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### Is OSHA Unconstitutional?

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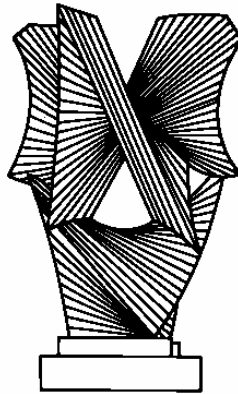
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# CHICAGO

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## IS OSHA UNCONSTITUTIONAL?

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## Is OSHA Unconstitutional?

Cass R. Sunstein

### I. Introduction

Imagine that Congress creates a federal agency to deal with a large problem, one that involves a significant part of the national economy. Suppose that Congress instructs the agency: *Do what you believe is best. Act reasonably and appropriately. Adopt the legal standard that you prefer, all things considered.* Suppose, finally, that these instructions lack clear contextual referents, such as previous enactments or judicial understandings,<sup>1</sup> on which the agency might build.

If the nondelegation doctrine exists, as the Supreme Court proclaims,<sup>2</sup> then this hypothesized statute would seem to violate it. After all, the Court has not overruled or even questioned its decision in the *Schechter Poultry* case, striking down the National Industrial Recovery Act.<sup>3</sup> On the contrary, the Court has continued to insist on the need for an “intelligible principle” by which to limit the exercise of agency discretion.<sup>4</sup> Remarkably, however, the core provision of one of the nation’s most important regulatory statutes – the Occupational Safety and Health Act – is not easy to distinguish from the hypothesized statute. That provision defines an “occupational safety and health standard” as one that is “reasonably necessary or appropriate to provide safe or healthful employment or places of employment.”<sup>5</sup> When the Secretary of Labor issues regulations governing tractors, ladders, or electrical equipment, the only question to be asked is whether one or another standard is “reasonably necessary or appropriate.”

Notably, this language appears in a mere definitional clause, not in a separate substantive provision instructing the Secretary what, exactly, he is supposed to consider in deciding what to do. Nor is the agency required to do whatever is “necessary,” strictly speaking, in order to provide safe employment; its duty is softened, in the sense that it is

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<sup>1</sup> Contextual referents are emphasized in *Amalgamated Meat Cutters v. Connally*, 337 F. Supp 737, 748 (DDC 1971) (“[T]he Court has made clear that the standards of a statute are not to be tested in isolation and derive meaningful context from the purpose of the Act, its factual background, and the statutory context.”)(internal citations omitted).

<sup>2</sup> See *Whitman v. American Trucking Assn.*, 531 US 457, 487 (2001); *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 US 607, 672 (1980) (Rehnquist concurring).

<sup>3</sup> *ALA Schechter Poultry Corp. v. US*, 295 US 495, 542 (1935).

<sup>4</sup> *Whitman*, 531 US at 471; *Industrial Union*, 448 US at 685–86.

<sup>5</sup> 29 USC § 652(8).

told to do what is “*reasonably* necessary.” In fact the agency is not even required to do that. Apparently it is permitted to reject what is “reasonably necessary” and instead to select what is merely “appropriate.” And how does the agency decide what counts as either “reasonably necessary” or “appropriate”? Suppose that the agency chooses to proceed in strict accordance with cost-benefit analysis, treating that form of analysis as its rule of decision. Is it permitted to do that, on the ground that what is “*reasonably* necessary” or “appropriate” is whatever cost-benefit analysis counsels<sup>6</sup>? Or suppose that the agency treats cost-benefit analysis as relevant but not conclusive, on the ground that (say) \$800 million in monetized safety benefits to workers justifies an expenditure of \$900 million on the part of employers (an expense that could result in increased prices, decreased wages, or decreased employment). Would that approach be lawful? Or suppose that the agency rejects cost-benefit analysis altogether, and decides to require employers to eliminate all “significant” risks (however defined) to the extent that is “feasible” (whatever that means). Is there anything in the “reasonably necessary or appropriate” language to foreclose that approach?

It is tempting to respond that the constitutional problem would be solved if the agency adopts subsidiary policy by which to discipline its own discretion.<sup>7</sup> For example, the agency might conclude that notwithstanding the vagueness of the statutory language, the best way to proceed is through a strict cost-benefit test. But in 2001, the Supreme Court squarely rejected the idea that a nondelegation problem can be cured by policy judgments at the agency level.<sup>8</sup> In the process – and this is the central difficulty, the motivation for posing the central question here – the Court eviscerated the rationale of the court of appeals decision that had upheld the “reasonably necessary or appropriate” language against constitutional attack.<sup>9</sup> And because of the sheer breath of the agency’s

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<sup>6</sup> For a theoretical argument to this general effect, see Matthew Adler and Eric Posner, *New Foundations for Cost-Benefit Analysis* (2006).

<sup>7</sup> This strategy is suggested in *Amalgamated Meat Cutters v. Connally*, 337 F. Supp 737, 759 (DDC 1971) (“Another feature that blunts the “blank check” rhetoric is the requirement that any action taken by the Executive . . . must be in accordance with further standards as developed by the Executive.”).

<sup>8</sup> See *American Trucking*, 531 US at 472 (“We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute”).

<sup>9</sup> *International Union v. OSHA*, 37 F.3d 665 (DC Cir 1994).

power, extending to essentially all of America's workers, the nondelegation objection is especially acute under the Court's own analysis.<sup>10</sup>

It is true that a narrowing construction from federal courts can rescue a statute from a nondelegation challenge,<sup>11</sup> but the question remains: What would be the content of any such narrowing construction, if it is to qualify as a construction rather than simple policymaking? The broadest difficulty is that with the "reasonably necessary or appropriate" language, Congress appears, at least at first glance, to have made no decision at all about the substantive standard under which the Secretary of Labor is supposed to proceed. A reader might be tempted to conclude that Congress has said, "make things better," without giving the Secretary guidance about how, exactly, he is to go about accomplishing that task.

One of my central aims here is to explore the nondelegation problem in one of the few settings in federal law in which that problem is genuinely acute under existing law.<sup>12</sup> But the discussion is also meant to shed light on some pressing questions for both regulatory policy and administrative law. Over 5000 Americans die each year in the workplace,<sup>13</sup> and more than four million are injured or sickened by the conditions of their employment.<sup>14</sup> Surely steps could be taken to reduce these deaths, injuries, and illnesses. Under the statutory language, the Secretary is required to make a wide range of choices about what, if anything, to demand of American employers and how, if at all, to protect American workers. The agency should do far better than it does.<sup>15</sup> What are the legal limits on its authority? Is the agency entitled to do nothing at all? Is it entitled to be aggressive, even draconian? Lurking questions involve consistency and transparency. Suppose that one OSHA regulation protects a large number of lives at relatively low cost, while another regulation protects a small number of lives at a relatively high cost.<sup>16</sup>

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<sup>10</sup> See *American Trucking*, 531 US at 473 (emphasizing importance of breadth of delegation).

<sup>11</sup> See *Industrial Union Dept.*, supra note, at 646 ("A construction of the statute that avoids this kind of open-ended grant should certainly be favored.").

<sup>12</sup> After *American Trucking*, supra note, it seems clear that the Court has little interest in reviving the nondelegation doctrine. See *infra*.

<sup>13</sup> See <http://www.bls.gov/news.release/foi.t01.htm>

<sup>14</sup> <http://www.bls.gov/iif/oshwc/osh/os/osbl0003.pdf>

<sup>15</sup> A dated but still-relevant study is Thomas McGarity and Sidney Shapiro, *Workers At Risk: The Failed Promise of the Occupational Safety and Health Administration* (1993).

<sup>16</sup> This does in fact seem to be the pattern. See Stephen Breyer et al., *Administrative Law and Regulatory Policy* 26-27 (6<sup>th</sup> ed. 2006).

Suppose too that the agency's explanations for its decisions are often opaque, so that it is hard to understand why the agency chose one level of regulation rather than another, and how the agency sets its own priorities.<sup>17</sup> Can anything be done, before or within the agency or in courts, to ensure against crazy-quilt patterns, to clarify why the agency is aggressive in some domains and lenient in others, and to ensure a degree of accountability, rather than a technocratic smokescreen or fog?

As we shall see, there are three possible answers to these questions. The most aggressive would be to strike down the "reasonably necessary or appropriate" language on constitutional grounds. A real attraction of this approach is that it would inevitably trigger a democratic debate about the proper content of occupational safety and health policy – a debate that would in all likelihood be more sophisticated and constructive than the crude discussion, over thirty years ago, that initially produced OSHA.<sup>18</sup> On the other hand, courts have been reluctant to invoke the nondelegation doctrine to strike down federal legislation, and for exceedingly good reasons.<sup>19</sup> A decision to invalidate OSHA would send shock waves through the federal regulatory state, and courts should hesitate before doing that.

The least aggressive approach, rooted in the Avoidance Canon, would be to respond to the apparent vagueness of the statutory language by making a serious effort to use that language to create floors and ceilings on agency action. Such an effort might plausibly yield three principles. First, the statute requires the agency to regulate serious or significant risks; second, it forbids the agency from regulating small or trivial risks; and third, it requires the agency to respect the constraints of feasibility. As we shall see, judicial insistence on these three requirements would not answer all of the concerns of those attracted to the nondelegation objection, but they would go a long way in that direction, while significantly helping to improve the operation of the statutory scheme.

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<sup>17</sup> See *infra*.

<sup>18</sup> For an outline of the original statute, written near the time of its enactment, see David Currie, OSHA, 1976 Am Bar Assn Res. J. 1107; for an excellent discussion of the policy dilemmas and of how (poorly) the statute handles them, see Susan Rose-Ackerman, Progressive Law and Economics – and the New Administrative Law, 98 Yale LJ 341 (1998).

<sup>19</sup> The most valuable discussion is Eric A. Posner and Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U Chi L Rev 1721 (2002) (challenging the nondelegation doctrine on originalist and welfarist grounds); see also Stewart, *supra* note (arguing that the nondelegation doctrine is not administrable by federal judges). My goal here is not to evaluate the legitimacy or value of the nondelegation doctrine. Instead I take the doctrine as a given for purposes of discussion.

