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I. INTRODUCTION

From the time that Moses directed the Israelites to construct a parapet for their roofs "that thou bring not blood upon thine house, if any man fall from thence,"[1] to the present, the matter of workplace health and safety has occupied a place on the agenda of civilized societies. However, in the United States efforts to confront the problem of occupational injuries were sporadic and largely ineffective until the Occupational Safety and Health Act[2] was enacted.[3] OSHA[4] is universally considered a landmark in the history of labor and employee health legislation. It was adopted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."[5]

In order to fulfill this purpose, the Act authorizes the Secretary of Labor to promulgate rules and standards[6] with which each employer must comply.[7] Despite this massive attempt to promote the health and safety of employees, OSHA has been subjected to intense criticism by both protected employees and regulated employers. Employees argue that the regulations do

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1. *Deuteronomy* 22:8; *cf.* Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n, 528 F.2d 645 (5th Cir. 1978) (holding that OSHA perimeter guarding standard is only applicable to floors and not to roofs).

2. 29 U.S.C. §§ 651-678 (1988) (OSHA).

3. The Occupational Safety and Health Act was signed into law on December 29, 1970, and became effective on April 28, 1971.

4. The term "OSHA" has been used to describe the Act, the Agency (Occupational Safety and Health Administration), and the entire occupational safety and health program. For purposes of this Comment, the term "OSHA" may refer to any of these meanings with the presumption that the context in which it is used will clarify the intended meaning.

5. 29 U.S.C. § 651(b) (1988).

6. *Id.* § 655.

7. *Id.* § 654. Since 1970, OSHA has established numerous rules and standards which appear in several volumes of the *Code of Federal Regulations* (C.F.R.). The regulations primarily are located within Title 29 of the C.F.R.

not go far enough to adequately protect workers,[8] while employers maintain OSHA's regulations are so pervasive as to unduly burden them with excessive and unnecessary regulation.[9]

Within the enabling legislation of the Act, Congress set forth both extensive procedural requirements and substantive criteria which new standards must meet before OSHA may promulgate a new rule under section 6(b) of the Act.[10] These procedural rules allow for the expression of views by interested persons and are designed to bring about more reasoned decisionmaking. However, despite such safeguards, judicial review by the courts of appeals is afforded to provide a system of checks and limitations upon the regulating agency.[11]

The regulatory questions of when, how, and to what extent OSHA may promulgate standards have been at issue since 1973.[12] Consequently, the Supreme Court and various courts of appeals have been called upon to issue a long line of opinions either upholding or vacating the validity of OSHA standards.[13] The Supreme Court has substantively established binding principles on OSHA's rulemaking activity. These guidelines limit the agency's intrusive regulatory authority while allowing it to fulfill its congressional mandate. These guidelines also stipulate the burden OSHA must bear in order for a challenged regulation to be judicially validated. For instance, the Court's decision in *Industrial Union Department v. American Petroleum Institute, Inc.*[14] (*Benzene*) imposed the re-

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8. *See* AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992) (the AFL-CIO challenged both the procedures and findings OSHA used in determining new standards); Industrial Union Dep't v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974) (a public interest group objected to the delay in the effective date of asbestos standards).

9. *See* Keith N. Hylton, *Efficiency and Labor Law*, 87 NW. U. L. REV. 471 (1993).

10. 29 U.S.C. § 655(b) (1988).

11. According to 29 U.S.C. § 655(f), standards issued by OSHA may be challenged by "any person who may be adversely affected by a standard."

12. The first decision regarding a major OSHA standard was Associated Industries, Inc. v. Department of Labor, 487 F.2d 342 (2d Cir. 1973) (vacating lavatory standard).

13. *See* Society of the Plastics Indus., Inc. v. OSHA, 509 F.2d 1301 (2d Cir.) (affirming vinyl chloride standard), *cert. denied*, 421 U.S. 992 (1975); Synthetic Organic Chem. Mfrs. Ass'n v. Brennan, 503 F.2d 1155 (3d Cir. 1974) (affirming standard for ethyleneimine) (*SOCMA I*), *cert. denied*, 420 U.S. 973 (1975). *Contra* Associated Indus., Inc. v. Department of Labor, 487 F.2d 342 (2d Cir. 1973) (vacating lavatory standard); Dry Color Mfrs. Ass'n v. Department of Labor, 486 F.2d 98 (3d Cir. 1973) (vacating carcinogen emergency temporary standard).

14. 448 U.S. 607 (1980) (the *Benzene* case).

quirement that OSHA may regulate only where it finds a "significant health risk."[15] And in *American Textile Manufacturers Institute, Inc. v. Donovan*[16] (*Cotton Dust*) the Court defined the limits of the term "feasibility," prohibiting OSHA's use of cost-benefit analysis in issuing standards.

Despite these guiding principles from the Supreme Court, the various courts of appeals have reached divergent and conflicting results in cases where OSHA standards have been challenged. The uneven pattern suggests that the views of the courts of appeals regarding their review responsibility and the application of the Supreme Court's guiding principles are the cause for the significant divergence of results.

The marked difference in the attitude among some of the courts of appeals has led some parties challenging standards to undertake major efforts to locate the judicial fora most apt to be sympathetic to their position.[17] Additionally, conflicting signals have been sent to OSHA regarding the scope of its rulemaking authority. As a result of this judicially created confusion, OSHA, industry leaders, and union representatives are grasping in the dark for a more definitive view of the judicial review process concerning OSHA regulations.[18]

OSHA standards are more likely to survive judicial scrutiny if the courts of appeals adopt standards which are deferential to the rulemaking authority of OSHA. By abdicating its responsibility to seriously scrutinize the propriety of rule promulgation to the presumed prudence of OSHA, a court will rarely, if ever, find a regulation which facially falls outside the wide scope of OSHA's regulatory authority. Conversely, if a court compels OSHA to clear all of the hurdles established both within OSHA, and by the Supreme Court, then only the regulations which are explicitly within the scope of the section 6(b)[19] rulemaking authority will survive.[20] An example of

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15. *Id.* at 614-15.

16. 452 U.S. 490 (1981) (the *Cotton Dust* case).

17. *See* Industrial Union Dep't v. Bingham, 570 F.2d 965 (D.C. Cir. 1977) (transferring proceedings to the Fifth Circuit Court of Appeals). The race to the courthouse becomes even more complex when one or more challenges to the agency's rule are filed in multiple jurisdictions. *See also* American Petroleum Inst. v. OSHA, 8 O.S.H. Cas. (BNA) 2025 (5th Cir. Sept. 15, 1980).

18. *See* Rowena M. Duren, Note, *The Employer's Dilemma: The Implications of Occupational Safety and Health in the Arbitral Process—Conflicting Contractual and Statutory Commands*, 34 SYRACUSE L. REV. 1067 (1983).

19. 29 U.S.C. § 655(b) (1988).

20. *See* Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regula-*

each of these positions has been rendered by the courts within the past eighteen months.

In 1991, the American Dental Association, joined by Home Health Services and Staffing Association, challenged a rule promulgated by OSHA[21] during that year concerning occupational exposure to bloodborne pathogens.[22] Despite challenges to the rule during the adoption process,[23] the standards were enacted. Consequently, suit was brought in the Seventh Circuit Court of Appeals.

Speaking for the majority, Circuit Judge Richard A. Posner admitted that, "[the rule] may be unnecessary; it may go too far; its costs may exceed its benefits."[24] Despite this, the Seventh Circuit upheld the bloodborne-pathogen rule by adopting an extremely deferential posture regarding OSHA's ability to freely promulgate regulations,[25] stating: "So in the main the rule must be upheld. Which is not to say that it is a good rule . . . . But our duty as a reviewing court of generalist judges is merely to patrol the boundary of reasonableness, . . . OSHA's bloodborne-pathogens rule . . . does not cross it."[26]

The Eleventh Circuit Court of Appeals exhibited a much different perspective of judicial review in the case of *AFL-CIO v. OSHA*.[27] In 1989, OSHA issued a set of permissible exposure limits (PELs) for 428 toxic substances.[28] Affected industries and labor unions challenged the rule, arguing that OSHA

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tory Alternatives and Legislative Reform, 6 YALE J. ON REG. 1 (1989).

21. 29 C.F.R. § 1910.1030 (1991). Bloodborne pathogens are certain disease-causing microorganisms found in the blood and other body fluids of some individuals which can infect others whose blood or body fluids they enter. The two such microorganisms of greatest concern are the hepatitis B virus (HBV) and the human immunodeficiency virus (HIV). The regulations OSHA promulgated are designed to guard against the transmittal of bloodborne pathogens from patients to health care workers.

22. American Dental Ass'n v. Martin, 984 F.2d 823 (7th Cir.), *cert. denied*, 114 S. Ct. 172 (1993).

23. *Martin*, 984 F.2d at 824.

24. *Id.* at 831. See *id.* at 825-26 for a discussion by Judge Posner concerning the cost of the regulations compared to the benefit in economic terms. "No doubt the agency's $813 million estimate is an underestimate." *Id.* at 826.

