupational Safety and Health Act provides procedures to be followed by the Secretary of Labor when making rules. 29 U.S.C. § 655 (1976). The Administrative Procedure Act is, therefore, inapplicable to OSHA rule making, though OSHA's procedural requirements do resemble the procedures set out in § 4 of the Administrative Procedure Act. For a general discussion of OSHA rule making procedures, *see* 5 J. CORP. LAW 222 (1979).

107. For a discussion of the placement of burden of proof in informal rule making, *see* K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 6:15 (2d ed. 1978).

108. *See, e.g.*, Environmental Defense Fund v. EPA, 548 F.2d 998 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 925 (1977), in which the court held that Congress had deliberately shifted the burden of proof to require manufacturers to demonstrate the safety of their pesticides.

The placement of the burden is important here because it can, to a certain extent, be separated from the requirement that OSHA show that the risk sought to be eliminated is significant. In effect, though, it also bars the agency from promulgating generic exposure standards, such as the no-exposure limit for carcinogens. A generic policy reducing exposure to toxic substances to the "lowest level feasible" on the ground that there is an "inability to demonstrate a threshold or establish a safe level"[109] clearly does not satisfy the agency's burden of proof. Instead of a showing by the Secretary of Labor that a given exposure level is hazardous, this kind of policy puts the burden on Industry to show that the exposure level is *not* hazardous. Because of the difficulty of proving a negative, such a policy gives Industry an impossible task. The plurality's opinion effectively eliminates this problem.

B. *The Dissenting Opinion*

The dissenting opinion of Justice Marshall was joined by Justices Brennan, White, and Blackmun and is, therefore, the opinion in which the greatest number of Justices concurred. Its harsh and vindictive criticism of the plurality is, however, matched by its own logical inconsistencies.

Justice Marshall chided the plurality for undertaking what he characterized as a "nearly *de novo* review of questions of fact and of regulatory policy," saying that the plurality's extensive review of the facts was "especially inappropriate when the factual questions at issue are ones about which the Court cannot reasonably be expected to have expertise."[110] The Court, he said, does not sit "to undertake independent review of adequately supported scientific findings made by a technically expert agency."[111] This argument, if taken to its logical conclusion, "would allow the Secretary and OSHA almost unlimited and unreviewable discretion."[112] Furthermore, it ignores the Act's legislative history and the reason for requiring findings to be supported by substantial evidence. The legislative history shows that a "substantial evidence" standard of review was added to the bill as a compromise measure. In Senate floor debates, concern was expressed that the informal rule making procedures of the reported bill were unfair to the employer: "[W]e cannot just have a bill set up for the employee and not worry about the employer, because someone has to provide the job."[113] The substantial evidence standard was added because the "arbitrary and capricious" standard of review accompanying informal rule making procedures would seriously undermine the right of employers to a judicial remedy. Under the arbitrary and capricious standard

109. 43 Fed. Reg. 5918, 5932 (1978).

110. 448 U.S. 607, 695 n.9 (Marshall, J., dissenting).

111. *Id.* at 695.

112. Connolly, *Court's Benzene Decision Sheds Almost No Light*, Legal Times of Wash., July 7, 1980, at 2.

113. 116 CONG. REC. 36511–12 (1970), *reprinted in* S. SUBCOMM. ON LAB. OF THE COMM. ON LAB. AND PUB. WELF., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 320 (1970).

"it would be very, very strange if [employers] . . . ever win a case."[114] The purpose of the substantial evidence standard was to ensure that the Secretary had "a record on which to base his findings and to serve as a basis for judicial review."[115] Thus, Justice Marshall's comments apparently miss the mark. The reason for requiring findings by OSHA to be supported by substantial evidence is not to allow the courts to defer to agency findings, as Justice Marshall suggests, but to ensure that the findings are adequately supported by the evidence.

Justice Marshall followed his attack on the plurality's standard of review with an attack on the substance of the review. Agreeing with OSHA that the agency need not be able to quantify the risk posed by exposure to benzene, he then went on to argue that the Secretary of Labor had supported his findings with substantial evidence.[116] To support this contention, he provided his own extensive, one-sided review of the facts.