A third approach, and in some ways the most attractive, would be to construe the “reasonably necessary or appropriate” language to mandate some form of cost-benefit balancing. On a plausible view, a regulation is not “*reasonably* necessary” if the benefits do not justify the costs, and the word “appropriate” plainly suggests balancing. One version of this approach would require the agency to use cost-benefit analysis as the rule of decision, so that regulations could go forward only if the monetized benefits exceed the monetized costs. But in the context of workplace safety, where distributional concerns are obviously relevant, a strict monetary test would run into serious problems. A softened and preferable version would require the Secretary to calculate both costs and benefits and to find a “reasonable relationship” between the two.<sup>20</sup> An approach of this general kind is probably the best response to the nondelegation challenge, and it would also have the important virtue of promoting both transparency and coherence in occupational safety policy. At the same time, any kind of cost-benefit reading would raise serious questions about the application of cost-benefit principles to the distinctive context of occupational safety, where those principles might not readily apply, at least not in their standard form. I will offer some brief suggestions about how those questions might be answered.

## **II. Occupational Safety, Occupational Health, and Delegation**

To understand the constitutional issue, it is necessary to explore a complex line of cases. Notably, no one has challenged OSHA regulations on constitutional grounds since 1994.<sup>21</sup> But rulings in that period place the constitutional problem in sharp relief. The central problem is that the Supreme Court’s latest pronouncements, apparently designed to restrict the use of the nondelegation doctrine, eliminate the existing line of defense for the “reasonably necessary or appropriate” language.<sup>22</sup>

### **A. Benzene**

The constitutional debate over OSHA began quite unexpectedly in 1980, with the Secretary of Labor’s effort to reduce permissible exposure limits to benzene, a known carcinogen. In that case, no constitutional objection was raised by the parties. Instead the

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<sup>20</sup> *Industrial Union*, 448 US at 667 (Powell concurring).

<sup>21</sup> See *International Union v. OSHA*, 37 F.3d 665 (DC Cir 1994).

<sup>22</sup> *American Trucking*, *supra* note, at 472.

Court was asked to answer what turned out to be a surprisingly difficult question of statutory construction: When the Secretary is regulating carcinogens, what is the legal standard<sup>23</sup>? To answer that question, the Court had to deal with two independent provisions. The first included the “reasonably necessary or appropriate” language. The second was the provision more specifically governing toxic substances and harmful physical agents, which reads, in full, as follows<sup>24</sup>:

“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.”

One of the Court’s key tasks was to reconcile the “reasonably necessary or appropriate” language, which applies to all occupational safety and health standards, with the “no employee will suffer” language, which is limited to standards involving “toxic materials or harmful physical agents.” The Court had three principal options. First, it could have said that the two provisions, taken together, call for some form of cost-benefit analysis. Perhaps a standard is not “reasonably necessary or appropriate” unless the benefits exceed the costs; perhaps a standard is not “feasible” if the costs are high and the benefits are low. Second, the Court could have said, as the government vigorously urged,<sup>25</sup> that the Secretary of Labor is forbidden from regulating on the basis of cost-benefit analysis, and must instead regulate to the point of (economic and technological) feasibility whenever at least one “employee will suffer material impairment” as a result of exposure. Third, the Court could have said that a risk could be regulated only if it rose to a certain level of significance, in the sense that a statistically small risk (1 in 1 million? 1 in 100 million? 1 in 50 million?) would not justify regulatory controls.

Each of these positions attracted support within the Court. Justice Powell favored a form of cost-benefit balancing, in the sense that he would require the agency “to determine that the economic effects of its standard” bore “a reasonable relationship to the

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<sup>23</sup> See *Industrial Union Dept.*, *supra* note, at 611.

<sup>24</sup> 29 USC § 655(b)(5).

<sup>25</sup> 448 US at 666.



expected benefits.”<sup>26</sup> In his view, a standard is neither “reasonably necessary” nor “feasible” if the expenditures are “wholly disproportionate to the expected health and safety benefits.”<sup>27</sup> This conclusion makes some intuitive sense, but as a matter of interpretation, it runs into evident problems. The toxic materials provision governs benzene (a toxic substance), and that provision requires the Secretary to set the standard that “most adequately assures . . . that no employee will suffer material impairment of health . . . .” Suppose that a regulation would cost \$900 million but would save five workers from “material impairment of health.” On standard assumptions about the monetary valuation of human life, producing a figure of around \$6 million,<sup>28</sup> such a regulation would impose costs that are disproportionate to benefits. But under the statutory language, the agency must nonetheless ensure “that no employee will suffer” -- and hence it would be required to proceed even if the monetized costs greatly exceed the monetized benefits.

To be sure, the word “feasible” operates as a firm limit on what the Secretary might do. No regulation may be issued if it is not “feasible.” But in light of the structure of the sentence, “feasible” means practicable, in the sense of capable of being done, and does not entail cost-benefit balancing. If “feasible” referred to cost-benefit balancing, it would be inconsistent with the “no employee will suffer” language, because a cost-benefit test would allow a number of employees to “suffer.” And so the Court ruled in a subsequent decision, drawing on ordinary meaning and the structure of the statute to suggest that feasible means “practicable.”<sup>29</sup> (I shall turn shortly to some evident puzzles here, involving the meaning of feasibility.)

In a dissenting opinion commanding four votes, Justice Marshall adopted the second position, urged by the government in defense of the benzene regulation.<sup>30</sup> He contended that the toxic materials provision, with its “no employee will suffer” language, prohibited cost-benefit balancing, and also imposed no requirement that the agency show

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<sup>26</sup> 448 US at 667.

<sup>27</sup> *Id.*

<sup>28</sup> The value of a statistical life is around \$6 million. See, e.g., Cass R. Sunstein, *Laws of Fear* (2006).

<sup>29</sup> *American Textile Manufacturers Institute, Inc v Donovan*, 452 US 490, 508 (1981). To be sure, this idea raises questions of its own. What, exactly, does it mean for a standard to be “practicable”? Suppose that some percentage of affected businesses would fail if the regulation were imposed. What percentage would be high enough to make the regulation no longer feasible?

<sup>30</sup> 448 US at 688.

a risk to be significant, in the sense of exceeding a certain statistical threshold. In his view, the specific provision governing toxic substances must prevail over the more general “reasonably necessary or appropriate” language. Carefully parsing the text and legislative history, Justice Marshall insisted that the agency was not required to quantify the risk to establish that it rose to a level of significance.<sup>31</sup>

The Court’s plurality disagreed.<sup>32</sup> Its key argument was that a standard would not count as “reasonably necessary or appropriate” unless it would serve to eliminate a “significant risk of harm.” The plurality struggled to defend its interpretation by reference to the statutory text and history,<sup>33</sup> and it conspicuously failed to come to terms with the “no employee will suffer” requirement, which seemed to suggest that a statistically small risk (say, one in five million) would trigger regulatory controls if the risk would produce death or serious injury in a few employees. Lacking a clear anchor in the standard legal materials,<sup>34</sup> the plurality pointed instead to what it saw as the unfortunate implication of Justice Marshall’s reading, which would “give OSHA power to impose enormous costs that might produce little, if any, discernible benefit.”<sup>35</sup> Here the Court seemed to suggest a background principle for use in construing risk-reduction statutes: *In the face of doubt, such statutes should not be interpreted to authorize the government to impose substantial burdens for trivial gains.*<sup>36</sup>

To this the plurality added an explicit nondelegation concern: if the statute did not require the risk to “be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way,” it might be unconstitutional, and courts should favor a “construction . . . that avoids this kind of open-ended grant.”<sup>37</sup> Citing *Schechter Poultry*, the Court thus suggested a nondelegation canon, to the effect that courts should favor a construction that grants an agency bounded rather than unbounded authority.<sup>38</sup> The basic idea is a variation on, or a specification of, the more general Avoidance Canon,

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<sup>31</sup> Id. at 714

<sup>32</sup> Id. at 639–40.

<sup>33</sup> Id. at 639–649.

<sup>34</sup> See, eg, John Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup Ct Rev 223, 244.

<sup>35</sup> 448 US at 645.

<sup>36</sup> See the discussion in Cass R. Sunstein, Cost-Benefit Default Principles, 99 Mich L Rev 1651 (2001).

<sup>37</sup> 448 US at 646.

<sup>38</sup> See Manning, *supra* note.

asking courts to avoid serious constitutional issues by requiring Congress to speak unambiguously if it seeks to raise such issues.<sup>39</sup> If Congress intends to grant an agency open-ended authority, to an extent that raises serious nondelegation concerns, it must make its will plain.<sup>40</sup>

For present purposes, the key opinion came from then-Justice Rehnquist.<sup>41</sup> He contended that the key provisions amounted to “a legislative mirage, appearing to some Members but not to others, and assuming any form desired by the beholder.”<sup>42</sup> In his view, the words “to the extent feasible” rendered the toxic substances provision “largely, if not entirely, precatory.”<sup>43</sup> Justice Rehnquist did not argue that a nondelegation problem would arise if Justice Powell were correct; a requirement of cost-benefit balancing hardly offends the Constitution, even though a number of supplemental judgments must be made to make such balancing operational.<sup>44</sup> Nor did Justice Rehnquist argue that if Congress meant to enact the interpretation favored by the plurality, the statute would create any constitutional problem. If Congress instructed an agency to regulate all “significant risks” to the point of “feasibility,” the agency would retain considerable discretion, but not to an extent that would violate the nondelegation doctrine.<sup>45</sup> And while the plurality suggested that the government’s interpretation would be constitutionally troublesome, Justice Rehnquist did not make that claim, which is hard to take seriously: Surely Congress holds the constitutional power to require aggressive and cost-blind regulation of workplace risks, whether or not the underlying risks can be shown to be significant. (For nondelegation purposes, there is all the difference in the world between a draconian statute, which tells an agency to impose stringent regulation, and an open-ended statute, which asks an agency to select its own standard.) Justice Rehnquist essentially urged that so long as the nondelegation doctrine exists, *Congress must make some choice among the three principal interpretive possibilities*. If it has failed to do so – if all courts have is a

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<sup>39</sup> See *Kent v. Dulles*, 357 US 116, 130 (1958) .

