IT ALL STARTED WITH BENZENE

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ABSTRACT

The foundations of modern administrative law were laid in 1980, with the disparate opinions of a sharply divided Court in Industrial Union Department, AFL-CIO v. American Petroleum Institute *(commonly referred to as the "Benzene Case"). Consider four points. (1) The Benzene Case is now understood to be the first contemporary appearance of the Major Questions Doctrine. (2) The Benzene Case marked the return of the nondelegation doctrine, signaled most plainly by then-Justice William Rehnquist's elaborate concurring opinion but also by a favorable reference in the plurality opinion by Justice John Paul Stevens and an open-minded sentence from Justice Lewis Powell. (3) The Benzene Case is the origin of contemporary cost-benefit default principles, permitting or requiring agencies to exempt* de minimis *risks, to consider costs, and to engage in some form of cost-benefit balancing, unless Congress has squarely said otherwise. (4) The Benzene Case essentially defined "significant risk," with a precise numerical definition (one in one thousand) that persists at the Department of Labor to this day. At the same time, a close analysis of the plurality opinion in the Benzene Case shows that it is best understood as a specification, above all, of the Absurdity Canon—a* Church of the Holy Trinity v. United States *for the modern administrative state—with the specific purpose of ensuring against the imposition of high costs for small benefits, and thus of requiring a kind of proportionality between costs and benefits. So understood, the Benzene Case had, and continues to have, an important and salutary effect on regulatory programs. Its significant and much broader current role, more than four decades after the opinions were issued, is an intriguing case study in doctrinal development, and in particular, how Supreme Court decisions can plant small seeds that become big trees.*

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I. INTRODUCTION: SEEDS INTO TREES

Was modern administrative law born in 1980? Did it spring from the disparate opinions of a sharply divided Court in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*[1] (often referred to as the "Benzene Case")? Did Chief Justice Warren Burger and Justices William Brennan, Potter Stewart, Byron White, Thurgood Marshall, Harry Blackmun, Lewis Powell, William Rehnquist, and John Paul Stevens—all now deceased—establish the foundations of administrative law as it stands today?

One could make the argument. Consider four points.

(1) The Benzene Case uses and adapts a specification of the Absurdity Canon to the particular setting of the administrative state.[2] In brief, the specification requires the benefits of regulation to justify the costs of regulation. The Benzene Case can even be seen as a *Church of the Holy Trinity v. United States*[3] for the modern era, particularly designed for a period of pervasive national regulation involving safety, health, and the environment. So understood, the Benzene Case launched a thousand ships.[4]

(2) The Benzene Case marks the return of the nondelegation doctrine, signaled most plainly by Justice William Rehnquist's elaborate and somewhat shocking concurring opinion,[5] but also by a favorable and also somewhat shocking reference in the plurality opinion by Justice John Paul Stevens.[6]

(3) The Benzene Case is now understood to be the first appearance of the

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1. 448 U.S. 607 (1980) (plurality opinion) (ruling that the Occupational Health and Safety Act did not provide the Occupational Safety and Health Administration (OSHA) the authority to lower the threshold for allowable parts-per-million of benzene in the workplace without showing a significant risk).

2. *See generally* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

3. 143 U.S. 457 (1892) (holding that it is appropriate for a court to look to the policy intention of the legislature to avoid absurdity).

4. For the largest of the vessels, see *Michigan v. EPA*, 576 U.S. 743 (2015) (holding that the Environmental Protection Agency (EPA) is required to consider costs when determining whether a regulation is "appropriate and necessary").

5. 448 U.S. at 673 (Rehnquist, J., concurring).

6. *Id.* at 646.

Major Questions Doctrine,[7] requiring explicit congressional authorization for certain kinds of agency action best described as "transformative"[8] or "staggering."[9]

(4) The Benzene Case is the origin of contemporary cost-benefit default principles, permitting and even requiring agencies to exempt *de minimis* risks, to consider costs, and to engage in some form of cost-benefit balancing unless Congress has explicitly said otherwise.[10]

(5) The Benzene Case essentially defined "significant risk,"[11] with a definition that persists at the agency level to this day.[12]

My goal in this Essay is to develop each of these points, with close reference to the plurality opinion. My major emphasis is on (1), (4), and (5) above: by calling for a demonstration that risks are "significant," and by strongly signaling the need to balance benefits against costs, the Benzene Case was a

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7. For subsequent uses of the doctrine, see for example *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). The Benzene Case is singled out in both *Utility Air* and in Justice Gorsuch's elaborate concurring opinion in *West Virginia*. *See Util. Air Regul. Grp.*, 573 U.S. at 324; *West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring). Justice Barrett also points to the decision. *See Nebrask*a, 143 S. Ct. at 2381 (Barrett, J., concurring). In this light, it seems fair to say that the Benzene Case is broadly recognized as the contemporary foundation of the Major Questions Doctrine. As we will see, that is not an accurate reading of what the plurality said and did, but for now, let us not be fussy.

8. *Util. Air Regul. Grp.*, 573 U.S. at 324.

9. *Nebraska*, 143 S. Ct. at 2373.