Several times in his opinion, Justice Marshall stated that OSHA based its findings on "direct evidence of incidence[s] of leukemia . . . at exposure levels of ten ppm and below."[117] A reading of the Secretary's findings, however, shows only one study that found a risk of leukemia at ten ppm or below.[118] This study suffered from so many methodological defects that one of the authors of the study "testified that OSHA had gone 'off the deep end' in interpreting the study as demonstrating that 'exposures generally below twenty-five ppm have already induced leukemia.'"[119] OSHA had even conceded that it could not "derive any conclusions linking the excess leukemia risk observed with any specific exposure level."[120] Justice Marshall also noted that, with regard to the dermal contact issue, "[b]oth animal and human studies had found . . . absorption" of benzene by the skin.[121] OSHA's express findings on this issue, however, were not as definitive as Justice Marshall's statements indicate. OSHA stated that "[t]he record evidence on the effect of liquid benzene on the eyes or the skin is extremely limited . . . . The few studies of skin effects on animals and humans . . . are not definitive as to the extent of benzene that is absorbed . . . ."[122]

Justice Marshall also expressed an opinion concerning the cost-benefit issue. He argued that there was no requirement that such an assessment be

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114. 116 CONG. REC. 36521 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 113, at 343–344.

115. 116 CONG. REC. 42206 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 113, at 1218.

116. In this case, the Secretary of Labor found, on the basis of substantial evidence, that (1) exposure to Benzene creates a risk of cancer . . . *even at the level of 1 ppm*; (2) no safe level of exposure has been shown; (3) benefits in the form of saved lives would be derived from the permanent standard; (4) the number of lives that would be saved could turn out to be either substantial or relatively small; (5) . . . it is impossible to calculate even in a rough way the number of lives that would be saved . . .; and (6) the standard would not materially harm the financial condition of the covered industries. 448 U.S. 607, 689 (1980) (Marshall, J., dissenting) (emphasis added).

117. *Id.* at 707.

118. 43 Fed. Reg. 5918 (1978).

119. Testimony of Ronald Young, as quoted in the Brief for Respondents, *supra* note 41, at 13.

120. 43 Fed. Reg. 5918, 5927 (1978).

121. 448 U.S. 607, 722 n.35 (1980).

122. 43 Fed. Reg. 5918, 5948 (1978).

performed but concluded that even if there were one, the analysis had already been performed. "[T]he Secretary," said the Justice, "made an express finding that the hazards of benzene exposure were sufficient to justify the regulation's costs."[123] OSHA did indeed perform a detailed analysis of the costs that the new regulation would impose on industry. However, when it came to analyzing the benefits, the agency concluded only that "[w]hile the actual estimation of the number of cancers to be prevented is highly uncertain, the evidence indicates that the number *may* be appreciable."[124] While this is a "finding," there is no evidence in the record to support it. In the words of the plurality, and contrary to the interpretation of the record presented by Justice Marshall,

> OSHA's rationale for lowering the permissible exposure limit was based, not on any finding that leukemia has ever been caused by exposure to ten ppm of benzene and that it will *not* be caused by exposure to one ppm, but rather on a series of assumptions indicating that some leukemias *might* result from exposure to ten ppm and that the number of cases *might* be reduced by reducing the exposure level to one ppm.[125]

In attacking the plurality's construction of the statute, the dissent responded to the nondelegation argument only in a footnote.[126] The purpose of the doctrine, said Justice Marshall, was "to assure that the most fundamental decisions will be made by Congress . . . rather than by administrators. Some minimal definiteness is therefore required in order for Congress to delegate its authority to administrative agencies." This definiteness was provided by the word "feasible," which, when read in context with the rest of the statute, "means technologically and economically achievable." This term, he said, affords the Secretary "considerably more guidance than . . . [that given] other administrators acting under different regulatory statutes." Instead of abdicating its responsibility to make the hard choices, Congress made the choice to protect the American worker from "an indeterminate risk of cancer and other fatal diseases."[127]

These arguments, while proposing to address the plurality's nondelegation argument, in reality do no more than circle the issue. Justice Marshall's reading of the statute, which corresponds with OSHA's interpretation, would give the agency a mandate to eliminate *any* risk of material harm, no matter how insignificant. The possibility that this would give OSHA almost total control over American industry was viewed as more than hypothetical by the plurality. OSHA, it noted, already had proposed a generic cancer policy,[128] and the National Institute of Occupational Safety and Health already had

123. 448 U.S. 607, 720 (1980).
124. 43 Fed. Reg. 5918, 5940 (1978) (emphasis added).
125. 448 U.S. 607, 634 (1980) (emphasis added).
126. *Id.* at 717 n.30.
127. *Id.*
128. 42 Fed. Reg. 54,148 (1977).

published a list of 2415 potential occupational carcinogens.[129] In an age in which nearly every product made by man seems to cause cancer, giving absolute control over such substances to a government agency is something the plurality was just not willing to let Congress do.