25. See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 510-12 (1985), for a discussion concerning the deference which courts apply in the absence of substantive review and the infrequency with which such courts invalidate agency decisions.

26. *Martin*, 984 F.2d at 831.

27. 965 F.2d 962 (11th Cir. 1992).

28. 29 C.F.R. § 1910.1000 (1989).

had not made sufficiently conclusive findings to justify promulgation of the rule.

The court vacated the standards and remanded to the agency, stating that the rule "is so flawed that it cannot stand."[29] The court reasoned that OSHA "failed to establish that existing exposure levels in the workplace present a significant risk of material health impairment or that the new standards eliminate or substantially lessen the risk."[30] Also, "OSHA ha[d] not met its burden of establishing that [the standards] [were] either economically or technologically feasible."[31] The Eleventh Circuit came to this conclusion because it adopted a "harder look" standard of review rather than the "arbitrary and capricious" standard used by other circuits.[32]

The purpose of this Comment is to examine the proper role of judicial review regarding the validity of OSHA regulations. The cases *American Dental Ass'n v. Martin*[33] and *AFL-CIO v. OSHA*[34] will be used as vehicles to explore the conflicting rulings being handed down by the various courts of appeals. Ultimately, this Comment will draw conclusions concerning which formula for review reaps the most jurisprudentially correct conclusions.

To lay the necessary groundwork for such a discussion, Part II of this Comment surveys the relevant guiding principles established by the Supreme Court to review OSHA regulations. Part III then examines the facts and outlines the courts' reasoning in *Martin* and *AFL-CIO*. Next, Part IV analyzes the holdings in *Martin* and *AFL-CIO* from the perspective of the relevant requirements discussed in Part II—namely, the standard of review, existence of a significant risk of material health impairment, and whether the regulations are feasible. Finally, Part V concludes that the holding in *AFL-CIO* is preferable to that of *Martin*. Unlike the Seventh Circuit, the Eleventh Circuit, in deciding *AFL-CIO*, properly adhered to the binding principles established by the Supreme Court in order to reach an economically and socially efficient outcome.

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29. *AFL-CIO*, 965 F.2d at 986.
30. *Id.* at 980.
31. *Id.* at 982.
32. *Id.* at 970.
33. 984 F.2d 823 (7th Cir.), *cert. denied*, 114 S. Ct. 172 (1993).
34. 965 F.2d 962 (11th Cir. 1992).

II. GUIDING PRINCIPLES FOR VALIDATION OF OSHA STANDARDS

OSHA's authority to issue legally enforceable occupational safety and health standards is extremely broad. Congress, when establishing OSHA, made certain of this in the "Findings and Purpose" section of the Act.[35] This section supplies policy guidance concerning the purposes of the OSHA standards, which emphasize the overriding protective goal of the standards. A cursory review of the OSHA rulemaking authority may give the impression that, but for some limited procedural requirements, OSHA retains limitless flexibility and discretion to decide the stringency, and thus the cost, of its standards.[36] However, Congress did not intend, nor has the judiciary been willing to allow, OSHA to act unchecked.

Despite numerous challenges, OSHA has been largely, but not uniformly, successful in upholding its standards when challenged in federal courts. For instance, while OSHA suffered a setback in the *Benzene* case, the Supreme Court upheld its regulation in the *Cotton Dust* case. Through these and other cases, the Supreme Court has interpreted congressional intent concerning the appropriate role of the courts when reviewing challenged OSHA regulations.

A. The Standard of Review

In judicial proceedings reviewing OSHA standards, a critical issue is the scope of the court's authority to review OSHA's determinations. This is commonly referred to as the standard

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35. In part, this section provides:

> (a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
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> (b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, 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 . . . .

29 U.S.C. § 651 (1988).

36. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (arguing that Congress has given administrative agencies unwarranted leeway under regulatory statutes and that Congress must pass regulatory statutes themselves with more particularity).

of review.[37] The apparent conflict between the various circuits concerning the appropriate standard of review stems from differing amounts of deference afforded to OSHA by the courts.

Prior to the enactment of the Occupational Safety and Health Act, courts applied a more searching "substantial evidence" test when decisions were made by regulatory agencies after administrative adjudications or following completion of a formal rulemaking process.[38] At the same time, a less stringent "arbitrary and capricious" test was employed when reviewing agency rules issued after only an informal rulemaking proceeding.[39]

Concerning the standard of review to be employed when reviewing challenges to OSHA regulations, Congress directed that "[t]he determinations of the Secretary [of Labor] shall be conclusive if supported by *substantial evidence* in the record considered as a whole."[40] Despite such seemingly plain language, the various courts of appeals have adopted vastly differing amounts of deference to OSHA standards when employing the "substantial evidence" standard.

OSHA rulemaking creates a unique situation when determining the appropriate standard of review. OSHA regulations are promulgated through an essentially informal process similar to the procedures outlined in section 4 of the Administrative Procedure Act.[41] Given the similarity between OSHA and APA rulemaking proceedings, the appropriate standard of review becomes difficult to distinguish. Section 10(e) of the APA[42] calls for agency action to be reviewed using the arbitrary and capricious standard.[43] The APA directs the judiciary to apply

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37. AFL-CIO v. OSHA, 965 F.2d 962, 969 (11th Cir. 1992).

38. Administrative Procedure Act (APA), 5 U.S.C. § 556(d) (1988). "'Formal' rulemaking . . . requires the agency to promulgate a rule on the basis of a record created through trial-type procedures . . . ." STEPHEN G. BREYER, REGULATION AND ITS REFORM 347 (1982). The procedural requirements to be followed during the formal rulemaking process are listed in sections 556 and 557 of the Administrative Procedure Act. *See* 5 U.S.C. §§ 556-557 (1988).

39. 5 U.S.C. §§ 553, 706 (1988). "[I]nformal rulemaking . . . requires the agency only to give notice of a proposed rule and allow comment upon it before the agency makes up its mind." BREYER, *supra* note 38, at 347. See Stephen G. Wood et al., *Regulation, Deregulation, and Re-regulation: An American Perspective*, 1987 B.Y.U. L. REV. 381, 412, for a discussion of the process of promulgating rules under the informal rulemaking process.

40. 29 U.S.C. § 655(f) (1988) (emphasis added).

41. 5 U.S.C. § 553 (1988). Informal rulemaking is also referred to as notice and comment rulemaking. BREYER, *supra* note 38, at 116.

42. 5 U.S.C. § 706 (1988); Wood et al., *supra* note 39, at 414.

43. Agency action may be set aside if it is "arbitrary, capricious, an abuse of

the "arbitrary and capricious" standard based upon the nature of the rulemaking proceeding, while OSHA's enabling legislation clearly mandates "substantial evidence."

This dichotomy caused both the courts and Congress to question whether the procedural guidelines of the APA were adequate to provide sufficient safeguards.[44] Consequently, another type of rulemaking category was created—hybrid rulemaking. "Hybrid rulemaking does not describe a single type of rulemaking proceeding, but includes any rulemaking proceeding that involves more procedure than informal rulemaking but less procedure than formal rulemaking."[45] A crucial issue confronting the courts reviewing the challenged OSHA regulations was whether the proper standard to be applied was the one generally applied to informal rulemaking—the arbitrary and capricious test[46]—or whether the less deferential standard should be applied.

Until recently, review of agency standards was extremely limited. In early cases, courts afforded agencies great deference and "upheld their policy choices as long as they were not wholly irrational."[47] During this period, "[j]udges reserved substantive review for instances of adjudication and formal rulemaking, to which they applied the 'substantial evidence' standard—a standard purportedly distinct from, and stricter than, the arbitrary and capricious test applied to informal rulemaking."[48]

By the mid-1970s the hard-look doctrine had become significant.[49] Applying this doctrine, courts "appeared to be demanding something more rigorous than mere consideration and explanation."[50] They required agencies to promulgate rules based upon valid policy judgements that could be substantiated by evidence. This hard-look test served two major purposes. First was the "requirement that agencies' findings of fact have

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discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (1988).

44. *See* Wood et al., *supra* note 39, at 412.

45. *Id.* at 413 (citations omitted).

46. 5 U.S.C. § 706(2)(A) (1988) (APA dictating the use of the arbitrary and capricious test for rules resulting from informal proceedings); *see* Motor Vehicle Mfg. Ass'n v. State Farm Auto. Mut. Ins. Co., 463 U.S. 29, 41 (1983).

47. Garland, *supra* note 25, at 532; *see* Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 290 (1974) (arbitrary and capricious standard requires nothing more than a rational basis for the treatment of evidence).

48. Garland, *supra* note 25, at 532 & n.147.

49. *See id.* at 510-11.

50. *Id.* at 533.

a basis in the record."[51] This signified a new approach to regulation—a presumption against regulation unless the agency could make a sufficient showing. Second, the hard-look doctrine "reestablished agency fidelity to congressional intent."[52] By holding agencies accountable for their findings, the courts were able to see that agencies did not exceed their congressionally granted powers.