<sup>40</sup> *Id.*

<sup>41</sup> 448 US at 671.

<sup>42</sup> *Id.* at 681.

<sup>43</sup> *Id.* at 682.

<sup>44</sup> See W. Kip Viscusi, *Fatal Tradeoffs* (1992); for a critique, see Lisa Heinzerling and Frank Ackerman, *Priceless* (2006).

<sup>45</sup> See *American Trucking*, *supra* note.

“mirage” -- then any intelligible principle must be supplied by the agency itself, in violation of the Constitution.

Eight members of the Court disagreed with Justice Rehnquist, not on the ground that the italicized claim is wrong, but on the ground that Congress did, in fact make the relevant choice. For present purposes, the larger point is that the division within the Court raises an obvious question: Suppose the toxic substances provision is not involved and that the agency is guided only by the “reasonably necessary or appropriate” language. How, if at all, would the agency be constrained? The question is far from fanciful, because much of the agency’s work does not involve toxic substances, and hence the more specific provision, with its “no employee will suffer” and “to the extent feasible” language, does not seem to be applicable at all.

## **B. Safety standards, health standards, and the new nondelegation doctrine**

1. *The challenge.* The issue reached the court of appeals in 1991.<sup>46</sup> The case involved the agency’s regulation of industrial equipment that might move suddenly and hence produce injuries. The regulation required two procedures: “lockout” and “tagout.” With “lockout,” certain equipment must be locked, so as to ensure that no movement can occur. With “tagout,” a plastic warning must be placed on equipment, informing workers that the equipment should not be operated unless the tag is removed. In issuing the regulation, the agency said that the toxic substances provision was inapplicable and that it was governed only by the “reasonably necessary or appropriate” language.<sup>47</sup> In the agency’s view, the statute drew a sharp distinction between “safety standards” and “health standards,” and the more stringent “no employee shall suffer” provision was applicable only to the latter.

Rejecting the agency’s position, the United Auto Workers argued that the toxic substances provision did apply and hence that the agency must apply the “significant risk/feasibility” framework established in *American Petroleum*. Noting that the toxic substances provision included a reference to “harmful physical agents,” the United Auto Workers contended that this provision literally applies to dangerous equipment, which is

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<sup>46</sup> *International Union v. OSHA*, 938 F.2d 1310 (DC Cir 1991).

<sup>47</sup> *Id.* at 1313.

a “physical agent.” The court responded that this argument was a form of sophistry.<sup>48</sup> In its view, Congress appeared to have drawn a distinction between health risks and safety risks. To support this point, the court noted that the phrase “harmful physical agents” appeared in a separate provision that seemed to involve health (“toxic substances and other harmful agents”) rather than safety; it concluded that at the very least, the agency could reasonably conclude that the toxic releases provision applied only to health standards.<sup>49</sup>

The court’s conclusion meant that in issuing safety standards, the Secretary was governed only by the “reasonably necessary or appropriate” provision. With the background provided by Justice Rehnquist’s opinion in *American Petroleum*, the National Association of Manufacturers challenged that provision as an unconstitutional delegation. In responding to that challenge, the agency outlined its understanding of its statutory authority.<sup>50</sup> It agreed that it would have to establish a “significant risk.” It added that it could not regulate beyond the point that was “both technologically and economically feasible.” But it did not treat feasibility as a floor; it could, if it chose, regulate far less aggressively. In the court’s words, “the upshot is an asserted power, once significant risk is found, to require precautions that take the industry to the verge of economic ruin . . . or to do nothing at all.”<sup>51</sup>

The court acknowledged that because agency standards must be applied across broad categories, the agency could not punish particular companies that it did not like, and hence a central nondelegation concern, involving favoritism, was reduced. Nonetheless, some potentially “dangerous favoritism” remained, since stringent standards might come down especially hard on small firms and favor large ones.<sup>52</sup> Thus the agency’s understanding “would give the executive branch untrammelled power to dictate the vitality and even the survival of whatever segments of American business it might choose.”<sup>53</sup> The court emphasized that the agency’s discretion covered all of American

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<sup>48</sup> Id at 1314.

<sup>49</sup> Id. at 1314.

<sup>50</sup> Id at 1318.

<sup>51</sup> Id at 1317.

<sup>52</sup> Id at 1318.

<sup>53</sup> Id at 1318.

enterprise, not a single industry, and that the delegation did not involve a power particularly conferred on the president, such as the power over foreign policy.

How might the nondelegation problem be cured? Emphasizing the importance of predictability and the rule of law, the court's evident preference was for a narrowing construction by the agency, perhaps involving a form of cost-benefit analysis.<sup>54</sup> Evidently the court believed that a key purpose of the nondelegation doctrine is to control agency discretion, and that if the agency adopted a form of self-binding through a commitment to cost-benefit analysis, the constitutional problem would be solved. In other words, the agency might supply the requisite "intelligible principle" on its own, and in that way overcome the nondelegation challenge. And indeed, the court insisted that cost-benefit analysis would be compatible with statutory text and history.<sup>55</sup> The word "reasonably" suggests balancing, associated as it is with the "reasonable man" standard in tort law.<sup>56</sup> Unfortunately, the court did not acknowledge that the word "reasonably" modifies "necessary," and hence the statute failed to impose a freestanding obligation to be "reasonable" – perhaps a problem for the cost-benefit interpretation. But the statutory phrase is "reasonably necessary or appropriate," and surely the word "appropriate" could (reasonably) be understood to entail cost-benefit balancing. Thus the court refused to strike down the statute, emphasizing that it could be interpreted to allow such balancing, and could therefore be construed to be constitutional.<sup>57</sup>

2. *The agency's response.* On remand, the agency declined the court's invitation to construe the statute to require cost-benefit balancing.<sup>58</sup> But it did attempt to a form of self-binding through an intelligible principle, or rather through an assortment of such principles. Thus the agency listed six principles that would limit its discretion<sup>59</sup>:

- a. The risk must be significant.
- b. Compliance must be economically feasible.
- c. Compliance must be technologically feasible.
- d. The standard must use the most cost-effective measures.

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<sup>54</sup> Id 1319 ("Cost-benefit analysis is certainly consistent with the language of § 3(8).")

<sup>55</sup> Id 1319.

<sup>56</sup> Id at 1319.

<sup>57</sup> Id. 1321.

<sup>58</sup> *International Union v. OSHA*, 37 F.3d 665 (DC Cir 1994).

<sup>59</sup> Id. at 668.

- e. The agency must explain its adoption of a standard departing from any national consensus standard.
- f. The agency must explain its standard by reference to record evidence and also explain any inconsistency with prior agency practice.

The court of appeals thought that by themselves, these principles were not sufficient to rescue OSHA, because they gave the agency too much room to “roam” between different levels of stringency.<sup>60</sup> But the agency added a final criterion. Looking at various other sections, the agency said that it has to “provide a high degree of employee protection,” moving close to the point of feasibility.<sup>61</sup> Because the agency could “deviate only modestly from the stringency of” the health standards, the court said that the agency’s approach imposed sufficient discipline to rescue the statute from nondelegation attack.<sup>62</sup> The central idea seemed to be that once a significant risk was shown, the agency would regulate at least close to the point of feasibility. The agency was therefore bound by a set of constraints that amounted, as a whole, to the equivalent of the requisite intelligible principle; the nondelegation problem was therefore cured.

The court’s rationale here raises some immediate questions: What does “feasibility” mean? When, exactly, does regulation become so stringent that it is no longer “feasible” to comply with it? If a regulation is expensive, it is likely to endanger at least one or a few firms. Is such a regulation not “feasible” for that reason? Or are massive business failures required? If the agency says the latter, then it faces an evident problem: Under that approach, any particular regulation will move industry to the brink of massive business failures, and that step will make other regulations impossible to absorb even if they are relatively inexpensive. In practice, the agency cannot possibly choose regulations that put whole industries on the brink of failure. In this light, a great deal of additional work would be helpful to understand actual agency practice in light of the feasibility condition – and appropriate legal constraints on that practice. For present purposes, the key point is that because of the agency’s emphasis on the need for stringency, the court of appeals found that the nondelegation objection was answered.

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<sup>60</sup> Id. at 669.

<sup>61</sup> Id. at 669.

<sup>62</sup> Id. at 669.

### C. The dead nondelegation doctrine

The court of appeals holdings just discussed suggest a simple principle: *If a statute is an unconstitutional delegation as written, it can nonetheless be saved as a result of subsidiary policymaking by the agency, in the form of a narrowing construction, even if that construction is merely optional in light of the standard sources of statutory interpretation.* This principle amount to a new nondelegation doctrine. But in 2001, the Supreme Court unambiguously rejected that doctrine.<sup>63</sup>

The case tested the meaning and validity of a key provision of the Clean Air Act, one that appears similar to the “reasonably necessary or appropriate” phrase. That provision asks the EPA to issue national ambient air quality standard to the point “requisite to protect the public health.”<sup>64</sup> Building on its OSHA decisions, the court of appeals held that the statutory phrase was an unconstitutional delegation, because it lacked an intelligible principle.<sup>65</sup> What counts as “requisite”? The court thought that Congress had not answered that question. “Here it is as though Congress commanded the EPA to select ‘big guys,’ and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point.”<sup>66</sup> At the same time, the court said that the EPA could issue a narrowing construction that would save its constitutionality. In the key sentence, the court said that “an agency wielding the power over American life possessed by EPA should be capable of developing the rough equivalent of a generic unit of harm that takes into account population affected, severity and probability.”<sup>67</sup> Unlike in the OSHA cases, the court ruled that the statutory term explicitly banned the agency from basing its decisions on cost-benefit analysis.<sup>68</sup> But the agency would be permitted, and indeed required, to act in accordance with some kind of quantitative “benefits analysis,”

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<sup>63</sup> *Whitman v American Trucking Association*, 531 US 457 (2001).

<sup>64</sup> 42 USC 7409.

<sup>65</sup> *American Trucking Association v. EPA*, 175 F3d 1027, 1034 (DC Cir 1999).

<sup>66</sup> 175 F.3d at 1034.

<sup>67</sup> *Id.* at 1039.