10. *See* Michigan v. U.S. Env't Prot. Agency, 576 U.S. 743 (2015); *see also* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009). For an early catalog, see Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651 (2001).

11. Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 655 (1980) ("On the other hand, if the odds are one in a thousand that regular inhalation of gasoline vapors that are 2% benzene will be fatal, a reasonable person might well consider the risk significant and take appropriate steps to decrease or eliminate it.").

12. *See* Occupational Exposure to Beryllium, 82 Fed. Reg. 2470, 2474 (Jan. 9, 2017) (codified at 29 C.F.R. pts. 1910, 1915, 1926).

> Following Benzene, OSHA has, in many of its health standards, considered the one-in-a-thousand metric when determining whether a significant risk exists. Moreover, as "a prerequisite to more stringent regulation" in all subsequent health standards, OSHA has, consistent with the Benzene plurality decision, based each standard on a finding of significant risk at the "then prevailing standard" of exposure to the relevant hazardous substance.

Id. (citing Bldg. & Constr. Trades Dep't v. Brock, 838 F.2d 1258, 1263 (D.C. Cir. 1988)). For lower court cases, see *N. Am.'s Bldg. Trades Unions v. OSHA*, 878 F.3d 271, 282 (D.C. Cir. 2017); *Nat'l Mar. Safety Ass'n v. OSHA*, 649 F.3d 743, 750 (D.C. Cir. 2011).

defining moment in the rise of the Cost-Benefit State.[13] But it must be emphasized that the decision has done much more; contemporary administrative law owes a great deal to it. The Benzene Case planted numerous seeds. They are now trees.

II. "REASONABLY NECESSARY OR APPROPRIATE"

Two statutory provisions were at issue in the Benzene Case. The first is the definition of an "occupational safety and health standard."[14] That provision states: "The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[15]

Suppose that this provision was the *only* substantive one in the Act. What does it mean? An obvious puzzle is that a definitional clause need not be taken to include substantive criteria. It defines what a term means, but it is not the usual place to find restrictions on agency authority. In the case of the Occupational Safety and Health Administration (OSHA), however, it is the only port in a storm outside the context of toxic substances.[16] No other provision of the statute offers relevant criteria for the agency to follow.

One possibility, and perhaps the most natural, is that the definitional provision contemplates some form of cost-benefit balancing.[17] The words "*reasonably* necessary"[18] are plausibly taken to do that: "[N]ecessary" signals that there has to be some problem of safety to which the agency must respond, while "reasonably" connotes some form of balancing.[19] If the only language were "reasonably necessary to provide safe or healthful employment," it might be understood to favor cost-benefit balancing.[20] The words "or

13. *See* CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2003).

14. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 612.

15. 29 U.S.C. § 652(8).

16. Int'l Union, UAW v. OSHA (*UAW II*), 37 F.3d 665, 668 (D.C. Cir. 1994).

17. *See Indus. Union Dep't, AFL–CIO*, 448 U.S. at 672 (Rehnquist, J., concurring).

18. 29 U.S.C. § 652(8) (emphasis added).

19. This view is strongly supported by *Michigan v. EPA*, 576 U.S. 743 (2016). Consider the Court's words: "Read naturally in the present context, the phrase 'appropriate and necessary' requires at least some attention to cost. One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Id.* at 752. The phrase "appropriate and necessary" is, of course, very close to "reasonably necessary or appropriate."

20. *UAW II*, 37 F.3d at 668.

appropriate" can be seen to make that interpretation easier rather than harder. The term "appropriate" might well be taken to suggest some form of balancing.[21] Whether a regulation is "appropriate" depends on its costs and benefits.[22]

At the same time, the cost-benefit interpretation of the clause is hardly unavoidable. Some statutes explicitly refer to consideration of costs and benefits,[23] but the term "reasonably necessary or appropriate" is abstract and does not explicitly do that. Because it does not, some interpreters might insist that it is important to pause before accepting the view that it does so implicitly.

A second possibility is that the relevant words signal a simple requirement: a standard must address a *significant* risk to safety and health in the workplace.[24] If a standard would reduce a nonexistent risk, it would not be "reasonably necessary or appropriate," and so too if it would address a trivial or *de minimis* risk.[25] In this view, there is no need to engage in cost-benefit balancing.[26] What is required is identification of a significant risk so that the Secretary is acting in a way that responds to the reason that the Act was enacted in the first instance: to protect occupational safety and health.[27] This is the view that the plurality embraced in the Benzene Case.[28]

A third view is that the phrase "reasonably necessary or appropriate," especially in a definitional clause, is essentially an open-ended grant of discretion.[29] It could mean anything at all. Its meaning lies in the eye of the beholder. Therefore, it is a blank check to the Secretary of Labor. If there is a nondelegation doctrine,[30] the definitional clause violates it.[31] That is Justice Rehnquist's view in the case.[32] What is remarkable, and not much noticed,

21. *See id.* (signaling this possibility).

22. The Court so acknowledged not long after the Benzene Case: "Taken alone, the phrase 'reasonably necessary or appropriate' might be construed to contemplate some balancing of the costs and benefits of a standard." Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 512 (1981).