The proper application of this standard within the context of OSHA regulations was a major issue confronting the Court of Appeals for the District of Columbia Circuit when called upon to review standards regulating asbestos hazards in *Industrial Union Department v. Hodgson*.[53] Here, the court enunciated a relatively deferential approach to OSHA's standards designed to more effectively protect employees. In order to reach this conclusion, the *Hodgson* court noted that the legislative history, notwithstanding the statutory language, supported the type of review "customarily . . . directed to adjudicatory proceedings or formal rulemaking."[54] The court also recognized that many of the issues confronting OSHA would be on the "frontiers of scientific knowledge."[55] Additionally, the District of Columbia Court of Appeals decided to resolve doubts in favor of employee health, since "the protection of the health of employees is the overriding concern of OSHA."[56] Thus, while the court insisted that its review must be calculated to prevent arbitrary and unreasonable standards, a deferential approach to OSHA standards was adopted.

This deferential approach has been adopted by several of the circuits. These courts have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[57] Under this deferential

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51. *Id.*

52. *Id.* at 512.

53. 499 F.2d 467 (D.C. Cir. 1974).

54. *Id.* at 473 (citations omitted).

55. *Id.* at 474. In *American Dental Ass'n v. Martin*, the Fifth Circuit resolved this question by stating that the science-policy regulations which OSHA promulgates require deference from the "nonspecialist, biomedically unsophisticated Article III judiciary." *Martin*, 984 F.2d at 828. For a further discussion of the science-policy questions, see Thomas O. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 731-47 (1979).

56. *Hodgson*, 499 F.2d at 475.

57. *Cotton Dust*, 452 U.S. 490, 522 (1981) (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)).

standard, a reviewing court may not displace an agency's conclusion even if the evidence supports conflicting inferences "so long as a reasonable person could reach that conclusion."[58] Additionally, "[w]here the agency's policy determinations are based upon complex scientific and factual data, or involve speculative projections, [the court's] review is particularly deferential."[59]

Proponents of this deferential approach point to statements from the Supreme Court to support their claim. For example, the Court has stated that because "[OSHA] places responsibility for determining substantial evidence questions in the courts of appeals, . . . '[the] Court will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied' by the court below."[60] As a result, advocates of OSHA regulations commonly contend that challengers have failed to show that a court of appeals misapprehended or grossly misapplied the standard of review.[61]

This deferential approach is not unanimously applied by all circuits. First, the burden of proof remains upon OSHA to justify its standards.[62] Critics of the deferential approach note that shifting the burden of proof to the challengers will have the effect of diluting the standard of review to the point that the dangers of arbitrariness and irrationality become present.[63] In such an atmosphere, OSHA would be free to impose whatever rule it preferred, regardless of the cost, need, or probability of desired result.

Second, there is a fundamental division concerning the rigors of the "substantial evidence" standard.[64] Under the "substantial evidence" test, "[courts] must take a *'harder look'*

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58. National Grain & Feed Ass'n v. OSHA, 866 F.2d 717, 728 (5th Cir. 1989) (citing Public Citizen Health Research Group v. Tyson, 976 F.2d 1479, 1485 (D.C. Cir. 1986)).

59. *Id.* at 729 (citing Forging Indus. Ass'n v. Secretary of Labor, 773 F.2d 1436, 1443 (4th Cir. 1985)).

60. *Cotton Dust*, 452 U.S. at 523 (quoting *Universal Camera*, 340 U.S. at 491).

61. *See* Brief for the Federal Parties at 20, *Benzene*, 448 U.S. 607 (1980) (Nos. 79-1429, 79-1583).

62. *See Benzene*, 448 U.S. at 653.

63. *See* Tracy N. Tool, Note, *Begging to Defer: OSHA and the Problem of Interpretive Authority*, 73 MINN. L. REV. 1336 (1989).

64. The "substantial evidence" standard is mandated by Congress within OSHA's enabling legislation. *See* 29 U.S.C. § 655(f) (1988).

at OSHA's action than [they] would if [they] were reviewing the action under the more deferential arbitrary and capricious standard applicable to agencies governed by the Administrative Procedure Act."[65] The substantial evidence test requires OSHA "to identify relevant factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting significant contrary evidence and argument."[66] However, the agency cannot rely on the notice and comment nature of the informal rulemaking procedure to stack the deck in its favor by presenting only favorable conclusions. The Eleventh Circuit noted, "Considering the record 'as a whole' further requires that reviewing courts 'take into account not just evidence that supports the agency's decision, but also countervailing evidence.'"[67]

This rendition of the "substantial evidence/hard-look" test provides for more rigorous scrutiny than the deferential approach taken by some circuits. Nevertheless, Congress delegated unusually broad discretionary authority to establish standards necessary to protect employees.[68] Proponents of the hard-look approach argue that the proper standard of review is for reviewing courts to "provide a careful check on the agency's determinations without substituting its judgement for that of the agency . . . [and] to ensure that the regulations resulted from a process of reasoned decisionmaking consistent with the agency's mandate from Congress."[69] In the alternative, under the traditional arbitrary and capricious standard, OSHA is able to promulgate standards although the new rules are based

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65. AFL-CIO v. OSHA, 965 F.2d 962, 970 (11th Cir. 1992) (emphasis added) (quoting Asbestos Info. Ass'n v. OSHA, 727 F.2d 415, 421 (5th Cir. 1984)).

66. United Steelworkers v. Marshall, 647 F.2d 1189, 1207 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *see also* Synthetic Organic Chem. Mfrs. Ass'n v. Brennan, 503 F.2d 1155, 1160 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975).

67. *AFL-CIO*, 965 F.2d at 970 (quoting AFL-CIO v. Marshall, 617 F.2d 636, 649 n.44 (D.C. Cir. 1979)).

68. *See* 29 U.S.C. § 651(b) (1988).

69. AFL-CIO v. Marshall, 617 F.2d 636, 649-50 (D.C. Cir. 1979).

> By requiring not only that the agency set forth a rationale consistent with the statutory purpose and outline available alternatives, but also that the agency support its findings of fact with record evidence and choose a final outcome that is reasonable in light of the facts, alternatives, and statutory purpose, a court can substantially decrease the odds that an agency decision motivated by improper purposes will escape invalidation.

Garland, *supra* note 25, at 557.

upon improper motives and do not exhibit fidelity to the Agency's Congressional mandate.[70] Although OSHA was empowered with broad rulemaking authority, neither Congress nor the Supreme Court recognizes the Agency's ability to make unchecked findings. Congress placed the responsibility to guard against discretionary excesses by OSHA squarely upon the courts of appeals.[71]

B. Existence of a Significant Risk of Material Health Impairment

OSHA defines the occupational health and safety standard as "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."[72] To justify issuing a standard, "OSHA [must] make a threshold finding that a significant risk of material health impairment exists"[73] to employees and that the new standard is "reasonably necessary or appropriate" to eliminate or substantially reduce that risk.[74] Therefore, OSHA is not entitled to arbitrarily regulate any risk; rather, only those which present a "significant risk of material health impairment."[75]

In the *Benzene* case, a sharply divided Supreme Court vacated OSHA benzene standards.[76] In this plurality decision, the Court set forth some guiding principles to be used when determining what health impairments are material and what constitutes a significant risk. The Court held that assuming the existence of risk, based merely upon an OSHA finding, impermissibly shifted the burden of proof from OSHA to the

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70. "When a court declines to scrutinize (or even assumes the existence of) supporting facts, ignores the presence of alternatives, and requires nothing more than a minimally rational explanation, almost any outcome can pass muster—even if it springs from an unstated, inappropriate motive." Garland, *supra* note 25, at 556.

71. 29 U.S.C. § 655(f) (1988).

72. *Id.* § 652(8) (emphasis added).

73. AFL-CIO v. OSHA, 965 F.2d 962, 972 (11th Cir. 1992) (citing *Benzene*, 448 U.S. 607, 614-15 (1980); *Cotton Dust*, 452 U.S. 490, 505-06 (1981)).

74. *AFL-CIO*, 965 F.2d at 973 (citing *Benzene*, 448 U.S. at 615).

75. *Id.* (citing *Benzene*, 448 U.S. at 641-42). See *Benzene*, 448 U.S. at 641-42, for a discussion of the difference between "safe" and "risk-free."

76. *Benzene*, 448 U.S. at 607-08. Although five different opinions were handed down, a majority of five Court members voted to vacate the standard.

industry.[77] More appropriately, OSHA ultimately bears the burden to prove by substantial evidence that such a risk truly exists and that the proposed standard is necessary.[78]

Next, the Agency was required to show, by substantial evidence, that it was at least more likely than not that the new standards would eliminate or reduce a significant risk in the workplace.[79] The Court also refused to allow OSHA to set the same limit for all industries, "largely as a matter of administrative convenience," unless the Agency was able to make the requisite showing of significant risk.[80] Here, the Court relied on the exemption of gasoline station employees from the requirements of the standard despite the fact that they were exposed to the inhalation of gasoline vapors.[81] OSHA's position concerning establishment of a single standard for an entire industry was inconsistent because there were other industries in which lower levels would have been feasible.[82] Thus, in the Court's view, OSHA's concessions to practicality undermined its arguments favoring highly protective standards.