<sup>68</sup> *Id.* at 1038. (“Cost-benefit analysis . . . is not available . . .”).



requiring regulation when the benefits reached a certain magnitude, and forbidding regulation when the benefits did not reach that magnitude.<sup>69</sup>

The Supreme Court rejected this approach.<sup>70</sup> First, it held that a narrowing construction by the agency was neither here nor there.<sup>71</sup> The nondelegation doctrine is rooted in Article 1, section 1, and in the Court's view, its purpose is therefore to require that laws are made by the national legislature<sup>72</sup>; it follows that agency self-binding is neither here nor there. Hence the intelligible principle must come from Congress itself. If Congress has given an agency a blank check, it does not matter if that agency chooses to narrow its discretion, certainly if the narrowing is based on the agency's own policy judgments. Second, the Court held that the statute, as written, was not an unconstitutional delegation.<sup>73</sup> National ambient air quality standards must be set at the level that is "requisite to protect the public health." This requirement means that such standards must be "sufficient, but not more than necessary."<sup>74</sup> In the Court's view, that constraint is sufficient to overcome the nondelegation problem. The Court did emphasize that that problem would be analyzed by reference to the scope of the agency's power, which was certainly broad in this case, covering as it did a wide assortment of industries<sup>75</sup>; but the EPA's discretion was far from uncabined by the statutory language.

At first glance, the Court's analysis on this last point seems hopelessly unsatisfying: How is the word "necessary" a useful limitation on agency discretion? The objection of the lower court appears unanswered: Doesn't this provision grant the agency the discretion to proceed as stringently as it wishes, without imposing any kind of floor and ceiling? But perhaps the Court's conclusion is not as unhelpful as it seems. A national ambient air quality standard could be characterized as more aggressive than "necessary," and therefore as unlawful, if it delivered benefits that are exceedingly small, or if it regulated risks that do not concern ordinary people in ordinary life. As Justice Breyer wrote, the statute "does not require the EPA to eliminate every health risk,

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<sup>69</sup> Id. at 1039–40.

<sup>70</sup> 531 US at 472.

<sup>71</sup> Id. at 472. ("Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.")

<sup>72</sup> On some serious complexities here, see Posner and Vermeule, *supra* note.

<sup>73</sup> 531 US at 476.

<sup>74</sup> Id. at 473

<sup>75</sup> Id.

however slight, at the expense of any economic risk, however great . . . .”<sup>76</sup> In his view, the statute does not authorize the agency “to eliminate all risk – “an impossible and undesirable objective.”<sup>77</sup> What counts as requisite to protect the public health will “vary with background circumstances, such as the public’s tolerance of the particular health risk in the particular context at issue.”<sup>78</sup> Thus the agency should consider “the severity of a pollutant’s adverse effects, the number of those likely to be affected, the distribution of those adverse effects, and the uncertainties surrounding each estimate.”<sup>79</sup>

It follows from these remarks that some imaginable restrictions would violate the statute, because they would go beyond the point that is “requisite.” Equally important, it also follows that a national standard could be characterized as less aggressive than “necessary” if it left a residual risk that was, in fact, significant.<sup>80</sup> Suppose that in light of the pollutant’s adverse effects, and the number of people at risk, the EPA’s standard was inexplicably lenient. It might well be concluded that such leniency would be unlawful, because it would fall short of the level “requisite to protect the public health.”<sup>81</sup>

We might go further. If Justice Breyer’s analysis is put together with the Court’s, the EPA’s task may not be radically different from what was sought by the court of appeals, that is, to devise “the rough equivalent of a generic unit of harm that takes into account population affected, severity and probability.”<sup>82</sup> Without some kind of generic unit of harm, it might not be possible for the agency to give an adequate explanation of why any particular regulation is more stringent or less stringent than necessary.<sup>83</sup> And to this extent, the simple words “requisite to protect the public health” do establish both floors and ceilings on agency action.

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<sup>76</sup> Id at 494 (Breyer concurring).

<sup>77</sup> Id. at 494.

<sup>78</sup> Id at 494.

<sup>79</sup> Id at 495.

<sup>80</sup> It is relevant here that in *Mass. v. EPA*, 549 US --- (2007), the Court held that an agency’s failure to respond to a petition to make rules is subject to judicial review. Thus if an agency refuses to make a rule in the face of a petition asking for one, courts might review the agency’s refusal as unlawful. The Clean Air Act offers particular requirements here. For discussion, see *American Lung Association v. EPA*, 134 F.3d 388 (DC Cir 1998).

<sup>81</sup> Id. at 496. See also *American Lung Association v. EPA*, 134 F.3d 388 (DC Cir 1998) (requiring EPA to reconsider failure to issue short-term standard for asthmatics).

<sup>82</sup> 175 F3d at 1079.

<sup>83</sup> But see *American Trucking Assn. v. EPA*, 283 F3d 355 (DC Cir 2001) (applying deferential review to ozone and particulates standards).

To reach this conclusion, courts might rely on the text, simple and brief though it is, and need not engage in any especially aggressive form of statutory construction (as the Supreme Court did in *American Petroleum*). The statutory terms in the relevant provision of the Clean Air Act are plausibly taken to invite floors and ceilings – and do so while forbidding the agency from engaging in cost-benefit balancing. We shall shortly see how this analysis applies to OSHA.

### **III. The Constitutional Problem**

#### **A. OSHA’s unnoticed vulnerability**

My principal topic is the meaning and validity of the “reasonably necessary or appropriate” clause. It will be useful, however, to begin with a brief overview of the agency’s practice.

1. *Agency practice: a glance.* Since 1994, OSHA safety regulations have not been challenged on nondelegation grounds. But the agency has nonetheless issued a number of such regulations. In explaining those regulations, the agency has typically offered an account of the “pertinent legal authority,”<sup>84</sup> which refers to the “reasonably necessary or appropriate” language. In what has become a kind of boilerplate, cutting across Republican and Democratic administrations, the agency has explained that a regulation satisfies that standard “if it substantially reduces or eliminates significant risk; is economically feasible; is technologically feasible; is cost effective; is consistent with prior Agency action or is a justified departure; is supported by substantial evidence; and is better able to effectuate the Act’s purposes than any national consensus standard it supersedes.”<sup>85</sup> A standard counts as economically feasible “if industry can absorb or pass on the cost of compliance without threatening its long term profitability or competitive structure.”<sup>86</sup> A standard counts as cost-effective “if the protective measures it requires are the least costly of the available alternatives that achieve the same level of protection.” In addition, safety standards “must be highly protective.”<sup>87</sup> The words “highly protective”

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<sup>84</sup> 61 FR 56746, 56790–91 (1996) (Standard for Occupational Exposure to 1,3-Butadiene).

<sup>85</sup> See *id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

are not themselves defined, but they are a clear bow in the direction of the holding in the *International Union* case.

What does all this mean? Some of it means nothing at all, or at least nothing that bears on the question at hand. Under existing administrative law doctrine, all agency decisions must be either consistent with past action or a “justified” departure<sup>88</sup>; that requirement does not come from OSHA, and it is irrelevant to a nondelegation challenge. It is true that under OSHA, any regulation must be supported by substantial evidence,<sup>89</sup> but the requirement of record evidence is hardly sufficient to respond to a nondelegation objection, which points to an absence of statutory standards. Nor is any help provided by the idea that any regulation must be “better able to effectuate the Act’s purposes” than the standard that it supersedes. This idea merely replicates the idea that a departure must be “justified,” and by itself, a reference to “the Act’s purposes” tell us exactly nothing about what those purposes are.

It follows that the agency’s understanding can be reduced to three ideas: (1) the risk must be significant; (2) the regulation must be feasible; and (3) within the continuum bounded at one end by “very lenient” and at the other by “the constraint of feasibility, the agency will choose what is “highly protective.” As I have noted, the word “feasible” is misleading. No on-off switch separates the “feasible” from the “infeasible.” Inevitably, the agency is exercising some discretion in deciding exactly how aggressive to be.

It is true that in assessing significant risk, the regulations often refer to the passage in *American Petroleum* that estimated a significant risk as somewhere between a one in a billion risk of death per cancer and a one in a thousand risk.<sup>90</sup> For most of its standards, OSHA calculates the significance of a risk in exactly these terms: it determines the rate of death per 1000 workers, assuming a 45-year work life.<sup>91</sup> If the risk of death is above 1/1000, it qualifies as significant.<sup>92</sup> As early as 1988, the agency said that a risk of over 1.64/1000 counts as significant – and that a risk of 0.6/100,000 “may be approaching a level that can be viewed as safe.”<sup>93</sup> But many regulations—and the safety

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<sup>88</sup> See *Motor Vehicle Manuf. Assn. v. State Farm Mutual Automobile*, 463 US 29 (1983).

<sup>89</sup> 29 USC 655.

<sup>90</sup> 448 US at 655; 61 FR 56746, 56790–91 (1996) (Standard for Occupational Exposure to 1,3-Butadiene).

<sup>91</sup> 62 FR 1494, 1562 (1997) (methylene chloride standard)

<sup>92</sup> *Id.*

<sup>93</sup> Occupational Exposure to Fomaldehude, 52 Fed. Reg. 56,168, 56,234 (1987).

standards in particular—express significant risk in terms of the magnitudes of annual deaths and injuries, rather than in terms of deaths per 1000 workers. With a bit of math these can be recast in terms of deaths per 1000 workers,<sup>94</sup> and informal calculations reveal that whenever we know the magnitude of the annual death and injury rate, the risk is greater than one death per 1000 workers (and this does not even count injuries).<sup>95</sup> The only exception is the standard for confined spaces, where the risk is indeterminate because the size of the workforce is not given.<sup>96</sup>

As a general practice, the agency’s safety regulations do offer separate statements of both costs and benefits, but the agency does not formally compare the monetized benefits to the monetized costs to calculate “net” benefits. Costs are stated in dollars and benefits are usually expressed in terms of deaths and injuries prevented. That is, both benefits and costs are quantified, but usually only costs are monetized. Nonetheless, assuming \$6.8 million as the value of a life (OSHA’s preferred figure during this range), every regulation—with one exception<sup>97</sup>—that claims to prevent deaths is justified, in terms of cost-benefit analysis, on the basis of these prevented deaths alone (not even taking injuries into account).