23. *See, e.g.*, Safe Drinking Water Act, Pub. L. 93–523, 88 Stat. 1660 § 1412 (1996).

24. *See* Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 614–15 (1980) (plurality opinion).

25. *Id.* at 615.

26. *Id.*

27. *Id.* at 639–40.

28. *Id.* at 614–15.

29. *See id.* at 675 (Rehnquist, J., concurring).

30. I do not engage that question here. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

31. *See Indus. Union Dep't, AFL–CIO*, 448 U.S. at 675.

32. *Id.* at 675 (Rehnquist, J., concurring).

is that Justice Rehnquist raised the nondelegation objection *entirely on his own*.[33] The issue was not briefed or argued. Not used to invalidate a statute since 1935,[34] and never used to invalidate a statute before that year, the nondelegation doctrine was widely regarded as a kind of dinosaur, which is undoubtedly one reason that no one in the case raised it.[35]

Which view is best? The Avoidance Canon[36] suggests that the third view should be rejected if it is possible to do so.[37] The Court ought not to lightly strike down an act of Congress. Cost-benefit balancing would not violate the nondelegation doctrine;[38] the same is true of a requirement that the Secretary identify a significant risk.[39] But it cannot be said that the phrase "reasonably necessary or appropriate" clearly makes a choice between the two options. Perhaps the best approach would be to invoke *Chevron U.S.A., Inc. v. Natural Defense Council, Inc.*,[40] and thus to allow the Secretary to choose between the two interpretations. Or perhaps the best approach would be to invoke *Michigan v. Environmental Protection Agency*;[41] that agencies should be required to consider costs unless Congress has squarely forbidden them from doing so. On reflection, that is indeed the best approach. A cost-blind approach would not be reasonable, and Congress should not be taken to have forbidden reasonableness or even to have permitted unreasonableness.[42] Thus far, the

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33. *See id.* at 673.

34. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

35. For an influential, brief discussion, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1983), cited by Justice Rehnquist in the Benzene Case. *See* Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring).

36. *See* John Manning, *The Nondelegation Canon as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (2000). *See* Weiss v. United States, 510 U.S. 163, 170 n.5 (1994); Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).

37. *See* Gundy v. United States, 588 U.S. 128 (2019); Kent v. Dulles, 357 U.S. 116 (1958).

38. *See* Michigan v. EPA, 576 U.S. 743 (2015).

39. This is the clear implication of the Benzene Case itself. Note, however, that on one view, the term "significant risk," taken by itself, is too open-ended. That view is not consistent with existing law. *See generally Gundy*, 558 U.S. 128. But we can fairly ask whether Justice Gorsuch—and those who agree with him—would find the question so easy. *See id.* at 2135–43.

40. 467 U.S. 837 (1984).

41. *Michigan*, 576 U.S. 743.

42. *See id.* at 753. Some support for this idea might come from HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–78 (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994) [hereinafter HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW] and in particular the suggestion that in construing statutes, the court

appropriate interpretation of "reasonably necessary or appropriate" is that the agency must show that the benefits of occupational safety and health standards justify the costs. To be sure, that idea leaves many questions open. But it provides a legally acceptable framework within which the agency must operate.

Let us notice, however, that there is a problem with using the Avoidance Canon to avoid a nondelegation problem.[43] If a *court* chooses the interpretation that avoids that problem, how, exactly, is *that* problem avoided? It is one thing to say that a court should choose an interpretation that avoids a free speech problem. By hypothesis, the relevant choice simply avoids that problem. But a nondelegation problem exists when and because Congress has failed to make relevant policy choices.[44] If it is a court that is making such choices, the nondelegation problem would not be avoided at all.[45]

The best response must be that the court is not really making such choices. Instead, it fairly interprets congressional instructions.[46] If Congress uses the phrase "reasonably necessary or appropriate," the choice of cost-benefit balancing, as the preferred interpretation, is not one of judge-made policy; it is the best understanding of that phrase, taken in context. Here, then, is where we are. Standing by itself, the "reasonably necessary or appropriate" clause requires a form of cost-benefit balancing, though it could also be understood to require the agency to show a "significant risk." In the Benzene Case, Justice Powell was the only one to press this point.[47] Let us now see why.

III. "NO EMPLOYEE WILL SUFFER"

Where toxic materials or harmful physical agents are concerned, a standard must also comply with § 6(b)(5),[48] which provides:

> 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

"should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably." *Id.* at 1378.

43. *See* Manning, *supra* note 2.

44. *See* Gundy v. United States, 588 U.S. 128, 167–69 (2019) (Gorsuch, J., dissenting).

45. *Compare id.* at 2135 (Gorsuch, J., dissenting), with *Chevron*, 467 U.S. at 865.

46. *See Gundy*, 588 U.S. at 135–36.

47. Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 667 (1980) (Powell, J., concurring) ("An occupational health standard is neither 'reasonably necessary' nor 'feasible,' as required by statute, if it calls for expenditures wholly disproportionate to the expected health and safety benefits.").

48. 29 U.S.C. § 655(b)(5).

> exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws.[49]

That is a mouthful. What does it mean? We know that insofar as we are dealing with toxic materials or harmful physical agents, the standard must be imposed "to the extent feasible."[50] That means that it cannot be beyond the point that is feasible and also that it cannot fall short of what is feasible. But what counts as feasible?[51] In one view, feasibility is only a matter of technology.[52] If employers lack the technology that would do what the standard requires, they cannot comply with it and cannot be directed to comply with it. But that proposition raises questions of its own. Insofar as we are dealing with technological feasibility, is there a kind of off-on switch? Some technologies do not exist, but they can be made to exist for the right price. Some technologies exist, but they are exceedingly expensive. Are they feasible or not?[53] A judgment about technological feasibility is not simply one of fact. It requires a major judgment, or a series of major judgments, of policy.[54]

We might also think that "to the extent feasible" refers not only to technological feasibility but also to economic feasibility.[55] Suppose that employers have access to the relevant technology to reduce risk (it is readily available) but that the technology costs too much for them to bear. They can no

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49. *Id.* (emphasis added).

50. *Id.*

51. *See* Note, *OSHA's Feasibility Policy: The Implications of the "Infeasibility" of Respirators*, 129 HARV. L. REV. 2235 (2016).

52. *Id.* at 2238.

53. *See id.* at 2236–40.

54. In OSHA's view, "[a] standard is technologically feasible if the protective measures it requires already exist, can be brought into existence with available technology, or can be created with technology that can reasonably be expected to be developed." Occupational Exposure to Methylene Chloride, 62 Fed. Reg. 1494, 1496 (Jan. 10, 1997) (codified at 29 C.F.R. pts. 1910, 1915 & 1926) (citing Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 513 (1981)). OSHA has also defined technological feasibility as what is achievable using work practice or engineering controls that are "commonly known, readily available and . . . currently used to some extent in the affected industries and processes." Occupational Exposure to Hexavalent Chromium, 71 Fed. Reg. 10,100, 10,256 (Feb. 28, 2006) (codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918 & 1926).

55. *See* Note, *OSHA's Feasibility Policy*, *supra* note 51, at 2238–39. For valuable discussion, see Eric Posner & Jonathan Masur, *Against Feasibility Analysis*, 77 U. CHI. L. REV. 657 (2010).

longer stay in business.[56] It stands to reason that the standard is not "feasible." Even if so, the underlying idea is both abstract and vague: What is meant by the claim that for "employers," the cost is "too much to bear"? To make sense of that idea, it would have to be specified. What if the cost can be borne by most employers but not all? What if the cost can be borne by eighty percent of employers? Seventy percent? Sixty percent? What if the cost can be borne in the technical sense that employers can stay in business but with a significant reduction in profits (and perhaps a need to scale back operations and thus reduce employment)? Let us bracket these questions for now[57] and simply note that, as with technological feasibility, the idea of economic feasibility requires major judgments of policy, not simply of fact.

Thus far, the words "to the extent feasible" are naturally read to refer to technological and economic feasibility. On an alternative interpretation, "feasible" can be taken to mean something altogether different: *justified by reference to an analysis of costs and benefits*.[58] In that view, "to the extent feasible" means to the extent desirable after assessing its likely effects, both good and bad. Justice Powell favored that interpretation,[59] and Justice Rehnquist thought it was a reasonable candidate.[60] But there are two problems with that interpretation of "to the extent feasible."

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56. One court has said that a standard is economically feasible "if it does not threaten 'massive dislocation' to, or imperil the existence of the industry." United Steelworkers of Am., AFL-CIO v. Marshall, 647 F.2d 1189, 1265 (D.C. Cir. 1980).

57. *See* Note, *OSHA's Feasibility Policy*, *supra* note 51, at 2241 (noting that OSHA has a general threshold policy: if the costs of maintaining a permissible exposure level are (1) less than 1% of revenues and (2) less than 10% of profits, then OSHA will presume that the PEL is economically feasible). Occupational Exposure to Respirable Crystalline Silica, 81 Fed. Reg. 16,286, 16,292 (Mar. 25, 2016) (codified at 29 C.F.R. pts. 1910, 1915 & 1926).

58. *See* Michigan v. EPA, 576 U.S. 743, 752 (2016).

59. Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 667 (1980) (Powell, J., concurring) ("I conclude that the statute also requires the agency to determine that the economic effects of its standard bear a reasonable relationship to the expected benefits.").

60. *Id.* at 672 (Rehnquist, J., concurring).

> In considering these alternative interpretations, my colleagues manifest a good deal of uncertainty . . . [t]his uncertainty, I would suggest, is eminently justified, since I believe that this litigation presents the court with [the question of] whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths.

Id.

The first is that it strains ordinary meaning.[61] If someone is asked to do something "to the extent feasible," they are usually being directed to do it if they possibly *can*, not if they think they should, all things considered. "Feasible" is more naturally taken to mean "possible" or "practicable," rather than justified on the basis of cost-benefit balancing.[62] The second problem, and an even more formidable one, is the rest of the statutory phrase: "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."[63]

Pause over the italicized words.[64] Suppose that a regulation would cost $900 million and prevent twenty deaths. Because statistical lives are valued at about $12 million,[65] the regulation would not survive cost-benefit balancing. But if an agency declines to issue that regulation on that ground, it would not "most adequately assure[] . . . that no employee will suffer material impairment of health."[66] The "no employee will suffer" language seems flatly to preclude an interpretation of "feasible" that would entail cost-benefit balancing.