Finally, the plurality ruled that the substance must pose a risk which could be "quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way."[83] However, the plurality made it clear that although a finding of significant risk was required, it did not intend to remove OSHA's ability to regulate hazardous substances. In other words, the Court will not require the Agency to "wait for deaths to occur" before taking any action.[84] First, the plurality said the significant risk requirement is not a "mathematical straightjacket;"[85] rather the determination that a particular level of risk is significant can be "based largely on policy considerations."[86] Second, the Court conceded that OSHA need not support its findings "with anything approaching scientific

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77. *See id.* at 653.
78. *Id.*
79. *See id.* at 639-46.
80. *Id.* at 650. Although OSHA may determine that a significant risk of harm exists in one industry, that determination is not sufficient to apply protective regulations to all industries in the interests of administrative convenience until a significant risk is shown to exist in each industry.
81. *Id.* at 628.
82. *Id.* at 650.
83. *Id.* at 646.
84. *Id.* at 656 n.63.
85. *Id.* at 655.
86. *Id.* at 656 n.62.

certainty," but that it could utilize "conservative assumptions" in interpreting data.[87] In applying the Court's direction, the Eleventh Circuit wrote, "The lesson of *Benzene* is clearly that OSHA may use assumptions, but only to the extent that those assumptions have some basis in reputable scientific evidence."[88] Although the Supreme Court granted OSHA leeway in making its findings, it did not remove the core requirements imposed upon the agency by Congress. Hence, "OSHA is not entitled to take short-cuts with statutory requirements."[89]

In this way, the Supreme Court gave OSHA considerable flexibility in performing risk assessments and determining that a risk was significant; however, it was clear the Court would not permit OSHA to avoid the process entirely by relying on mere policy in order to bypass the restrictive guiding principles.

C. Feasibility

Once OSHA determines that a toxic substance creates a significant risk of material health impairment, it is still not free to promulgate any standard. Whatever regulation OSHA promulgates must comply with the requirements of section 6(b)(5) of OSHA. In part, section 6(b)(5) provides: "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 health or functional capacity."[90] Courts have interpreted this to mean that "section 6(b)(5) mandates that the standard adopted 'prevent material impairment of health to the extent feasible.'"[91]

An OSHA standard must be feasible in the sense that most employers will be able, both technologically and economically, to comply with its requirements.[92] A standard is technological-

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87. *Id.* at 656; *see* Victor B. Flatt, *OSHA Regulation of Low-Exposure Carcinogens: A New Approach to Judicial Analysis of Scientific Evidence*, 14 U. PUGET SOUND L. REV. 283 (1991).

88. AFL-CIO v. OSHA, 965 F.2d 962, 979 (11th Cir. 1992).

89. *Id.* at 975.

90. 29 U.S.C. § 655(b)(5) (1988) (emphasis added).

91. *AFL-CIO*, 965 F.2d at 973 (quoting *Cotton Dust*, 452 U.S. 490, 512 (1981)).

92. *Cotton Dust*, 452 U.S. at 508-09, 513 n.31; American Iron & Steel Inst. v. OSHA, 939 F.2d 975, 980 (D.C. Cir. 1991).

ly feasible if the means of compliance are either already in use or will be available within the standard's deadlines.[93]

The issue of technological feasibility is generally resolved by an OSHA showing "that modern technology has at least conceived some industrial strategies . . . which the industries are generally capable of adopting."[94] However, the issues surrounding economic feasibility are much less settled.[95]

A standard is economically feasible if the costs it imposes do not "threaten 'massive dislocation' to, or imperil the existence of, the industry."[96] The Third Circuit used the phrase "massive economic dislocation" to describe the extent of economic impact which OSHA would need to find before determining that a regulation is not economically feasible.[97] Similarly, the D.C. Circuit referred to a standard which would make "financial viability generally impossible."[98] The Supreme Court accepted the view that a standard is economically feasible if it will allow the industry to maintain "long-term profitability and competitiveness."[99] Although these definitions are generally accepted, their applications remain a source of contention. The friction concerns whether OSHA should or may use a cost-benefit analysis and, in the absence of such analysis, whether OSHA must alternatively adopt the most cost-effective alternative.

The issue of economic feasibility was presented to the Supreme Court in *Benzene*. The lower court had ruled that OSHA must show that the "measurable benefits" expected by the standard bear a "reasonable relationship" to the costs imposed.[100] Although the Fifth Circuit had said that no formal

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93. *See Cotton Dust*, 452 U.S. at 508-09.

94. United Steelworkers v. Marshall, 647 F.2d 1189, 1266 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

95. *See* Howard A. Latin, *The Feasibility of Occupational Health Standards: An Essay on Legal Decisionmaking Under Uncertainty*, 78 NW. U. L. REV. 583 (1983).

96. *Marshall*, 647 F.2d at 1265 (citations omitted) (quoting AFL-CIO v. Brennan, 530 F.2d 109, 123 (3d Cir. 1975)) (an industry's ability to pass on costs becomes relevant to this inquiry if it cannot absorb the costs without massive dislocation).

97. *Brennan*, 530 F.2d at 123.

98. Industrial Union Dep't v. Hodgson, 499 F.2d 467, 478 (D.C. Cir. 1974).

99. *Cotton Dust*, 452 U.S. 490, 530 n.55. (1981) (quoting Brief of Federal Respondent at 49, *Cotton Dust* (Nos. 79-1429, 79-1583)).

100. American Petroleum Inst. v. OSHA, 581 F.2d 493, 501-05 (5th Cir. 1978), *aff'd sub nom.* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) (the *Benzene* case).

cost-benefit analysis was required, and that a rough, but educated, benefit analysis was sufficient, OSHA argued that any cost-benefit technique places an "economic value (implicit or explicit) on life, health, bereavement pain, and suffering, and other consequences of occupational disease and death."[101] The Supreme Court found it unnecessary to rule whether OSHA must balance costs and benefits because they were able to vacate the benzene standards on significant risk grounds.[102]

The issue of economic feasibility was revisited in *Cotton Dust*. The Supreme Court held that OSHA does not require cost-benefit analysis.[103] The Court did not expressly rule that the cost-benefit analysis is precluded. However, the statement in the opinion that cost-benefit was inconsistent with the language, legislative history, and policies of the Act was a strong indication that the Court believes cost-benefit analysis is prohibited.[104] OSHA has since interpreted the decision as precluding cost-benefit analysis.[105]

Although the Supreme Court removed all wind from the sails of cost-benefit analysis, it did so only in the area of standards regulating toxic substances or harmful physical agents. The Court did not preclude use of cost-benefit analysis by OSHA in priority setting or in other regulatory actions apart from section 6(b)(5).[106] Although the *Cotton Dust* opinion sounded the death knell for cost-benefit analysis, the Court did indicate that the practical impact of using cost-benefit analysis would be to force OSHA "to choose the less stringent point" in setting standards than would be set if OSHA were left to its own feasibility approach.[107] Hence, the tool of cost-benefit analysis, although likely to promote efficient and sufficiently protective regulations, has been removed from the arsenal of both the courts and regulation challengers.

The issue of cost-benefit analysis, although determined by the Supreme Court, still elicits strong expressions from both

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101. Brief for Federal Parties at 62 n.52, *Benzene*, 448 U.S. 607 (1980) (Nos. 78-911, 78-1036).

102. *Benzene*, 448 U.S. at 639-40.

103. *See Cotton Dust*, 452 U.S. at 512-13.

104. *See id.* at 490-92.

105. Brief for the Federal Respondent in Opposition at 19, American Dental Ass'n v. Reich, 114 S. Ct. 172 (1993) (No. 93-7).

106. *Cotton Dust*, 452 U.S. at 509 n.29 (expressing no opinion on the use of cost-benefit analysis to other provisions of the Act).

107. *Id.* at 513.

proponents and opponents of its use. Supporters argue that its economic tools can be most useful to a rational policymaker.[108] Opponents claim that it obliterates moral values.[109]

Although the practical effect of the decision was the elimination of cost-benefit analysis as a tool of judicial review, the doctrine of cost effectiveness was not abolished.[110] Cost-benefit analysis determines whether the social benefits of the regulation outweigh the costs to the industry of imposing it and, therefore, whether standards ought to be imposed at all. On the other hand, cost effectiveness merely compels the choice of a less costly alternative in the case where there are multiple methods of effectively reducing the significant risk.

OSHA accepted the doctrine of cost effectiveness, saying that "the statute permits the Secretary to select the least expensive means of compliance that will provide an adequate level of protection."[111] The Supreme Court went even further, saying that the possibility existed that OSHA might be required to choose a one-respirator standard rather than a five-respirator standard, if the same level of protection could be reached using both policies.[112] Thus, it is reasonable to expect OSHA to adopt the most cost-effective procedure.[113]

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108. *See* Bruce D. Fisher, *Controlling Government Regulation: Cost-Benefit Analysis Before and After the* Cotton Dust *Case*, 36 ADMIN. L. REV. 179 (1984).