It is unclear why the agency only rarely explicitly monetizes prevented deaths or injuries, but there is some evidence that the agency does monetize when the ultimate question is close. For example, the agency monetized the 1.3 annual deaths its recent electrical installation standard was intended to prevent, and then converted to 2005 dollars to yield \$9.1 million in prevented death benefits. The regulation cost \$9 million.<sup>98</sup>

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<sup>94</sup> The risk is calculated by divided deaths by workforce size, and multiplying by 45. See 65 FR 68262-01, 68556 (ergonomics standard).

<sup>95</sup> For example, in the steel erection safety standard, the significant risk was 35 deaths and 2279 serious injuries per year caused by steel erection accidents. According to the standard, 56,000 workers are exposed to the risk. Using these numbers in the formula above yields a risk of 28 per 1000—clearly significant. The closest case appears to be the scaffolding standard, which protects 2.34 million workers from a significant risk of 79 deaths and 9750 injuries per year. 61 FR 46026. This works out to 1.5 deaths per 1000 worker-lives. Without the injuries, this would be a close to borderline case. The ergonomics standard did not attempt to quantify risk in terms of deaths, but estimated the risk of musculoskeletal disorders or injuries ranging from 33 to 926 cases per 1000 workers, which “are clearly significant by any reasonable measure. 65 FR 68262, 68752 (2000).

<sup>96</sup> 72 FR 67352 (2007) (with a significant risk of approximately 6 fatalities and 900 injuries per year).

<sup>97</sup> The only exception is the hexavalent chromium standard, 71 FR 10100 (2006). The cost-benefit analysis in this regulation is extensive, perhaps because it is unclear whether the regulation is justified on cost-benefit grounds. See *id.* at 10308. However, since this is a health regulation, OSHA is required to reduce the risk to the limits of feasibility.

<sup>98</sup> 72 FR 7136 (2007).

A recent confined space proposed standard stated monetized benefits of \$85 million; the regulation cost \$77 million.<sup>99</sup> Another case of conspicuous monetization is the ergonomics standard,<sup>100</sup> overturned by Congress.<sup>101</sup> This standard was unique in that it would have prevented only injuries and not deaths. The agency calculated the value of the prevented injuries to be \$9.1 billion, with costs of \$4.5 billion.<sup>102</sup> According to these numbers, the ergonomics standard was not a “close call,”<sup>103</sup> but the controversy surrounding the sheer size of the proposed regulation presumably spurred explicit monetization.

2. *The surprising effect of American Trucking.* The *American Trucking* decision did not exactly invite greater use of the nondelegation doctrine. On the contrary, the Court’s insouciant approach to the “requisite to protect the public health” language suggested a noticeable absence of enthusiasm for the doctrine. Nonetheless (and there is an obvious irony here), the Court’s rejection of the new nondelegation doctrine eliminated the route by which the court of appeals had upheld the “reasonably necessary or appropriate” language against constitutional attack. After *American Trucking*, it is plain that a narrowing construction by the agency will not save an otherwise unacceptable delegation. If OSHA is to be rescued from constitutional objection, it must be because of what the statute says, not because of agency policymaking in the absence of legislative guidance. Recall here the emphasis in *American Trucking* on the scope of the agency’s power: Because OSHA covers essentially all American workers, the existence of untrammelled discretion would be a serious problem.

We are now in a position to see the central difficulty. After *American Trucking*, everything turns on whether the phrase “reasonably necessary or appropriate” sets out an intelligible principle. To be sure, the statutory provision would be valid if it could be treated as analogous to the national ambient air quality provisions of the Clean Air Act. As we have seen, the Court upheld the phrase “requisite to protect the public health” on the ground that it forbids cost-benefit balancing and calls for a cost-blind inquiry into

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<sup>99</sup> 72 FR 67352 (2007 proposed regulation). See also the hexavalent chromium standard, 71 FR 10100, in which the monetized benefits were arguably exceeded by the costs.

<sup>100</sup> 65 FR 68262 (2000).

<sup>101</sup> See Cong. Rec. H684, Mar. 7, 2001, roll call no. 33.

<sup>102</sup> 65 FR 68262 (2000).

<sup>103</sup> *Id.*

how much regulation is “necessary.” In the Court’s view, that inquiry is not unguided. But there are real difficulties in understanding OSHA to mean the same thing as the Clean Air Act. As construed by the court of appeals, the words “reasonably necessary or appropriate” are plausibly but not necessarily taken to authorize cost-benefit balancing – and thus seem to leave it to the Secretary to decide whether the statute requires cost-benefit analysis or not. In other words, Congress has not set out an intelligible principle supporting or rejecting cost-benefit analysis. Whether standards must be based on that form of analysis is for the agency to decide. Perhaps this is a fatal defect. Insofar as the words “reasonably necessary or appropriate” are involved, Justice Rehnquist’s original objection seems at least plausible: The agency has been authorized to chose whatever principle it likes.

To be sure, the very idea of an “intelligible principle” poses its own difficulties. What, exactly, does that idea mean? The best answer points to the purpose of the nondelegation doctrine, which is to ensure that Congress, as the national lawmaker, does not grant blank checks to the executive branch (or anyone else).<sup>104</sup> If Congress has set out an intelligible principle, agency discretion is sufficiently bounded. On this view, it might well be unacceptable for Congress to tell an agency to do as it chooses or whatever “the public interest requires” – unless the notion of the public interest, in context, offers sufficient discipline.<sup>105</sup> In this light, it should be clear that the difference between a principle that is “intelligible” and one that is not is inevitably one of degree. The question becomes how much discretion is too much discretion – a question that is not easily administered by federal courts. The difficulty of judicial administration is a standard objection to aggressive judicial enforcement of the nondelegation doctrine, even assuming that it has firm constitutional roots.<sup>106</sup> But as the doctrine now stands, it is necessary to ask how, if at all, OSHA limits the agency’s room to “roam.”

How might courts respond to this problem? There are three possibilities.

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<sup>104</sup> On the complexities here, see Posner and Vermeule, *supra* note.

<sup>105</sup> The Federal Communications Commission is generally controlled only by a test that refers to the “public interest, convenience, and necessity.” 47 USC 303. For discussion, see Randolph May, *The Public Interest Standard: Is it Too Indeterminate to be Constitutional?* (2001), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=294712](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=294712)

<sup>106</sup> See *Mistretta v US*, 488 US 361, 382 (Scalia, J, dissenting) (emphasizing difficulties in judicial implementation of nondelegation doctrine).

## B. Solutions and proposals

1. *Invalidation*. The most aggressive approach would be to invalidate the provision on constitutional grounds. To be sure, invalidation would represent the first invocation of the nondelegation doctrine to strike down a federal statute in over seventy years (and only the third in the nation's history<sup>107</sup>). In addition, it would send shock waves through the administrative state. But unlikely as it seems, disruptive though it would be, and radical as it would appear, that step is not entirely without appeal.

In *American Trucking*, the Court emphasized that the statutory phrase "requisite to protect the public health" does not seem more open-ended than several other statutory phrases that the Court has upheld against nondelegation attack. As we have seen, the "reasonably necessary or appropriate" clause is plausibly different, because that phrase seems to allow (but not to require) the agency to use some form of cost-benefit analysis as a rule of decision. It would therefore be easy to distinguish *American Trucking* on the ground that while Congress set out an intelligible principle to govern national ambient air quality standards, it failed to do so in the context of occupational safety standards. The basic idea would be that in the relevant provision of the Clean Air Act, Congress instructed the agency to engage in a cost-blind analysis inquiry into how much protection is "requisite," whereas in OSHA, Congress left the agency at sea.

At the same time, invalidation would force, for the first time, a sustained legislative encounter with the exceedingly difficult questions of policy raised by occupational safety and health regulation. When the statute was originally enacted in 1970, Congress did not seriously grapple with those problems.<sup>108</sup> Instead it rested content with recognizing the existence of a problem and the need for a regulatory solution.<sup>109</sup> In the last decades, public officials have learned an immense amount about how to think about regulation. Much of this learning might be brought to bear on a new enactment.<sup>110</sup>

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<sup>107</sup> The other two are *ALA Schechter Poultry Corp. v. US*, 295 US 495 (1935); *Panama Refining*, 293 US 539 (1935). In this respect, the nondelegation doctrine has had only one good year.

<sup>108</sup> See Currie, *supra* note; Rose-Ackerman, *supra* note.

<sup>109</sup> See *id.*

<sup>110</sup> For various perspectives, see *id.*; W. Kip Viscusi, *Fatal Tradeoffs* (1992); W. Kip Viscusi, *Rational Risk Regulation* (2000); Sidney Shapiro and Thomas McGarity, *Rethinking OSHA*, 6 *Yale J Reg* 1 (1989).



Of course there is disagreement about how best to incorporate what has been learned,<sup>111</sup> but that is precisely the question for democratic engagement. This is not the place for a sustained discussion of regulatory reform in the domain of occupational safety, but a few notations might be helpful.

It is now clear, for example, that information disclosure is sometimes the best response to serious risks.<sup>112</sup> It is plausible to think that the first line of defense, in the domain of worker safety, should be a requirement that employers inform employees about the hazards that they face.<sup>113</sup> In principle, disclosure should create an incentive to increase safety at the same time that it should ensure that workers receive a wage premium for the relevant risks.<sup>114</sup> Congress might well instruct OSHA to ensure that when the workplace exposes workers to risks above a certain threshold, they must be warned.<sup>115</sup>

At the same time, we know a great deal about the limits of disclosure strategies, stemming in part from bounded rationality on the part of those who must assess risks.<sup>116</sup> There is reason to believe that many workers are “risk optimists,” reducing cognitive dissonance by concluding that the workplace is safer than it actually is.<sup>117</sup> To the extent that this is so, information disclosure may not work. At the very least, it is necessary to ensure that workers adequately process the information that they receive, in part so that they do not conclude, falsely, that they are relatively immune from statistical risks.<sup>118</sup> In Congress might require the agency to supplement disclosure requirements in two different ways. First, it might impose clear bans on risks that reasonable employees would not be willing to run.<sup>119</sup> Second, it might ban employers from exposing employees

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<sup>111</sup> Thus Viscusi, *supra* note, emphasizes the value of balancing via cost-benefit analysis, while Thomas McGarity and Sidney Shapiro, *Workers At Risk* 292-304 (1993), argue for more aggressive regulation.