V. What The Decision Means For OSHA

A. *Initial Reactions*

Immediately following the *Industrial Union Department* decision, OSHA suspended its cotton dust standard as it applied to the cotton warehousing and classing industries on the grounds that the threshold "significant risk" standard had not been met. However, the standard was not lifted for other areas of the cotton industry because the "significant risk" test allegedly was satisfied.[130]

Meanwhile, the Fifth Circuit struck down the same cotton dust standard as it applied to the cotton gin industry.[131] Relying on the Supreme Court's opinion in *Industrial Union Department*, the court held that OSHA had failed to satisfy the threshold significant risk test. The court went further, however, and relying on its own opinion in *Industrial Union Department*[132] found that the agency also had failed to demonstrate that the costs of compliance were reasonably related to anticipated benefits. By so holding, the court continued its conflict with the District of Columbia Court of Appeals, which had ruled that OSHA was not required to perform any cost-benefit analysis in its rule making process.[133]

The Supreme Court recently resolved this dispute between the circuit courts. In *American Textile Manufacturers Institute v. Donovan*,[134] the Court held that while OSHA must indeed satisfy the "significant risk" test when promulgating new regulations, it need not employ cost-benefit analysis in the process. Rejecting the arguments of Justice Rehnquist in *Industrial Union Department* that the word "feasible" as used in section 6(b)(5) of the OSH Act was not a limitation on the agency, the majority agreed that:

> Congress itself defined the basic relationship between costs and benefits, by placing the "benefit" of worker health above all other considerations save those making attainment of the "benefit" unachievable. Any standard based on a bal-

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129. *See* 448 U.S. 607, 645 n.51 (1980).

130. 49 U.S.L.W. 2108 (Aug. 12, 1980) (notice of suspension of preamble to cotton dust standard, 29 CFR 1910.1043, on July 25, 1980).

131. Texas Independent Ginners Ass'n v. Marshall, No. 78-2663 (5th Cir. Nov. 14, 1980), 8 OCCUP. SAFETY & HEALTH CAS. (BNA) 2205.

132. 581 F.2d 493 (5th Cir. 1978).

133. AFL-CIO v. Marshall, 617 F.2d 636 (D.C. Cir. 1979).

134. 101 S.Ct. 2478 (1981). Justice Brennan was joined in his majority opinion by Justices Marshall, White, Blackmun, and Stevens. Justice Stewart filed a dissenting opinion, and Chief Justice Burger joined in the dissent of Justice Rehnquist. Justice Powell took no part in the decision. It should be noted here that Justice Stevens' position with the majority in *American Textile Inst.* is extremely important in light of the fact that he authored the plurality opinion in *Industrial Union Dep't.*

> ancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5). Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is.[135]

The decision in *American Textile Institute* takes nothing away from the plurality opinion in *Industrial Union Department*. Unlike the situation with benzene, the Court found that OSHA was able to demonstrate with little difficulty that exposure to even low levels of cotton dust can and does cause significant risks of severe bodily harm. In addition, the majority opinion in *American Textile Institute* found that OSHA had shown with substantial evidence that compliance with the cotton dust standards by Industry was both economically and technologically feasible. Thus, the fact patterns in the two cases were significantly different, and the resulting decisions should be read in tandem, with *Industrial Union Department* being viewed as the lower limit on OSHA's authority and *American Textile Institute* as the upper limit. As a result, while OSHA is effectively prohibited from issuing generic regulations and from requiring protection against de minimis risks, it is not required to demonstrate that the cost of any regulation is reasonably related to the resulting benefits. As long as compliance with the regulation is technologically and economically feasible and as long as the agency has shown by substantial evidence that the regulation is aimed at relieving a significant risk of harm, little can be done by Industry to obtain relief from enforcement.

B. *Impact on Administrative Law Problems*

The Supreme Court's decision in *Industrial Union Department* may have an impact on an issue of administrative law that was not even considered by the Justices: the scope of judicial review of administrative action. As will be noted, combining informal rule making with a substantial evidence standard of review is combining apples with oranges.[136] Informal rule making generally provides the administrative agency with a great deal of discretionary power, requiring no hearings, testimony, right of cross-examination, and most importantly, no formal record. In fact, the Court recently struck down an attempt by an appellate court to require an agency to formalize its proceedings when the enabling statute called only for notice and comment procedure.[137]

The traditional standard to which courts have adhered when reviewing agency decisions made in informal proceedings has been to insure that such decisions are not arbitrary and capricious. Such a standard severely limits court review and gives great discretionary power to the agency. The substantial evidence standard of review is used when an agency is required to act through formal procedures and when a full transcript of the proceedings is

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135. 101 S.Ct. 2478, 2481 (1981).
136. *See* text accompanying note 138 *infra*.
137. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1977).

available. In general, the standard requires that agency decisions be supported by substantial evidence in the record as a whole. It "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[138]

To combine informal rule making, which generates no record, with a substantial evidence standard of review, which requires a record, is to guarantee confusion on the agency's part as to just how much procedure it needs to protect its findings in court. OSHA, covering all bases, has for the most part completely formalized its proceedings. The result is that it has generated reams of very complex and highly technical data in almost every rule making effort.