109. *See* Michael S. Baram, *Cost Benefit Analysis: An Inadequate Basis for Health, Safety, and Environmental Regulatory Decisionmaking*, 8 ECOLOGY L.Q. 473, 502-15 (1980); Barry Roberts & Regina Kossek, *Implementation of Economic Impact Analysis: The Lessons of OSHA*, 83 W. VA. L. REV. 449 (1981).

110. Executive Order No. 12,291 was issued "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well reasoned regulations." 3 C.F.R. 127 (1982). The executive order further provides that regulatory action should not be taken unless the "potential benefits to society outweigh the potential costs." *Id.* at 128; *see infra* note 112 (supporting the contention that in promulgating rules, the Secretary is to select the least expensive alternative which will provide an adequate level of protection).

111. Brief for Federal Respondent at 56, *Cotton Dust*, 452 U.S. 490 (1981) (Nos. 79-1429, 79-1583).

112. *Cotton Dust*, 452 U.S. 490, 514 n.32 (1981) (explaining that the "reasonably necessary or appropriate" limitation in section 3(g) might compel OSHA to implement the one-respirator standard rather than the five-respirator standard).

113. American Dental Ass'n v. Martin, 984 F.2d 823, 833 (7th Cir.) (Coffey, J., concurring in part and dissenting in part), *cert. denied*, 114 S. Ct. 172 (1993).

III. *AMERICAN DENTAL ASS'N V. MARTIN* AND *AFL-CIO V. OSHA*

A. *The Facts:* American Dental Ass'n v. Martin

On December 6, 1991, OSHA promulgated a rule on occupational exposure to bloodborne pathogens.[114] The rule was designed to protect health care workers from viruses, particularly the hepatitis B (HBV) and the AIDS-causing human immunodeficiency viruses (HIV). Three employer groups challenged the rule: dentists, medical personnel firms, and home health care providers.[115]

The OSHA rule adopted the philosophy of "universal precautions," which means safeguards are taken against the blood of every individual rather than just the blood of patients known or believed to be likely carriers of HBV or HIV. The regulations included engineering controls,[116] work practice controls,[117] requirements for personal protective equipment,[118] housekeeping requirements,[119] reporting requirements,[120] and if warranted, provisions for medical care.[121]

A person infected with HBV has a one in three chance of contracting acute hepatitis, a serious and sometimes fatal liver disease. "Although most infected persons recover uneventfully, about one percent die and about six to ten percent of adult . . . victims of Hepatitis B become carriers."[122] A vaccination exists for HBV which is effective for eighty-five to ninety-seven percent of persons to whom it is administered.[123] HBV can be transmitted through blood-to-blood contact or through the virus contact with mucous membranes in the eyes, nose, or mouth. The Centers for Disease Control (CDC) calculated that over a forty-five year working lifetime, 83 to 113 of every 1000 nonimmune health care workers would suffer an HBV infection, from which two or three would die.[124] The court relied upon

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114. 29 C.F.R. § 1910.1030 (1991).
115. *Martin*, 984 F.2d at 824.
116. 29 C.F.R. § 1910.1030(d)(2)(viii) (1991).
117. *Id.* § 1910.1030(d)(2)(vi).
118. *Id.* § 1910.1030(d)(3)(i).
119. *Id.* § 1910.1030(d)(4).
120. *Id.* § 1910.1030(f)(1).
121. *Id.* § 1910.1030(f)(3).
122. American Dental Ass'n v. Martin, 984 F.2d 823, 824 (7th Cir.), *cert. denied*, 114 S. Ct. 172 (1993).
123. *Id.*
124. 56 Fed. Reg. 64,028-29, 64,028-35 (1991).

statistics which indicate that patient-communicated hepatitis B kills approximately two hundred health workers in the United States annually.[125]

Infection with HIV leads to acquired immune deficiency syndrome (AIDS), a disease which to date has proven fatal. HIV can also be spread through blood-to-blood contact. It commonly occurs through needlesticks or when contaminated blood comes in contact with non-intact skin.[126] HIV is not as easily transmitted as HBV due to HIV's inability to remain viable outside of the body. Consequently, "as of 1991, there had been only 24 confirmed cases of U.S. health care workers infected with the AIDS virus."[127]

In promulgating the standard, OSHA determined that bloodborne pathogens posed a significant risk of material health impairment to employees and that the standard was reasonably necessary and appropriate to eliminate or substantially reduce that risk. OSHA further determined that its assessment of significant risk justified imposition of the standard based on occupational exposure to blood. This determination disregarded the worker's particular occupational or workplace setting. OSHA also discussed alternative standards. In particular, it rejected a mandatory HBV program determining that a significant risk of HBV remained even with a universal vaccine and that "the hepatitis B vaccine will not protect employees from other bloodborne pathogens such as HIV."[128]

Pursuant to section 6(f) of OSHA,[129] the American Dental Association (ADA) sought review of OSHA's standards in the Seventh Circuit Court of Appeals. The dental association contended that OSHA failed to consider each sector of the health care industry separately, thereby finding a significant risk of material health impairment in all health care occupations due to their failure to disaggregate the industry.[130] Although the ADA conceded that a significant risk of infection existed in some health care procedures, they contended the risk was not sufficiently significant to warrant its application to dental health care settings.[131] Additionally, the ADA charged that

125. *Martin*, 984 F.2d at 824.
126. 56 Fed. Reg. 64,016-17 (1991).
127. *Martin*, 984 F.2d at 824.
128. 56 Fed. Reg. 64,037 (1991).
129. 29 U.S.C. § 655(f) (1988).
130. *Martin*, 984 F.2d at 826.
131. *Id.* at 826.

the standards imposed enormous economic costs on the dental health care profession at a time of major reforms to control the rising cost of health care.[132] On January 28, 1993, a 2-1 opinion was issued rejecting ADA's challenge.[133]

B. The Martin *Court's Reasoning*

Initially, the majority dealt with the American Dental Association's objection that OSHA failed to disaggregate the health industry into various sectors.[134] The court acknowledged OSHA's failure to assess the potential risk to workers on an industry-by-industry basis.[135] However, the court did note that OSHA "gave separate consideration to every point raised before it by the dental association. It pointed out that the saliva of dental patients frequently contains blood . . . and that it is possible, though far from certain, that even a small quantity of blood . . . can sometimes be infective."[136] Thus, the court exhibited deference enabling OSHA to adopt whatever regulations it believed necessary and allowed them to recognize a risk of bloodborne pathogens within the medical industry as a whole.[137]

In promulgating the rule, OSHA treated all sectors of the health care industry as if each were part of one generic whole. "What OSHA did not do was attempt to disaggregate the risk industry by industry."[138] Although it computed the costs each sector would bear to determine whether the economic feasibility rule would proscribe imposition of the standard in that sector, "it did not attempt to determine separately the risk of HIV or HBV infection in dentistry, in home-health services, in thoracic surgery, in ophthalmology, and so forth."[139]

The court warned that "OSHA cannot impose onerous requirements on an industry that does not pose substantial hazards to the safety or health of its workers merely because the industry is a part of some larger sector or group-

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132. *See id.* at 838 (Coffey, J., concurring in part and dissenting in part).

133. *Id.* at 823.

134. *Id.* at 826-27.

135. "What OSHA did not do was attempt to disaggregate the risk industry by industry." *Id.* at 827.

136. *Id.* at 826-27.

137. "It is not our business to pick the happy medium between these extremes. It is OSHA's business." *Id.* at 827.

138. *Id.*

139. *Id.*

ing . . . ."[140] However, it recognized that requiring the agency to "proceed workplace by workplace" would result in regulatory inefficiency and require "hundreds of thousands of separate rules."[141] Given this choice, the court again adopted a deferential approach, stating: "It is not our business to pick the happy medium between these extremes. It is OSHA's business. If it provides a rational explanation for its choice, we are bound."[142] Therefore, by abdicating the responsibility of selecting a happy medium, the court allowed OSHA to adopt a nonsensical extreme.

Next, the opinion considered whether bloodborne pathogens pose a significant risk of material health impairment to health care workers and whether the regulations are reasonably necessary or appropriate to eliminate or substantially reduce that risk. Here, the court supplied the greatest example of judicial abdication of its reviewing role to the "better judgment" of a regulatory agency.

On this point, the court stated: "OSHA's evaluation of the effects of the rule, relying as it does on the undoubted expertise of the Centers for Disease Control, cannot seriously be faulted, *at least by judges*. Hence we cannot say that the rule . . . flunks the test of material reduction of a significant risk to workplace health."[143] Furthermore, the court ruled that if requirements, "whether wise or not, are within the broad bounds of the reasonable," then they should be "entitled to respect by the nonspecialist, biomedically unsophisticated Article III judiciary."[144]

Finally, the court dealt with objections that the rule did not satisfy the feasibility requirement. The majority opinion acknowledged significant errors by OSHA with respect to the costs and benefits realized because of the final rule.[145] Regarding the standard of economic feasibility, the court employed a deferential approach, stating:

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140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 825 (emphasis added).
144. *Id.* at 828.
145. *Id.* at 826 (the majority expressed skepticism concerning the accuracy of OSHA's projected costs to the dental industry ($813 million estimate is an underestimate) and projected valuation of lives saved by the regulations ($4 million per life is also an underestimate)).