A textualist might, therefore, settle on the following view: standards must be technologically and economically feasible—no more and also no less. Within that constraint, they must be maximally protective; they must ensure that no employee is killed or (seriously or materially) hurt. That was Justice Thurgood Marshall's view in the Benzene Case.[67] But is that interpretation mandatory?

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61. *See* Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 508–09 (1981) ("The plain meaning of the word 'feasible' supports respondents' interpretation of the statute. According to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 831 (1976), 'feasible' means 'capable of being done, executed, or effected.'").

62. *Id.*

63. 29 U.S.C. § 655(b)(5) (emphasis added).

64. The Court saw the point in Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 513 (1981):

> Agreement with petitioners' argument that § 3(8) imposes an additional and overriding requirement of cost-benefit analysis on the issuance of § 6(b)(5) standards would eviscerate the "to the extent feasible" requirement. Standards would inevitably be set at the level indicated by cost-benefit analysis, and not at the level specified by § 6(b)(5). . . . We cannot believe that Congress intended the general terms of § 3(8) to countermand the specific feasibility requirement of § 6(b)(5). Adoption of petitioners' interpretation would effectively write § 6(b)(5) out of the Act.

65. *See Departmental Guidance on Valuation of a Statistical Life*, U.S. DEP'T OF TRANSP. (Mar. 23, 2021), https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis.

66. 29 U.S.C. § 655(b)(5).

67. Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 719 (1980) (Marshall, J., dissenting).

Within the bounds of the provision we are now discussing, the simplest answer is yes. A textualist would greatly struggle to avoid that answer.[68] One option would be to invoke the Absurdity Canon. Suppose that a standard would cost $900 million annually and prevent one death annually. Does the Act require the agency to issue that standard? A court might think that Congress could not possibly have meant to mandate that outcome. At the very least, Congress would have to express itself unambiguously if that is the outcome it sought to require. To be sure, the words "no employee will suffer" might be taken to be unambiguous. But perhaps they are best taken as expressive or precatory—a suggestion of the importance of prioritizing health and safety, rather than as a serious directive that the Secretary must ensure against a "material impairment" on the part of even a single employee. A textualist should be nervous here; "no employee will suffer" is not exactly ambiguous.

IV. CANONS

What if we take the two provisions together? Consider two alternatives.

The first is to insist that the specific provision involving toxic substances trumps the more general, which is also, after all, a (mere) definitional one.[69] In that view, the "reasonably necessary or appropriate" language may or may not call for cost-benefit balancing, but it cannot possibly overcome or trump the "no employee will suffer"[70] language. Whatever the meaning of the definitional provision, it is essentially irrelevant. Everything depends on the more specific one. This, too, was Justice Marshall's view,[71] and a majority of the Court accepted it in 1981.[72]

The second is to insist that the "reasonably necessary or appropriate" language establishes a threshold requirement that all standards must meet. Whether it requires cost-benefit balancing or a significant risk, what it requires must be met *first* before the "no employee will suffer" language becomes relevant. Whether we are dealing with ladders, elevators, or toxic substances, an occupational safety and health standard must always be "reasonably necessary or appropriate." The additional level of stringency for toxic substances *follows* a demonstration to that effect. This was the plurality's view in the Benzene Case.[73]

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68. *See id.* at 688 (Marshall, J., dissenting) ("In cases of statutory construction, this Court's authority is limited. If the statutory language and legislative intent are plain, the judicial inquiry is at an end.").

69. This is the thrust of *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 514–15 (1981).

70. 29 U.S.C. § 655(b)(5).

71. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 709 (Marshall, J., dissenting).

72. *Am. Textile Mfrs. Inst., Inc.*, 452 U.S. 490.

73. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 614–15 (plurality opinion) ("[Section] 3(8)

Under ordinary principles of interpretation, the first alternative is clearly better. A definitional clause is not properly taken to contain a substantive standard that trumps a more specific provision geared to a particular set of problems. For this reason, the committed textualist would be strongly drawn to the first alternative. Here again, the most plausible response would invoke the Absurdity Canon, or perhaps a broader Reasonableness Canon, seeing legislators as reasonable people acting reasonably.[74] The idea would be that if it is fairly possible, courts should interpret statutes to make sense, and an interpretation that gives priority to the "reasonably necessary or appropriate" language makes sense.

In the Benzene Case itself, the plurality offered two different arguments in favor of the "significant risk" requirement, notwithstanding its evident tension with the "no employee will suffer" language, which the plurality entirely ignored.[75] The first argument is worth quoting at length:

> In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view of §§ 3(8) and 6(b)(5), coupled with OSHA's cancer policy. Expert testimony that a substance is probably a human carcinogen—either because it has caused cancer in animals or because individuals have contracted cancer following extremely high exposures—would justify the conclusion that the substance poses some risk of serious harm no matter how minute the exposure and no matter how many experts testified that they regarded the risk as insignificant. That conclusion would in turn justify pervasive regulation limited only by the constraint of feasibility. In light of the fact that there are literally thousands of substances used in the workplace that have been identified as carcinogens or suspect carcinogens, the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit.[76]

What kind of argument is this? It seems to be something like the Absurdity Canon or, again, a broader Reasonableness Canon.[77] The plurality does not want to attribute to the national legislature an intention that it would be

requires the Secretary to find, as a threshold matter, that the toxic substance in question poses a significant health risk in the workplace and that a new, lower standard is therefore 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'").