The courts have been in disagreement as to how to review such evidence in an appeal from agency rule making. Judges, after all, are lawyers, and it would hardly be fair to expect them to be engineers, physicians, chemists, and architects as well. This problem has led to the development of two schools of thought. One group has agreed that judges are not competent to analyze the volumes of data generated in many rule making proceedings. These thinkers argue that the best way to guard against improper agency action is to make sure that sufficient procedures that assure "a reasoned decision that can be held up to the scrutiny of the scientific community and the public"[139] are followed by the agency.

The other school argues that, difficult as it may be, if the courts are to maintain control over the agencies, they must engage in substantive review of the evidence. Procedural due process, while better than nothing, is no guarantee of substantive due process: "Better no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably."[140]

The Supreme Court's review of the record in *Industrial Union Department* indicates its willingness to follow the thinking of the second school. Justice Stevens' review of the record, taking up more than ten pages of the opinion with a general review of the studies and findings presented by OSHA, reveals no fear of the complexity of the evidence. Justice Marshall sets forth the same type of review in his dissenting opinion, even while arguing that substantial deference should be given the agency's findings.

What this means for the future review of agency decisions is difficult to say. The impact on formal proceedings is likely to be insignificant. When informal proceedings are combined with a substantial evidence standard of

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138. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).

139. This is the view taken by Chief Judge Bazelon in his concurring opinion in Ethyl Corp. v. EPA, 541 F.2d 1, 66 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976). For an example of how this approach works see the *Scenic Hudson* cases: Scenic Hudson Preservation Conf. v. FPC (I), 354 F.2d 608 (2d Cir. 1965); Scenic Hudson Preservation Conf. v. FPC (II), 453 F.2d 463 (2d Cir. 1971).

140. This is the view expressed by Judge Leventhal in his concurring opinion in Ethyl Corp. v. EPA, 541 F.2d 1, 68–69 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976). For an example of this approach see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

review, however, the impact could be great. This is, of course, assuming that the appellate courts follow the Supreme Court's lead in this and other regulatory cases.

Reviewing the vast quantities of data presented by many regulatory proceedings has proved to be quite time consuming. Further delay is added when a judge has to acquaint himself with areas with which he is unfamiliar. In a system with court dockets that are already overloaded, requiring substantive review could be disastrous. The proponents of the first school also have a valid argument. In many cases it is unreasonable to expect a judge to be an expert on the law as well as two or three other highly technical fields. Then, too, such review could thwart the very reasons for which agencies exist. They are generally intended to be bodies of experts who can act swiftly to solve problems. Judicial review of the record not only slows the process of agency decision making, it also tempts judges to substitute their own judgment for that of the agency, as Justice Marshall accused the plurality of doing in *Industrial Union Department*.

On the other hand, substantive review of agency findings may serve to keep agencies from regulating in areas in which facts are uncertain and policies ambiguous. If an agency knows its regulatory efforts are going to be closely scrutinized, it may choose not to press for solutions to problems that are not easily resolved. This would, in turn, serve to do one of two things. Either Congress would choose to act on the issue, or the industry would be left to resolve itself. When the issue is politically sensitive, however, Congress is not likely to tackle it willingly, and difficult problems simply do not solve themselves; when left alone, they fester.

VI. CONCLUSION

Whatever the final impact of the *Industrial Union Department* decision, it is likely to be important for some time to come. No longer can OSHA engage in sweeping regulatory efforts to protect the nation's work force from every conceivable risk. In the area of toxic substances, only those risks that are significant may be attacked. Lest the agency attempt to deter judicial supervision of this test, the Court has demonstrated its willingness to roll up its collective shirt sleeves and delve into whatever technical evidence the agency cares to generate. However, while industry may have cause to let its hopes rise, the regulatory battles are by no means over. The image of corporations as insensitive profit takers that grind the working man into the ground, an image well deserved in many cases, will be a long time dying.

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