> OSHA did not (indeed is not authorized to) compare the benefits with the costs and impose the restrictions on finding that the former exceeded the latter. Instead it asked whether the restrictions would materially reduce a significant workplace risk to human health without imperiling the existence of, or threatening massive dislocation to, the health care industry. For this is the applicable legal standard.[146]

Although the rule adopted by the majority to not require the regulations to pass a cost-benefit analysis is consistent with the Supreme Court opinion in *Cotton Dust*, the majority failed to discuss the cost-effectiveness of the regulation.[147]

The majority conceded that the final rule "may be unnecessary; it may go too far; its costs may exceed its benefits."[148] Yet, the majority disregarded those errors and upheld the rule, concluding that a reviewing court merely patrols the boundary of reasonableness and that the bloodborne-pathogen rule "does not cross it."[149]

C. *The Facts:* AFL-CIO v. OSHA

On January 19, 1989, OSHA issued a new set of Air Contaminants Standards[150] to update previously existing standards pursuant to section 6(b) of OSHA.[151] This revised standard pertained to the permissible exposure 'levels (PELs) for 428 different toxic substances. Specifically, the standards lowered the PELs for 212 substances, set new standards for 164 newly regulated substances, and left 52 other substances unchanged.[152]

Challengers to the standards contended that "OSHA's use of generic findings, the lumping together of so many substances

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146. *Id.* at 825 (citing 29 U.S.C. § 655 (b)(5) (1988); *Benzene*, 448 U.S. 607, 642-45, 655-56 (1980); *Cotton Dust*, 452 U.S. 490, 509-12, 530-36 (1981)).

147. "The most cost effective and cost-efficient regulation would be to require HBV vaccinations for all health care workers at risk of exposure in the United States, and to enforce existing state regulations." *Id.* at 847 (Coffey, J., concurring in part and dissenting in part). Certainly HBV vaccinations for all health care workers would be less expensive than the $813 million imposed upon the dental industry by the existing regulations.

148. *Id.* at 831.

149. *Id.*

150. 54 Fed. Reg. 2332-2983 (1989) (to be codified at 48 C.F.R. § 1910).

151. 29 U.S.C. § 655(b) (1988).

152. AFL-CIO v. OSHA, 965 F.2d 962, 969 (11th Cir. 1992). "Permissible exposure limits (PELs) reflect the maximum amount of contaminants in air to which workers may be exposed over a given time period." *Id.* at 968 n.4.

in one rulemaking, and the short time provided for comment . . . combine to create a record inadequate to support this massive new set of PELs."[153] On July 7, 1992, a unanimous Eleventh Circuit Court of Appeals vacated the standards and remanded them to the agency.[154]

D. The Reasoning in AFL-CIO v. OSHA

The court in *AFL-CIO* employed a careful analysis of each hurdle set up by the Supreme Court and carefully specified where and how OSHA's findings failed to clear the required obstacles. Regarding the standard of review, the court noted its statutorily defined responsibility to only uphold OSHA findings if they were "supported by substantial evidence in the record considered as a whole."[155] Hence, the court rejected taking a deferential approach stating it "must take a 'harder look' at OSHA's action than [it] would if [it] were reviewing the action under the more deferential arbitrary and capricious standard."[156]

The court rejected the procedures used by OSHA to create the rules as "generic rulemaking."[157] The challenged standards dealt with 428 different substances affecting twenty-seven different industries. While the court ruled that "nothing . . . prevent[ed] OSHA from addressing multiple substances in a single rulemaking,"[158] this did not allow the court to ignore the requirements of the Act. The rule enunciated by the court requires OSHA to find that the significant risk of material health impairment exists for each and every regulated substance individually to be upheld.[159]

The agency's determination of the extent of risk imposed by the individual substances was problematic. The court found that "OSHA has a responsibility to quantify or explain, at least to some reasonable degree, the risk posed by each toxic sub-

153. *Id.* at 971.

154. *Id.* at 962.

155. *Id.* at 969-70 (emphasis omitted) (quoting 29 U.S.C. § 655(f) (1988)).

156. *Id.* at 970 (quoting Asbestos Info. Ass'n v. OSHA, 727 F.2d 415, 421 (5th Cir. 1984)).

157. *Id.* at 971 (emphasis omitted).

158. *Id.* at 972.

159. "[W]e believe the PEL for each substance must be able to stand independently, i.e., that each PEL must be supported by substantial evidence in the record considered as a whole and accompanied by adequate explanation." *Id.*

stance."[160] "[H]owever, OSHA made no attempt to estimate the risk."[161] Rather, OSHA took short cuts and "merely provided a conclusory statement that the new PEL will reduce the 'significant' risk of material health effects shown to be caused by that substance, without any explanation of how the agency determined that the risk was significant."[162]

Finally, the court considered whether the new standards satisfied the feasibility requirement. Again, the court demanded that OSHA satisfy its requirements. The opinion stated that "[d]espite OSHA's repeated claims that it made feasibility determinations on an industry-by-industry basis, it is clear that the agency again proceeded 'generically.'"[163] The "general presumption of feasibility" afforded to OSHA "does not grant a license to make excessively broad generalities as to feasibility."[164] OSHA failed to demonstrate economic feasibility for each affected industry.[165]

IV. ANALYSIS OF *MARTIN* AND *AFL-CIO* UNDER THE MICROSCOPE OF ESTABLISHED PRINCIPLES

A. The Standard of Review

By adopting the deferential role of patrol guards at the border of reasonability[166] in the review process, the majority in *Martin* not only disregarded guiding principles established by the Supreme Court, but also sent dangerous signals to OSHA concerning its regulatory powers. If the position of the *Martin* majority were to be universally adopted, OSHA would be free to impose regulations without meaningful limit, extending to the nonsensical limit where no reasonable mind could uphold the rule without fear of judicial invalidation.[167]

On the other hand, the *AFL-CIO* court faithfully discharged its duty to require OSHA to justify its conclusion through a showing of substantial evidence. By so doing, the Eleventh Circuit created an atmosphere in which the regulato-

160. *Id.* at 975 (emphasis omitted).
161. *Id.*
162. *Id.* (citations omitted).
163. *Id.* at 980.
164. *Id.* at 981-82.
165. *See id.* at 982.
166. *See* American Dental Ass'n v. Martin, 984 F.2d 823, 831 (7th Cir.), *cert. denied*, 114 S. Ct. 172 (1993).
167. *See Cotton Dust*, 452 U.S. 490, 522 (1981).

ry agency was not given free range to act as legislature, executive, and judiciary without making an accounting for that authority. Rather, by adopting the hard-look approach, the court allowed OSHA the requisite autonomy to fulfill its intended purpose, while reserving a critical check on potentially unbridled power.

On balance, the *AFL-CIO* court employed the more correct reviewing standard. The *Martin* court failed because it did not take a "harder look" as suggested by the Fifth[168] and Eleventh Circuits. Moreover, because it did not require OSHA to support its conclusions by substantial evidence, the court merely deferred to the expertise of the agency and opted for "administrative convenience."[169] A proper review requires the court to consider both the evidence supporting the agency's regulations as well as evidence calling for judicial invalidation. "Furthermore, 'the validity of an agency's determination must be judged on the basis of the agency's stated reasons for making that determination.'"[170]

Judge Posner neither questioned OSHA's motives nor did he seriously consider the merits of the dentists' contentions that the regulations were unnecessary and harmful. Judge Coffey, in his dissent, charged that "[t]he rule was drafted partially in response to the public hysteria surrounding AIDS created by the media's failure to balance their reporting with scientific data on transmission."[171]

The result of a judgment in which the court fails to probe the record to find evidence supporting OSHA's determinations establishes a high water mark for deference to an agency that does not do its job. Courts must remember that the burden of proof is upon the agency. By failing to perform their reviewing role, courts indicate that they will allow OSHA to continue to impose excessive regulatory burdens on industry in an arbitrary and capricious manner. The purposes of the congressionally created procedural safeguards, whereby OSHA can be

168. Asbestos Info. Ass'n v. OSHA, 727 F.2d 415, 421 (5th Cir. 1984).

169. *Martin*, 984 F.2d at 836 (Coffey, J., concurring in part and dissenting in part) (citing International Union, United Automobile Workers v. OSHA, 938 F.2d 1310, 1322 (D.C. Cir. 1991)).

170. AFL-CIO v. OSHA, 965 F.2d 962, 970 (11th Cir. 1992) (quoting *Benzene*, 448 U.S. 607, 631 n.31 (1980)).

171. *Martin*, 984 F.2d at 831 (Coffey, J., concurring in part and dissenting in part).

held accountable and responsible for the results of its actions are frustrated when courts do not take a hard-look approach.