<sup>112</sup> See Archon Fung et al., *Full Disclosure* (2006).

<sup>113</sup> Rose-Ackerman, *supra* note.

<sup>114</sup> On wage premiums, see W. Kip Viscusi, *Risk by Choice* (1983).

<sup>115</sup> Note that the agency does have a “hazard communication policy,” which requires disclosure in certain circumstances. 29 CFR 1910.1210. For discussion, see <http://www.ehrs.columbia.edu/HazardCommunicationPolicy.html>

<sup>116</sup> See Cass R. Sunstein, *Risk and Reason* (2002).

<sup>117</sup> See George Akerlof, *The Economic Consequences of Cognitive Dissonance*, in *An Economic Theorist’s Book of Tales* (1989).

<sup>118</sup> For relevant discussion, see Richard H. Thaler and Cass R. Sunstein, *Nudge* (2008).

<sup>119</sup> See Rose-Ackerman, *supra* note.

to certain risks when the monetized benefits of the ban outweigh the monetized costs, in a variation on the Safe Drinking Water Act.<sup>120</sup>

Very plausibly, however, a strict cost-benefit test is not appropriate in this context. Distributional considerations matter. It is imaginable, for example, that a \$800 million cost would be justified for a benefit of \$700 million in increased safety – if, for example, the cost was borne mostly by consumers, and if the benefit took the form of 100 lives saved each year. Even if the monetized costs exceed the monetized cost under standard assumptions about valuation,<sup>121</sup> it is reasonable to think that the agency should proceed in these circumstances. Perhaps the welfare effects of the regulation are desirable, on net, whatever the monetized analysis suggests. Perhaps the welfare gains to workers, in terms of safety, exceed the overall welfare losses (to employers, customers, and workers themselves, who might find themselves with reduced wages or without jobs). Monetary measures are based on willingness to pay, and it is possible that the welfare gain is greater than the welfare loss even if the monetized costs are greater than the monetized benefits. Even if this point does not hold, perhaps the regulation would be justified on redistributive grounds. If workers gain a great deal in terms of safety, perhaps the agency should proceed even if others (employers, consumers) lose more than workers gain.

Of course it is conventional to think that the best way to handle distributive considerations is through the tax system, with the suggestion that the intended beneficiaries would be better off with a cash payment than with a regulatory requirement, which may not help them much or even at all.<sup>122</sup> It is possible that mandatory safety regulations will result in reduced wages and decreased employment, and if so, it is not clear that workers, as a whole, will benefit from such regulations. Perhaps the losses in terms of wages and employment opportunities exceed the gains in terms of safety. We need to know something about the incidence of the various costs. If redistribution is the goal, the tax system is the preferred means. But at least it can be said that an occupational safety regulation might have desirable redistributive consequences, especially but not

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<sup>120</sup> 42 USC 42300g et seq.

<sup>121</sup> For discussion, see Cass R. Sunstein, *Valuing Life*, 54 *Duke LJ* 385 (2004).

<sup>122</sup> On some of the complexities here, see *id.*

only if workers lack information – and if it does, the agency might legitimately take those consequences into account.

On an attractive view, with roots in Justice Powell’s opinion in *American Petroleum*, the agency should be required to show a “reasonable relationship” between benefits and costs, and distributional considerations, and concerns about equity, might overcome what would follow from a strictly monetary test.<sup>123</sup> It is important to know who bears the costs and who enjoys the benefits, not merely the magnitude of both of these. But my primary goal here is not to specify what Congress should require the agency to consider. It is instead to suggest that there could be real value in democratic engagement with that question, especially in light of the relevant learning in the last decades.<sup>124</sup> One argument for use of the nondelegation doctrine – or perhaps it is a mere hope<sup>125</sup> -- is that invalidation of the statute might produce a better, because more informed, occupational safety law.

2. *Of significant and insignificant risks.* If possible, courts should avoid the heavy constitutional artillery, simply because of the disruption that invalidation would cause, and because of the many problems with judicial use of the nondelegation doctrine.<sup>126</sup> The least aggressive approach would build on both the agency’s current practices and Justice Breyer’s opinion in *American Trucking* so as to create floors and ceilings on agency action. A central claim here would be that courts should construe the disputed provision so as to avoid constitutional doubts – a principle that would, in this context, call for an interpretation that would limit agency discretion. The result of a reasonable interpretation would be to produce a band of judgments within which agency outcomes must fall. There are three major points here.

The first is that after *American Petroleum*, we know that the agency must establish that it is seeking to regulate a “significant” risk. It is not permitted to conclude that a standard is “reasonably necessary or appropriate” if the risk is trivial. A judgment about the significance of a risk would call for an assessment of both the magnitude and the probability of harm. If, for example, an industry practice exposes hundreds of

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<sup>123</sup> See Executive Order 12866, 58 Fed. Reg. 51735 (1990) (referring to distributive impacts and also to equity).

<sup>124</sup> See Safe Drinking Water Act, 42 USC 42300g et seq.

<sup>125</sup> See Posner and Vermeule, *supra* note.

<sup>126</sup> See note *supra*.

thousands of workers to a 1/1000 risk of mortality or serious injury, the risk unquestionably qualifies as significant. As the exposed population becomes smaller, the probability decreases, and the magnitude of the harm drops, it is harder to categorize the risk as “significant.” As several decisions have held, some risks have not been shown to be above the relevant floor.<sup>127</sup> In this respect, OSHA does overlap with the Clean Air Act at issue in *American Trucking*. While the latter statute forbids regulations that are not “requisite to protect the public health,” and thus bans the agency from imposing restrictions on trivial risks, the Court has made clear that OSHA has a similar requirement,<sup>128</sup> in the sense that the Secretary of Labor is not authorized to proceed unless the risk reaches a certain threshold.

The second point is that if a risk is significant, the agency is not permitted to ignore it.<sup>129</sup> If the agency regulates weakly, and another regulation would be far more protection, it has failed to do what is “reasonably necessary or appropriate.” Indeed, the agency might well be subject to judicial review if it fails to respond to a petition to produce a rule dealing with a substantial safety problem.<sup>130</sup> If the agency refuses to address a significant risk, it had better explain itself. To this extent, OSHA is analogous to the Clean Air Act; just as the agency cannot be too draconian, so too it cannot be too lenient.<sup>131</sup> In both contexts, there are both floors and ceilings on agency action. It is true the words “reasonably” and “or appropriate” soften OSHA in ways that the word “requisite” does not. But if the agency ignores a significant risk, or fails to eliminate such a risk, it is required to offer a good explanation, made out in terms of statutorily relevant factors.

The third point is that “feasibility” operates as a constraint on what the agency might do or require.<sup>132</sup> This conclusion is less than obvious, because the “reasonably necessary or appropriate” language does not, by itself, constrain the agency in this way; that language lacks a feasibility limitation. Perhaps the agency could deem a restriction

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<sup>127</sup> See, e.g., *AFL-CIO v. OSHA*, 965 F.2d 962 (11<sup>th</sup> Cir 1992).

<sup>128</sup> See 448 US at 491.

<sup>129</sup> Cf. *American Lung Association v. EPA*, 134 F.3d 388 (DC Cir 1998) (requiring EPA to reconsider failure to issue short-term standard for asthmatics).

<sup>130</sup> See *Mass. v. EPA*, 549 US --- (2007) (holding that failure to respond to petition to make rule is subject to judicial review).

<sup>131</sup> *Id.*

<sup>132</sup> See, e.g., *AFL-CIO v. OSHA*, 965 F.2d 962 (11<sup>th</sup> Cir. 1992).

“reasonably necessary” even if it would create serious economic dislocations – at least if the underlying risk is sufficiently large. But there are two problems with this conclusion. The first is that a regulation might well be considered neither “reasonably necessary” nor “appropriate” if it would not be feasible as a matter of either economics or technology. A restriction that would cause massive business failures would not seem to be “appropriate.” By itself, this argument may not be decisive,<sup>133</sup> but an argument from statutory structure strongly supports this conclusion. Note that the more aggressive toxic substances provision, governing health standards, contains an explicit feasibility limitation,<sup>134</sup> and it would be odd indeed to construe the less stringent and more general definitional clause not to include the same limitation. In view of the statutory structure, limiting health standards to the “feasible,” it makes sense to say that safety standards must be feasible as well. As I have emphasized, the idea of feasibility is far from self-defining, and inevitably it leaves a great deal of discretion to the agency. But that degree of discretion does not create a serious constitutional issue.

Are these three limitations, taken as a whole, sufficient to save the statute against a nondelegation challenge? Probably, but the answer is not obvious. If an intelligible principle is required, floors and ceilings may not be enough; we might also need some principle to tell us how to choose between the floor and the ceiling. As the court of appeals observed in *International Union*,<sup>135</sup> the three principles leave the agency with considerable discretion on a crucial issue, which is stringency. Suppose that the agency decided to regulate a significant risk to the maximum point, that is, the point of feasibility. Apparently that decision would satisfy the statutory requirements. By contrast, suppose that the agency decided to regulate a significant risk only slightly, to the point where it would be cut in half. Perhaps that decision would be unlawful if it allowed a significant risk to remain. But suppose that the agency decided to regulate a significant risk, not to the point of feasibility, but to the extent justified by a strict cost-benefit test. Suppose, in other words, that the agency concluded that a regulation of a significant risk was “reasonably necessary or appropriate” only if the benefits exceeded the costs. At first

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<sup>133</sup> Cf. *Lead Industries v. EPA*, 647 F.2d 1130 (DC Cir 1980) (holding that feasibility does not constrain EPA authority to issue national ambient air quality standards).

<sup>134</sup> 29 USC § 655(b)(5).

<sup>135</sup> 34 F.3d at 145.

glance, that approach would be consistent with the statute as well. It would be consistent, but not mandatory – and the fact that the agency would have discretion to choose, on its own, between “significant risk-feasibility,” or instead “significant risk-cost/benefit balancing,” might seem to doom the statute on constitutional grounds.