74. *See* Manning, *supra* note 2; HENRY M. HART & ALBERT SACKS, THE LEGAL PROCESS (1951). Indeed, we can easily see the plurality as having followed Hart and Sacks—and the idea that courts should assume that legislators are reasonable people acting reasonably—as applied to regulatory statutes that seem absolute or draconian.

75. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 611–62 (plurality opinion).

76. *Id.* at 645.

77. *See generally* HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, *supra* note 42.

"unreasonable to assume."[78] That unreasonable intention (and this may well be the key sentence in the entire opinion) would be "to impose enormous costs that might produce little, if any, discernible benefit."[79] Notwithstanding that iconic phrase, it is important to be careful here; the plurality did *not* rule that the agency had to show some kind of cost-benefit justification.[80] Its narrower conclusion is that the agency must show a significant risk. But with that requirement in place, at least it can be said that if enormous costs are being imposed, it is not for "little, if any, discernible benefit."[81]

It should be emphasized that the plurality's argument, as stated, has nothing at all to do with the actual statutory language. It seems to be a clear statement principle meant to avoid absurdity: if Congress wants to authorize agencies to impose enormous costs for little or no benefit, it must do so expressly.

Here is an alternative way of supporting what the Court is saying here. Consider this footnote from twentieth-century Austrian philosopher Ludwig Wittgenstein: "Someone says to me: 'Shew the children a game.' I teach them gaming with dice, and the other says 'I didn't mean that sort of game.' Must the exclusion of the game with dice have come before his mind when he gave me the order?"[82]

The answer to Wittgenstein's question is "no." If someone asks me to show a "game" to children, gambling is ordinarily not included in the category of "game," even though it is technically a game. The same is true of Russian roulette, spin-the-bottle, and boxing. If someone asks me to make a dinner reservation or to find a place for a vacation over the holiday, a wild,

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78. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 645.

79. *Id.*

80. *Id.* at 655 ("The requirement that a 'significant risk' be identified is not a mathematical straitjacket . . . the Agency has no duty to calculate the exact probability of harm."). Actually, the Court bracketed that question. In 1981, it ruled that the statute forbids cost-benefit balancing. Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981). Note the intriguingly revisionist reading in *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009):

> In *American Textile*, the Court relied in part on a statute's failure to mention cost-benefit analysis in holding that the relevant agency was not required to engage in cost-benefit analysis in setting certain health and safety standards. But under *Chevron*, that an agency is not *required* to do so does not mean that an agency is not *permitted* to do so.

Id. at 223 (first citing *Am. Textile*, 452 U.S. at 510–512; and then Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)). Contrary to this suggestion, *American Textile* was not a *Chevron* case (unsurprisingly, because it preceded *Chevron* by three years); it squarely held that the agency is not *permitted* to make cost-benefit analysis the rule of decision.

81. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 645.

82. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 33 (G.E.M. Anscombe trans., 3d ed. 1967).

absurd, or palpably unreasonable understanding requires strong contextual justification.[83] "I didn't mean that sort of restaurant!" or "I didn't mean that sort of vacation place!"—in ordinary conversation, people anticipate that response, and they do not make choices that would elicit it.

Applied to the Benzene Case, the basic idea would be that if Congress has used an ambiguous term, akin to "game," it should not be taken to have done something unlikely, extraordinary, bizarre, or evidently unreasonable.[84] To be sure, and importantly, the "no employee will suffer" language is not an ambiguous term, akin to "game."[85] But an understanding of that language to require massive expenditures for small gains might well be thought likely to evoke this kind of reaction from Congress: "We did not mean that sort of game." Textualists might well be Wittgensteinians; in fact, they ought to be.[86] To be sure, the Benzene Case was not simple on this count, again, because the phrase "no employee will suffer" does not seem ambiguous.[87] Whether textualists should understand that phrase as expressive or precatory, or instead as fixed and firm, is a legitimate question. But the plurality's answer is simple: The phrase cannot possibly be taken to mean what it appears to say.

The plurality also offered a second and quite different argument:

> If the Government was correct in arguing that neither § 3(8) nor § 6(b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the

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83. This is a version of the argument made by Justice Barrett in *Biden v. Nebraska*, 143 S. Ct. 2355, 2381 (2023) (Barrett, J., concurring). It is worth quoting her, not least because of the last case she cites:

> [A]n interpreter should "typically greet" an agency's claim to "extravagant statutory power" with at least some "measure of skepticism." *Utility Air*, 573 U.S., at 324. That skepticism is neither "made-up" nor "new." *Post*, at 2397, 2399–400 (Kagan, J., dissenting). On the contrary, it appears in a line of decisions spanning at least 40 years. *E.g.*, King v. Burwell, 576 U.S. 473, 485–86 (2015); Gonzales v. Oregon, 546 U.S. 243, 267–68 (2006); *Brown & Williamson*, 529 U.S., at 159–60; Industrial Union Dept., AFL–CIO v. American Petroleum Institute, 448 U. S. 607, 645 (1980) (plurality opinion).