B. Existence of a Significant Risk of Material Health Impairment

The greatest error reached first by OSHA and then by the *Martin* court was a determination that a significant risk of material health impairment exists in the dental health care industry.[172] The applicable legal standard in this area is that OSHA has the burden of proving that there currently exists a "significant risk of material health impairment" to employees and that the new standard is "reasonably necessary or appropriate" to eliminate or substantially reduce that risk.[173]

In order to reach the results necessary to justify regulation, OSHA engaged in faulty analysis and misrepresentation of actual risk.[174] Little doubt exists concerning the existence of significant risk if the entire health care community is viewed as a whole. Figures supplied by OSHA and relied upon by the majority show that in addition to the twenty-four confirmed cases of AIDS, Hepatitis B kills approximately 200 health care workers annually.[175] However, these figures are reached only when twenty-four health care industry sectors are aggregated together.[176]

A valid finding of significant risk could have been reached if OSHA had disaggregated each identifiable sector. In his dissenting opinion, Judge Coffey postulated, "Apparently OSHA realized it was unable to establish a significant risk in the appellants' respective fields and/or for the sake of convenience

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172. "OSHA's fatal error, in my opinion, occurred when it failed to recognize and consider the varying risk of occupational exposure in the respective appellants' professions." *Id.* at 839 (Coffey, J., concurring in part and dissenting in part).

173. *Benzene*, 448 U.S. at 615, 653; *Cotton Dust*, 452 U.S. 490, 506 (1981).

174. "OSHA made a hodgepodge of findings . . . resulting in nothing but a generalized determination of significant risk . . . ." *Martin*, 984 F.2d at 833 (Coffey, J., concurring in part and dissenting in part).

175. *Id.* at 824.

176. The twenty-four industry sectors include: offices of physicians (including ambulatory medical services), dental offices, hospitals, medical and dental laboratories, nursing homes, residential care facilities, dialysis centers, drug treatment centers, home health care, hospices, government outpatient facilities, blood collection and processing, health clinics in industrial facilities, personnel services, funeral homes and crematories, research laboratories, linen services, medical and dental equipment repair, law enforcement, fire and rescue, correctional institutions, schools, lifesaving, and regulated waste removal. 56 Fed. Reg. 64,041 (1991).

chose to combine the risk present in the entire health care area."[177] Had OSHA disaggregated the various sectors, it would have been unable to regulate the dental profession. Only one individual out of the twenty-five HIV cases relied upon by OSHA to constitute significant risk was employed in the dental profession.[178] Certainly a single incident is certainly not sufficient to constitute significant risk. Similarly, OSHA failed to determine the number of HBV cases among the respective sectors. Rather, OSHA relied on CDC estimates that 8700 cases occur annually throughout the health care industry.[179]

Failing to disaggregate a sector of a larger industry is not consistent with prior OSHA practices.[180] Criticizing the majority's treatment of this issue, Coffey noted, "[T]here are no obvious barriers to disaggregation here. In fact, OSHA has in past years promulgated a wide variety of industry and equipment-specific lockout standards."[181] OSHA did not satisfy its requirement to show that dental health care workers are exposed to a risk which can be categorized as significant.

The Seventh Circuit's error is magnified when compared with the treatment given to generic rulemaking by the Eleventh Circuit. That court correctly required OSHA to be very specific, at least to some reasonable degree, in quantifying the extent of the risk each substance posed to workers. The *AFL-CIO* court refused to close its eyes and respect repetitions of OSHA boilerplate findings that the new limit would protect workers from significant risk of some material health impairment.[182]

Had the analysis in *AFL-CIO* been applied to the dental association's argument that the dental health care sector had not been disaggregated, the bloodborne-pathogens rule would

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177. *Martin*, 984 F.2d at 835 (Coffey, J., concurring in part and dissenting in part).

178. *Id.* (citing 56 Fed. Reg. 64,017-19) (only 1 dentist out of the 100,000 practicing dentists has tested positive for HIV).

179. *Id.* (citing 56 Fed. Reg. 64,026) (there are 280,000 HBV infections annually).

180. *See id.* at 834 (Coffey, J., concurring in part and dissenting in part); Texas Indep. Ginners Ass'n v. Marshall, 630 F.2d 398, 403 (5th Cir. 1980) (the cotton ginning industry was excluded from the airborne concentration of cotton dust standard); 29 C.F.R. § 1910.1043(a)(2) (1993). For further examples of OSHA excluding specific industry sectors from a rule, see *Martin*, 984 F.2d at 834 n.7.

181. *Martin*, 984 F.2d at 834 (Coffey, J., concurring in part and dissenting in part) (emphasis added) (citing International Union, United Automobile Workers v. OSHA, 938 F.2d 1310, 1322 (D.C. Cir. 1991)).

182. AFL-CIO v. OSHA, 965 F.2d 962, 972 (11th Cir. 1992).

certainly have been invalidated. The Eleventh Circuit's requirement that each rule must be able "to stand independently, . . . supported by substantial evidence in the record"[183] would have required OSHA to disaggregate the health care industry and then show that a significant risk existed in each sector.

Another failure of OSHA and the *Martin* court was their erroneous finding that the new regulation reduced or eliminated the risk. The bloodborne-pathogen rule provided no new significant benefits to employees while it did impose costs and burdens on employers.

At the time of the rule's promulgation, the dental industry was already operating under a number of CDC guidelines, state agency and professional institution regulations, and voluntary measures such as HBV vaccination.[184] Given the standards which dentists used to protect themselves from health hazards and the admitted efficiency of the HBV vaccination, there is little evidence upon which OSHA could rely to suggest that its standards did anything more to reduce the risk to workers. Given the state of regulation prior to rule promulgation, Judge Coffey was justified in suggesting that "a 'rule is arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem,'"[185] and that this "leads to but one conclusion, that the final rule can and must be classified as arbitrary and capricious."[186]

C. Feasibility

The final hurdle OSHA must overcome to justify the imposition of a regulation is a showing that the standards are both technologically and economically feasible. Technological feasibility was not a contested issue in *Martin*, as many of the OSHA regulations were being observed prior to promulgation of the rule. Additionally, representatives of the dental industry do not argue that the entire health care industry should be exempted from regulation. On the other hand, in *AFL-CIO* the PEL standards were not found to be technologically feasible. The facts concerning this issue were not disputed and do not provide a useful forum for instructive contrast.

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183. *Id.*

184. *See Martin*, 984 F.2d at 837.

185. *Id.* (Coffey, J., concurring in part and dissenting in part) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins., 463 U.S. 29, 43 (1983)).

186. *Id.* at 837-38 (Coffey, J., concurring in part and dissenting in part).

Economic feasibility, on the other hand, is very much an issue of contention. The Eleventh Circuit ruled that OSHA failed to show that the PEL standard was economically feasible for the same reasons it found a lack of technological feasibility and significant risk; that the agency only determined "feasibility for each industry 'sector,' . . . without explaining why such a broad grouping was appropriate."[187] Continuing the theme of examining each industry separately, the Eleventh Circuit concluded: "Indeed, it would seem particularly important not to aggregate disparate industries when making a showing of economic feasibility."[188] Although this analysis is correct and was applicable to the case before the court, the opinion fails to provide a useful application of the Supreme Court's guiding principles concerning economic feasibility. The illustrative concepts and implications of the economic feasibility issue present themselves in an examination of the *Martin* decision. However, the proper model is not exemplified by what the Seventh Circuit did; rather, it is suggested by what it failed to do.

The *Martin* majority held that the standard was economically feasible despite the fact that the bloodborne-pathogen standard failed the cost-benefit test, the cost-effectiveness test, and the economic efficiency test. In lone dissent, Judge Coffey recognized that "[t]he rule unduly burden[ed] health care employers, including but not limited to dentists, doctors and hospitals."[189]

It is surprising that this majority, Judges Posner and Easterbrook, upheld the regulation utilizing such faulty economic analysis. Judges Posner and Easterbrook "are both properly recognized and respected as experts in the field of economics as well as law."[190] Posner, who wrote for the majority, is the author of *Economic Analysis of Law*, in which he states: "This book is written in the conviction that economics is a powerful tool for analyzing a vast range of legal questions."[191]

Posner correctly maintained that OSHA "did not (indeed is not authorized to) compare the benefits with the costs" of a

187. *AFL-CIO*, 965 F.2d at 982 (emphasis added).

188. *Id.*

189. *Martin*, 984 F.2d at 831-32 (Coffey, J., concurring in part and dissenting in part).

190. *Id.* at 838 (Coffey, J., concurring in part and dissenting in part).

191. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (3d ed. 1986).

regulation.[192] Rather, his economic analysis only examined "whether the restrictions would . . . imperil[] the existence of, or threaten[] massive dislocation to, the health care industry."[193] Posner was probably correct in asserting that the added $813 million a year in costs imposed by the regulations will not bankrupt the U.S. health care industry.[194] However, the health care system and its accompanying insurance systems "are struggling and almost bankrupt partially because of excessive and unnecessary regulations . . . ."[195] Although the existence of the health care industry may not be at risk, further OSHA regulations which exacerbate the health care crisis may do more harm than good.