The best response is that this degree of discretion, while substantial, does not amount to a blank check. The three principles are sufficiently intelligible, and sufficiently constraining, to respond to the constitutional objection. To those who reject this response but want to avoid invalidation, there is a remaining option.

3. *Cost-benefit analysis*. That option would require some form of cost-benefit analysis. The basic idea would be that the statutory text mandates that kind of analysis – and that the agency is forbidden from refusing to base its decisions on some form of balancing. Under the statutory phrase, the agency cannot proceed unless it has assessed both costs and benefits, and shown that the latter justify the former.

It is easy to see the form that such a ruling might take. As the court of appeals suggested in *Industrial Union*, the statute uses the term “reasonably necessary,” and the adverb might well be taken to call for a form of balancing.<sup>136</sup> We have seen that the word “reasonably” distinguishes OSHA from the Clean Air Act provisions governing national ambient air quality standards, which use the unmodified term “requisite.” The words “or appropriate” strengthen the argument. Taken as a whole, the statutory phrase “reasonably necessary or appropriate” might well be taken to suggest a general reasonableness standard, one that requires benefits to justify costs. Courts of appeals have taken a similar approach in the context of disability discrimination, in which the phrase “reasonable accommodation” has been understood to require a plaintiff to show, not that an accommodation passes a strict cost-benefit test, but that the costs would not be disproportionate to the benefits.<sup>137</sup> In the context of OSHA, such a construction would have the additional benefit of eliminating the nondelegation problem. If courts can construe the statutory language in such a way as to avoid that problem, they should do exactly that.

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<sup>136</sup> See 998 F.2d at 1319.

<sup>137</sup> See, e.g., *Vande Zande v. Wisconsin*, 44 F3d 538 (7<sup>th</sup> Cir 1995).

The strongest objection to this construction is that the statute does not unambiguously require it, and under established doctrine, an agency is permitted to interpret statutory ambiguities as it reasonably sees fit.<sup>138</sup> The best response is that this principle is trumped by the Avoidance Canon: Agencies are not permitted to construe statutes in such a way as to raise serious constitutional objections.<sup>139</sup> Suppose that we are tempted to agree with the court of appeals that unless the Avoidance Canon is invoked, the statute is properly construed to allow the agency to choose between an approach that requires cost-benefit balancing and an approach that does not. The problem is that under this approach, the nondelegation problem would reemerge. The solution to that problem is to hold that “reasonably necessary or appropriate” requires, and does not merely permit, cost-benefit balancing. It is true, of course, that the Avoidance Canon requires some intelligible principle, and that cost-benefit balancing is only one candidate; floors and ceilings, of the kind described above, are the primary alternative.

We shall shortly see that such balancing has significant advantages. For the moment, it will be useful to see how the agency’s safety regulations fit within the universe of federal regulations protecting against mortality risks.<sup>140</sup>

**Table 1**  
Data on Cost per Statistical Life Saved

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<sup>138</sup> *Chevron v. NRDC*, 467 US 837 (1984).

<sup>139</sup> See, e.g., *Rapanos v. US*, 547 US 715 (2006); *Edward DeBartolo v. Florida Gulf Coast*, 485 US 568 (1988); *Morales-Izquierdo v. Gonzales*, 486 F3d 484 (9<sup>th</sup> Cir 2006); *Whitaker v. Thompson*, 353 F3d 947 (DC Cir 2004); *AFL-CIO v. FEC*, 333 F3d 168 (DC Cir 2003).

<sup>140</sup> This table is taken from Robert H. Hahn and Paul C. Tetlock, *The Evolving Role of Economic Analysis in Regulatory Decision Making* (2007), available at <http://www.reg-markets.org/>

<b>Regulation</b>	<b>Agency</b>	<b>Year</b>	<b>Category</b>	<b>Cost per statistical life saved (millions of 2002 \$)</b>
Electrical Safety	OSHA-S	1990	Safety	0.1
Childproof Lighters	CPSC	1993	Safety	0.1
Logging Operations	OSHA-S	1994	Safety	0.1
Respiratory Protection	OSHA-H	1998	Other	0.1
Steering Column Protection	NHTSA	1967	Safety	0.2
Unvented Space Heaters	CPSC	1980	Safety	0.2
Safety Standards for Scaffolds	OSHA-S	1996	Safety	0.2
Trihalomethanes	EPA	1979	Toxin control	0.3
Cabin Fire Protections	FAA	1985	Safety	0.3
Organ Procurement	HHS	1998	Other	0.3
AED on Large Planes	FAA	2001	Other	0.3
Food Labeling	FDA	1993	Other	0.4
Electrical Power Generation	OSHA-S	1994	Safety	0.4
Stability and Control During Breaking/Trucks	NHTSA	1995	Safety	0.4
Mammography Standards	HHS	1997	Other	0.4
Fuel System integrity	NHTSA	1975	Safety	0.5
Underground Construction	OSHA-S	1983	Safety	0.5
Passive Restraints	NHTSA	1984	Safety	0.5
Head Impact Protection	NHTSA	1995	Safety	0.7
Servicing Wheel Rims	OSHA-S	1984	Safety	0.9
Alcohol and Drug Control	FRA	1985	Safety	0.9
Reflective Devices for Heavy Trucks	NHTSA	1999	Safety	0.9
Seat Cushion Flammability	FAA	1984	Safety	1
Side Impact and Autos	NHTSA	1990	Safety	1.1
Medical Devices	FDA	1996	Other	1.1
Floor Emergency Lighting	FAA	1984	Safety	1.2
Crane Suspended Personnel Platform	OSHA-S	1984	Safety	1.5
Low-Altitude Windshear	FAA	1988	Safety	1.8
Electrical Equipment sts/Metal Mines	MSHA	1970	Safety	1.9
Traffic Alert and Collision Avoidance	FAA	1988	Safety	2.1
Trenching and Excavation	OSHA-S	1989	Safety	2.1
Side Doors	NHTSA	1970	Safety	2.2
Children's Sleepwear Flammability	CPSC	1973	Safety	2.2
Concrete and Masonry Construction	OSHA-S	1985	Safety	2.4
Confined Spaces	OSHA-S	1993	Safety	2.5
Hazard Communication	OSHA-S	1983	Safety	3.1



<b>Regulation</b>	<b>Agency</b>	<b>Year</b>	<b>Category</b>	<b>Cost per statistical life saved (millions of 2002 \$)</b>
Child Restraints	NHTSA	1999	Safety	3.3
Benzene/Fugitive Emissions	EPA	1984	Toxin control	3.7
Rear/Up/Shoulder Belts/Autos	NHTSA	1989	Safety	4.4
Tire Pressure Monitoring Systems*	DOT	2005	Safety	4.8
Asbestos	OSHA-H	1972	Toxin control	5.5
EDB Drinking Water	EPA	1991	Toxin control	6
NOX SIP Call	EPA	1998	Other	6
Occupant Crash Protection*	DOT-NHTSA	2004	Safety	6.3
Benzene/Revised Coke by Products	EPA	1988	Toxin control	6.4
Radionuclides/Uranium mines	EPA	1984	Toxin control	6.9
Roadway Worker Protection	FRA	1997	Safety	7.1
Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring*	EPA	2001	Toxin control	8.2
Grain Dust	OSHA-S	1988	Safety	11
Electrical Equipment Standards/Metal Mines	MSHA	1970	Safety	13
Methylene Chloride	OSHA-H	1997	Toxin control	13
Arsenic/Glass paint	EPA	1986	Toxin control	19
Benzene	OSHA-H	1987	Toxin control	22
Arsenic/Copper smelter	EPA	1986	Toxin control	27
Uranium Mill Tailings/Inactive	EPA	1983	Toxin control	28
Hazardous Wastes Listing for Petroleum Sludge	EPA	1990	Toxin control	29
Acrylonitrile	OSHA-H	1978	Toxin control	31
Benzene/Revised: Transfer Operations	EPA	1990	Toxin control	35
4.4 methylenedianiline	OSHA-H	1992	Toxin control	36
Nat. Primary & Secondary Drinking Water Regulations Phase II	EPA	1991	Toxin control	50
Coke Ovens	OSHA-H	1976	Toxin control	51
Uranium mill Tailings/Active	EPA	1983	Toxin control	53
Asbestos	OSHA-H	1986	Toxin control	66
Asbestos/Construction	OSHA	1994	Toxin control	71
Arsenic	OSHA-H	1978	Toxin control	77
Asbestos Ban	EPA	1989	Toxin control	78

<b>Regulation</b>	<b>Agency</b>	<b>Year</b>	<b>Category</b>	<b>Cost per statistical life saved (millions of 2002 \$)</b>
Ethylene Oxide	OSHA-H	1984	Toxin control	80
Lockout/ Tagout	OSHA-S	1989	Safety	98
Hazardous Waste Management/Wood Products	EPA	1990	Toxin control	140
DES (Cattlefeed)	FDA	1979	Toxin control	170
Benzene/Revised: Waste ops	EPA	1990	Toxin control	180
Land Disposal Restrictions	EPA	1990	Toxin control	530
Sewage Sludge Disposal	EPA	1993	Toxin control	530
Hazardous Waste: Solids Dioxin	EPA	1986	Toxin control	560
Prohibit Land Disposal	EPA	1988	Toxin control	1100
Land Disposal Restrictions/Phase II	EPA	1994	Toxin control	2600
Drinking Water: Phase II	EPA	1992	Toxin control	19000
Formaldehyde	OSHA-H	1987	Toxin control	78000
Solid Waste Disposal Facility Criteria	EPA	1991	Toxin control	100000

What is striking about the OSHA's safety rules is the variability in cost per life saved – from a low of \$100,000 (a real bargain) to a high of \$11 million (above the standard figure, within the federal government, of around \$6 million<sup>141</sup>). The fact that OSHA safety regulations are concentrated toward the lower end of the range suggests the possibility of further opportunities for life-saving regulations. To be sure, these particular figures should be taken with many grains of salt, among other things because they do not include savings short of mortalities averted. The only point is that a glimpse at the figures shows significant and apparently inexplicable variability across safety regulations. Cost-benefit analysis might well help to increase sense and coherence.