Id. (cleaned up). Note that all of her cited cases are relatively recent, and that the phrase "at least 40 years" becomes accurate only because of one decision: the Benzene Case. *Id.*

84. *Nebraska*, 143 S. Ct. at 2381 (Barrett, J., concurring); Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251 (2024).

85. 29 U.S.C. § 655(b)(5).

86. *See generally Nebraska*, 143 S. Ct. at 2381 (Barrett, J., concurring) (invoking the Benzene Case in connection with the Major Questions Doctrine).

87. Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 612 (1980) (plurality opinion) (citing 29 U.S.C. § 655(b)(5)).

> Court's reasoning in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539, and Panama Refining Co. v. Ryan, 295 U.S. 388. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.[88]

What is remarkable here is that since 1935, the Court had not invoked the nondelegation doctrine with this degree of enthusiasm—a span of forty-five years. What is also remarkable is that no party in the case had raised the specter of *Schechter Poultry*.[89] Invocation of the nondelegation doctrine to cabin agency discretion was, in 1980, a major step.[90]

If there is a nondelegation doctrine,[91] we should be able to agree on the general principle. Suppose a statute could be interpreted in two ways: The first would be an open-ended grant of authority. The second would contain an intelligible principle. In light of the Avoidance Canon, the second interpretation should be preferred.[92] But does that general principle support the paragraph quoted above? That is not at all clear. If a statute required an agency to eliminate all workplace risks, to the extent feasible, it would hardly be an unconstitutional grant of discretion. It would instead be a severe, even draconian requirement, of the kind that is unusual but not unheard of in federal regulatory law.[93] The plurality seems to have confused (1) a statute that grants unbounded discretion with (2) a statute that imposes an absolute requirement of safety. A law that requires the U.S. Environmental Protection Agency (EPA) to ensure that no one dies from mercury is very different from a law that authorizes EPA to do whatever it likes with respect to mercury. The former statute is not a grant of open-ended discretion.

Can we imagine a response to this objection? The best attempt might be to concede that if a statute requires an agency to regulate very aggressively, it does not confer much discretion on the agency *once it has decided what toxic material or harmful agent to regulate*—but to emphasize that it does confer on the agency a great deal of discretion in deciding *which* toxic material or harmful agent to regulate. The fact that the agency can pick or choose what to regulate (very severely) is effectively a nondelegation problem.[94] Perhaps that is the problem that the plurality had in mind in the Benzene Case.

88. *Id.* at 646.

89. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

90. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 646.

91. Mortenson & Bagley, *supra* note 30, at 277–368 (explaining that the actions of the Founders indicate that the Constitution was not intended to contain a nondelegation doctrine); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 415 (2015).

92. *See* Gundy v. United States, 588 U.S. 128, 145–46 (2019).

93. *See* Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987).

94. Sunstein & Vermeule, *supra* note 91.

The difficulty with this argument is that broad prosecutorial discretion has never been thought to produce a nondelegation problem, and for good reasons. It is central to *executive* authority to decide against whom or what to initiate proceedings. To be sure, Congress can constrain that discretion,[95] but nothing in Article I requires it to do so.[96]

V. SIGNIFICANT RISKS

What is a "significant risk"?[97] The plurality effectively created a new statutory term, and that is it. But what does it mean? What makes a risk significant or insignificant? What is the dividing line? At first glance, we might insist that the significance of a risk cannot be assessed in a cost vacuum. If an agency could eliminate a small risk at no cost, it should do so. If an agency could eliminate a moderate risk at an immoderate cost, it should hesitate. But the plurality was plainly speaking of significance in a cost-vacuum.

Here is what the plurality said:

> It is the Agency's responsibility to determine, in the first instance, what it considers to be a "significant" risk. Some risks are plainly acceptable and others are plainly unacceptable. If, for example, the odds are one in a billion that a person will die from cancer by taking a drink of chlorinated water, the risk clearly could not be considered significant. On the other hand, if the odds are one in a thousand that regular inhalation of gasoline vapors that are 2% benzene will be fatal, a reasonable person might well consider the risk significant and take appropriate steps to decrease or eliminate it.[98]

The institutional proposition is worth underlining: At least in the first instance, the definition should be offered by the agency, not the courts. The Benzene Case was decided four years before *Chevron*,[99] and the first sentence here can be seen as a small dose of *Chevron*.[100] But the substantive propositions follow in short order. The plurality's numerical suggestions on this count are pretty offhand, even seat-of-the-pants. What is their source? Common sense? If so, what is the source of common sense? With respect to significance, judges might want not to consult our intuitions (how reliable are they?) but instead ask: *Would informed people be willing to pay something to reduce a risk of a certain magnitude?* That is an empirical question,[101] of course. If so, it should be tractable.