If the reviewing court were allowed to engage in cost-benefit analysis, the rule would not survive the scrutiny of judicial review. The benefits realized from the bloodborne-pathogens rule are relatively small. As discussed above, the rule does not secure significant benefits for health care workers. Given the previous state of regulation and voluntary vaccination, very little is gained by the OSHA regulation. Even accepting OSHA's estimated value of human life (about $4 million)[196] multiplied by the one confirmed case of AIDS in a dental worker and the uncertain estimate of HBV fatalities, the benefits are significantly outweighed by the costs imposed by the standards. If required, the OSHA regulations would not pass an economic cost-benefit analysis.

Despite the fact that OSHA is not compelled to engage in cost-benefit analysis, "the Supreme Court has recommended that OSHA . . . consider drafting the less costly of two equally effective proposals."[197] Given the Supreme Court's statements in the *Cotton Dust* case,[198] it is reasonable to expect a reviewing court to require OSHA to pass a cost effectiveness test.

In addition to the universal precautions based bloodborne-pathogens rule promulgated by OSHA, there is another alter-

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192. *Martin*, 984 F.2d at 825.

193. *Id.* at 825 (citing 29 U.S.C. § 655(b)(5) (1988); *Benzene*, 448 U.S. 607, 642-45, 655-56 (1980) (plurality opinion); *Cotton Dust*, 452 U.S. 490, 509-12, 530-36 (1981)).

194. *See id.* at 825 (stating that costs of $813 million per year are "clearly not enough to break the multi-hundred-billion dollar health care industry").

195. *Id.* at 838 (Coffey, J., concurring in part and dissenting in part).

196. *Id.* at 825.

197. *Id.* at 838 (Coffey, J., concurring in part and dissenting in part).

198. *Cotton Dust*, 452 U.S. 490, 513 n.32 (1981).

native which would be substantially equal in effectively reducing whatever risk exists to health care workers. Even OSHA has admitted that "[t]he risk of HBV infection is most efficiently and dramatically reduced by vaccinating all workers exposed to blood and other potentially infectious materials."[199] Coffey's dissent magnified the faltering of the agency's policy when he noted that, "For reasons unknown and contrary to sound medical judgment and research, OSHA concluded that even though vaccinations would reduce almost all risk of health care professionals becoming infected by HBV, the additional far more expansive, impractical and cost inefficient precautions were necessary."[200]

Although some may note that there are individuals who will refuse to be vaccinated,[201] this is not a compelling argument. OSHA has authority to adopt a mandatory vaccination program.[202] When viable alternatives are available to OSHA, it should not be allowed to adopt rules whose benefits could be achieved through far more efficient and reasonable means.

Finally, adoption of these standards creates economic inefficiency and violates sound judicial discretion. At this time of reform, unwarranted and repetitious regulation will create false signals in the health care market. Regulations which impose costs will cause demand for health care to diminish. As these costs increase, providers will either pass them on to consumers or will be forced to bear them through a reduction of profits. Innocent third parties will be adversely impacted by the regulations, as costs are passed on to consumers, resulting in a decrease of the amount of health care demanded. Although such a decrease in the dental industry will rarely have fatal results, it will result in a general deterioration of dental health and an increase in general suffering.

Chief Judge Stephen Breyer[203] has written:

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199. 56 Fed. Reg. 64,036 (1991).

200. *Martin*, 984 F.2d at 839 (Coffey, J., concurring in part and dissenting in part) (emphasis omitted) (citing 56 Fed. Reg. 64,036-38 (1991)).

201. *Id.* at 825.

202. *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (holding that vaccination can be required despite objections on the grounds of religion and privacy); *see also* Mills v. Rogers, 457 U.S. 291, 299 (1982); Youngberg v. Romeo, 457 U.S. 307, 319-20 (1979); Bell v. Wolfish, 441 U.S. 520, 560 (1979); Roe v. Wade, 410 U.S. 113, 147-54 (1973); Sherbert v. Verner, 374 U.S. 398, 402-03 (1963).

203. Stephen G. Breyer is the Chief Judge of the First Circuit Court of Appeals.

> The development of voluntary standards by industry groups creates little risk of harm to the firm through error, for their voluntariness allows individual firms to reject the standards if they are absurd, inappropriate, or simply wrong. When a "should" in such a standard is changed to a "must," however, the risk of harm increases.[204]

It is surprising to the informed observer to find Judge Breyer making an argument promoting economic efficiency and to find the economically conservative Judge Posner in the opposite camp.

One of the sharpest critics of OSHA regulations on the basis that they are economically inefficient is Judge Posner himself.

> The Occupational Safety and Health Act, which directs the establishment of minimum federal standards of worker safety and health, is a particularly ambitious example of worker protection legislation. Is it necessary? The employer has a selfish interest in providing the optimal level of worker health and safety . . . . Legislation prescribing the health and safety conditions of employment may raise the level of health and safety beyond the level desired by the employees and the employers . . . .[205]

After noting the only winners with OSHA regulations are labor unions, he concludes:

> Properly administered (an enormous qualification), OSHA might, therefore, simply raise the level of occupational safety and health to the level at which it would be but for the public subsidy of workers' injuries and illnesses. The problem, however, with using one government intervention in the marketplace . . . to justify another . . . is that it invites an indefinite and unwarranted expansion in government. A series of incremental steps each of which makes economic sense in light of the previous steps may, looked at as a whole, *make no economic sense at all.*[206]

Regardless of which test is utilized, the OSHA bloodborne-pathogens rule is not economically feasible. Additionally, the inefficient government regulation imposes unnecessary costs

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204. BREYER, *supra* note 38, at 102.
205. POSNER, *supra* note 191, at 311.
206. *Id.* at 312 (emphasis added).

upon the dental care consumer, reduces the number of individuals employed in the industry, and confers negligible benefits upon health care workers. Ultimately, no one is protected by or benefits from the rule.

V. CONCLUSION

Proper judicial review is the only procedural safeguard established by Congress to check excessive regulation by OSHA. When a circuit court of appeals correctly applies the guiding principles established by the Supreme Court and fulfills its reviewing role, it promotes administrative fidelity to congressional intent. *American Dental Ass'n v. Martin* and *AFL-CIO v. OSHA* are excellent examples of the divergent roles courts of appeals have elected to play in this process of judicial review of OSHA regulation.

The rules and applications of law forwarded by the Eleventh Circuit Court of Appeals in *AFL-CIO* are more jurisprudentially correct than the hands-off approach taken by the Seventh Circuit Court of Appeals in *Martin*. Judicial review of OSHA regulations as applied in *Martin* takes a step backwards. Its results prove catastrophic to an employer's ability to meaningfully challenge onerous and burdensome regulations. Rather than forcing OSHA to remain within the confines of its authority as conferred by Congress, this decision exhibited a tendency by courts to adopt a deferential attitude towards regulatory agencies. Under such a system, the only remaining escape from inefficient regulation is a showing that the rule is so burdensome that it imperils the very existence of the entire industry.

Given the current conflict of rulings among the circuits, the United States Supreme Court ought to grant certiorari in the future in an appropriate case, with the purpose of clarifying this area of law. In the event that the Court does rule on a such a case, they would be well advised to follow the Eleventh Circuit's *AFL-CIO* lead by establishing the "harder look" standard of review, requiring OSHA to show with reasonable certainty that a significant risk of material health impairment exists, and compelling OSHA to use the cost-effectiveness test.

Sound economic reasoning argues that any governmental regulation is inefficient and that self-interested employers will voluntarily impose upon themselves the optimal amount of

safety standards as the most efficient form of regulation.[207] However, it is a political and social reality that Congress has placed a higher value upon an over-regulated workplace in favor of worker protection at the cost of economic efficiency. Consequently, this proposed standard strikes the optimal balance between the desire to assure "safe and healthful working conditions"[208] and the need to sufficiently protect employers from "arbitrary and capricious" OSHA regulations.

The race to the courthouse, in the OSHA context, has developed because of a divergence of views amongst the circuits regarding their review responsibilities. Although the Supreme Court has set forth principles for the substantive content of OSHA standards, these differences in approach may in reality go beyond the question of the formal rule of law to be applied. Rather, it may focus on a far broader question of whether the court is sympathetic to the agency's regulatory goals and the social politics of the thing being regulated.[209] However, until the Supreme Court resolves the conflict and so long as the parties perceive that certain courts of appeals are more (or less) sympathetic to the agency's regulatory efforts, the race will surely continue.

David R. Cherrington

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207. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 16-18 (1988).

208. 29 U.S.C. § 651(b) (1988).

209. *American Dental Ass'n v. Martin*, 984 F.2d 823, 831, 841 (7th. Cir.), *cert. denied*, 114 S. Ct. 172 (1993) (OSHA promulgated this rule in response to the media coverage of the AIDS epidemic rather than in response to a significant risk of harm).