Of course any cost-benefit approach leaves some crucial questions unanswered. Hard-line enthusiasts for the nondelegation doctrine might object that those questions are so large that cost-benefit analysis, in the abstract, itself raises nondelegation concerns. What is the appropriate valuation of a statistical risk of mortality<sup>142</sup>? Should a statistical life be valued at \$1 million, \$6 million, \$10 million, or \$30 million? How should the

<sup>141</sup> See Sunstein, *supra* note.

<sup>142</sup> For relevant discussion, see Viscusi, *supra* note; Sunstein, *Valuing Life*, *supra* note.

agency value the thousands of injuries, falling short of mortality, that come from workplace accidents? Independent of the question of valuation, must the agency follow a strict cost-benefit test, in accordance with which regulations are banned if the monetary costs outweigh the monetary benefits? Or should the agency be permitted to give weight as well to distributional factors – as, for example, through a decision that a monetized cost of \$900 million justifies a monetized benefit of \$700 million, after a finding the latter would be felt by employers and their customers, whereas the latter would be felt largely by workers, given a chance to live longer and healthier lives?

To require a reasonable relationship between costs and benefits, it is not necessary for courts to answer such questions. In light of the worker-protective goals of OSHA, surely it would be legitimate and perhaps mandatory to take account of redistributive goals,<sup>143</sup> and to proceed if workers would be significantly benefited and if the costs are at least proportionate to that benefit. The agency should therefore be required to show, not that a regulation satisfies a strict cost-benefit test, but that the costs have a reasonable relationship to the benefits. If the monetized costs exceed the monetized benefits, the agency should be permitted to proceed so long as there is such a relationship between the two. Recall that even if a safety regulation fails a cost-benefit test by standard measures, it might produce welfare benefits on net. We have seen that those standard measures involve “willingness to pay,”<sup>144</sup> and they are only a crude measure of welfare effects.<sup>145</sup> The agency could well decide that a rule would have desirable welfare effects even if the monetized benefits were lower than the monetized costs.

To be sure, authority to consider distributive goals increases the discretion given to the agency; but so long as the benefits and costs must be shown to be proportional, the constitutional problem is not serious. I have emphasized that a cost-benefit approach to workplace safety regulations would raise many questions, but one of the advantages of that approach is that it would force the agency to ask and answer those questions in public. In addition, a proportionality test would have the advantage of fitting plausibly

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<sup>143</sup> On some of the complexities here, see Rose-Ackerman, *supra* note. As I have noted, it is incorrect to proceed as if an occupational safety standard automatically transfers resources from employers to employees. In all probability, employees will themselves bear some of the relevant costs, as for example through decreased wages and fewer employment opportunities. For illuminating discussion, see Christine Jolls, *Accommodation Mandates*, 53 *Stan. L. Rev.* 223 (2000).

<sup>144</sup> See Viscusi, *supra* note; Adler and Posner, *supra* note.

<sup>145</sup> See Adler and Posner, *supra* note.

well with the agency's own practice, both in terms of its conclusions and its standard rationale.<sup>146</sup> We have seen that the agency typically strives to give some accounting of both costs and benefits – and that in general, a reasonable relationship seems to exist between the two. The problem is that without the pressure of legal constraint, the agency's inquiry into costs and benefits is ad hoc and undisciplined, and produces some of the variability captured in Table 1. A cost-benefit construction, of the sort suggested here, would ensure greater transparency and regularity. It would also have the advantage of promoting greater clarity and monitoring of agency discretion – of increasing the likelihood that when the agency chooses one degree of stringency rather than another, its judgment can be scrutinized in public.

**C. Of narrowing constructions and subsidiary policymaking: a puzzle and a clarification**

There is a final puzzle, and it raises a large issue with respect to the relationship between courts and the administrative state. That issue involves the status of narrowing constructions, designed to avoid nondelegation challenges by construing agency discretion to be narrow rather than broad.<sup>147</sup> Such narrowing constructions are not uncommon,<sup>148</sup> and I have suggested that the cost-benefit approach is best justified as an example. But the whole approach raises a serious question. The problem, in sum, is that if, as *American Trucking* teaches, agencies are not permitted to rescue open-ended delegations through subsidiary policymaking in the guise of interpretation, courts should not be permitted to do so either.<sup>149</sup> The question therefore arises: What is the status of the Avoidance Canon, in the specific context of a nondelegation challenge, in the aftermath of *American Trucking*?

At first glance, nothing in *American Trucking* should endanger the use of the Avoidance Canon. The Court's suggestion was merely that if a statute does confer open-ended authority on an agency, the agency cannot eliminate that problem by deciding how

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<sup>146</sup> See *supra*.

<sup>147</sup> For an illuminating and detailed treatment, see John Manning, *The Nondelegation Doctrine As A Canon of Avoidance*, 2000 Supreme Court Review 223 (2000).

<sup>148</sup> This approach has been followed in many cases. See, e.g., *Amalgamated Meat Cutters v. Connally*, 337 F. Supp 737, 748 (DDC 1971).

<sup>149</sup> See Manning, *supra* note.

much discretion to exercise. “The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.”<sup>150</sup> The new nondelegation doctrine, repudiated by *American Trucking*, asked agencies to develop “subsidiary policy” by which to discipline their discretion under open-ended statutes. The reason is that the development of subsidiary policy counts as an exercise of discretion. It is not “interpretation.”

If *American Trucking* is understood in this way, it certainly suggests that courts cannot rescue a statute from a nondelegation challenge if they are themselves making subsidiary policy. But when a court is legitimately selecting an interpretation that narrows agency discretion, it is not really making subsidiary policy, certainly not in the sense that the court of appeals deemed sufficient, and the Supreme Court irrelevant, in *American Trucking*. Instead a court that properly uses the Avoidance Canon is relying on standard legal materials to hold that of two or more plausible interpretations of a text, the agency is bound by the one that gives it limited rather than open-ended authority. An approach of this kind would not be legitimate if the standard legal materials left both court and agency at sea – if the narrower interpretation does not qualify as an interpretation at all. But if courts can fairly insist on that interpretation, as a reasonable way of coming to terms with what Congress has actually said, *American Trucking* creates no obstacle.

Here, then, is a possible problem with the approaches I have outlined. Suppose that the relevant interpretation is really an exercise in policymaking – that courts are choosing an intelligible principle not on the basis of anything that Congress has done, but as a means of implementing what judges see as the best way to come to terms with a difficult problem. Under *American Trucking*, the “floors and ceilings” approach, and the cost-benefit approach, would not cure the nondelegation problem if they amounted to judicial policymaking. But I have argued that on the basis of the standard legal materials, both approaches are legitimate readings of the legal materials in light of the Avoidance

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<sup>150</sup> *American Trucking*, 531 US at 472.

Canon. If this argument is correct, then judicial insistence on one or another should not be taken as running afoul of the Court's rejection of the new nondelegation doctrine.

## **Conclusion**

My goal here has been to explore the meaning and validity of the principal provision governing occupational safety standards in the United States. Remarkably, Congress' sole guidance has been to tell the Secretary of Labor to do whatever is "reasonably necessary or appropriate" to provide safe and healthful places of employment. The leading court of appeals decision upholds this provision on the ground that the agency has developed subsidiary policy by which to limit its own discretion. After *American Trucking*, however, this route is unavailable.

In these circumstances, courts have three options. The most aggressive is to invalidate the statute on constitutional grounds. Notwithstanding its disruptive potential, this route does not entirely lack appeal. Congress should be expected to do much better than to instruct the Secretary of Labor to do what he deems "reasonably necessary or appropriate." Invalidation of the statute might well have a democracy-forcing function, one that would spur a degree of national deliberation about how best to protect American workers from hazards faced in the workplace. Such deliberation could well produce a greatly improved statute, one that would benefit from a great deal of theoretical and empirical work since OSHA was first enacted.<sup>151</sup> And however aggressive, this approach would be less radical than it might seem. No other federal regulatory statute confers so much discretion on federal administrators, at least in any area of such scope, and it is not difficult to distinguish OSHA from statutes that the Court has upheld.

The least aggressive option, grounded in the Avoidance Canon, is to parse the statutory language to create floors and ceilings on agency action. The central argument here is that the agency may not regulate trivial risks (as held in *American Petroleum*); must not ignore significant risks; and may not regulate beyond the point of feasibility. Thus interpreted, is OSHA unconstitutional? The question is not entirely easy to answer. On the one hand, the agency would have a limited band of operation; the floors and ceilings would reduce its room to maneuver. And if this interpretation were taken to ban

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<sup>151</sup> See notes supra.

the agency from making its decisions on the basis of cost-benefit analysis, then the problem would be close enough to that in *American Trucking*. The problem is that at a minimum, the “reasonably necessary or appropriate” language seems to permit the agency to base its decisions on cost-benefit analysis if that is what it seeks to do. The question then becomes: If the agency is given the discretion to choose between (a) cost-benefit analysis or (b) an approach based on significant risk/feasibility, is there a violation of the nondelegation doctrine? Probably not, but reasonable people might disagree about how to answer that question.

The third possibility, also grounded in the Avoidance Canon, would be to construe the statute to require some kind of cost-benefit balancing, rooted in a minimal requirement of proportionality between costs and benefits. This approach would permit the Secretary of Labor to decide exactly what cost-benefit analysis entails in the distinctive context of occupational safety – to assign values to mortality and morbidity effects and to give significant weight to considerations of equity and fair distribution. From a strictly doctrinal point of view, an evident advantage of this approach is that it would fit well with the statutory language while also eliminating the constitutional problem. And from the standpoint of sound policy, a proportionality requirement would also have the virtue of increasing the transparency of occupational safety law -- by ensuring, for the first time, that the key choices are explained in a way that is subject to public scrutiny and review.<sup>152</sup>

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<sup>152</sup> For those who believe that cost-benefit analysis undermines transparency, of course this argument will not be convincing. See Lisa Heinzerling and Frank Ackerman, *Priceless* (2004); for a different view, see Cass R. Sunstein, *Risk and Reason* (2002).

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