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95. *See* Dunlop v. Bachowski, 421 U.S. 560, 568 (1975).

96. U.S. CONST. art. I; *see also Dunlop*, 421 U.S. at 568.

97. Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 639 (1980).

98. *Id.* at 655.

99. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

100. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 715 n.29 (Marshall, J., dissenting) (discussing policy judgments embedded in the interpretation of "significant" similar to those in *Chevron*).

101. *See* W. KIP VISCUSI, PRICING LIVES (2018) (explaining that workers generally

Recall that as a matter of current government practice, the value of a statistical life is in the vicinity of $12 million.[102] That number comes from efforts to see how much people (actually workers[103]) demand to face statistical risks or are willing to pay to avoid statistical risks.[104] The real issue is the value of such risks, not the value of lives, which means that the evidence is perfectly suited to decide what risks count as "significant." Suppose people demand $120 to face a mortality risk of 1 in 10,000. If so, we might say that the value of a statistical life is $12 million, and so too if they demand $1,200 to face a mortality risk of 1 in 1,000.[105] From the government's current figure of $12 million, a mortality risk of 1 in 1,000 is unambiguously significant ($1,200!), and the same conclusion is clear for a mortality risk of 1 in 10,000 ($120 certainly fills the bill). From the standpoint of significance, a risk of 1 in 100,000 is plausibly described as nonobvious: Is $12 significant or not? We might well conclude that a risk of 1 in 1 million is not significant because that $1.20 is not a lot of money.

The major qualification is that it matters how *often* people face such a risk. If you face a one-in-a-billion risk every second of every day, you might pay something significant to get rid of it. But if you face an annual risk of one-in-a-billion, you might not worry much. If one faces a monthly risk of 1 in 100,000, your annual risk is over 1 in 10,000, which is certainly significant. Recall that the relevant provision of the statute says: "[E]ven if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life," which plainly refers to lifetime risk, not annual risk.[106]

Put the substance to one side. To emphasize the institutional point, the plurality embraced Justice Marshall's suggestion that:

> [W]hen the question involves determination of the acceptable level of risk, the ultimate

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demand more money to take on hazardous jobs); W. Kip Viscusi, *The Benefits of Mortality Risk Reduction*, 62 DUKE L.J. 1735 (2013) (noting that the government evaluates the fatality risk effects of underlying policy by using estimates of the value of a statistical life).

102. *See Departmental Guidance on Valuation of a Statistical Life*, *supra* note 65.

103. *See Departmental Guidance: Treatment of the Value of Preventing Fatalities and Injuries in Preparing Economic Analyses*, U.S. DEP'T OF TRANSP. (Mar. 2021), https://www.transportation.gov/sites/dot.gov/files/2021-03/DOT%20VSL%20Guidance%20-%202021%20 Update.pdf (explaining that workers are involved in most relevant studies, which is fortunate for our purposes).

104. *See* Cass R. Sunstein, *The Cost-Benefit Revolution*, 99 MICH. L. REV. 1652, 1704 (2001); CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (2018).

105. I am bracketing a number of complex issues here, including possible nonlinearities. If people are willing to pay $1,000 to eliminate a risk of 1 in 1,000, it does not follow that they would pay $100 to eliminate a risk of 1 in 10,000, or $10 to eliminate a risk of 1 in 100,000.

106. *See* Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) (1970).

> decision must necessarily be based on considerations of policy as well as empirically verifiable facts. Factual determinations can at most define the risk in some statistical way; the judgment whether that risk is tolerable cannot be based solely on a resolution of the facts.[107]

Amplifying Justice Marshall's point, the plurality added that the agency's "determination that a particular level of risk is 'significant' will be based largely on policy considerations."[108] (That is a large dose of *Chevron*.[109]) It is remarkable that notwithstanding that apparent invitation, the agency has essentially stuck with the plurality's suggestion that a risk of 1 in 1,000 is significant. For four decades, that benchmark has defined the agency's efforts,[110] even though lower risks would seem to be significant as well, given existing data with respect to the valuation of statistical mortality risks.

VI. OF COSTS AND BENEFITS

Justice Powell's concurring opinion added an important idea. In his view, "the statute also requires the agency to determine that the economic effects of its standard bear a reasonable relationship to the expected benefits."[111] He explained that an "occupational health standard is neither 'reasonably necessary' nor 'feasible,' as required by statute, if it calls for expenditures wholly disproportionate to the expected health and safety benefits."[112] Note that in this formulation, we do not have a simple cost-benefit test; Justice Powell did not say that the benefits must exceed the costs. The principle is one of the reasonableness of their relationship. If the benefits of a standard are $600 million, a standard might be justified if the costs are $700 million. But if the benefits are $20 million and the costs are $700 million, the standard would have to be struck down, on Justice Powell's account.

As we have seen, the statutory text does not make it at all easy to reach that conclusion. Surprisingly, Justice Powell made two points about policy: "[T]he economic health of our highly industrialized society requires a high rate of employment and an adequate response to increasingly vigorous foreign competition."[113] In this light, he seemed to favor a clear statement principle: "It is simply unreasonable to believe that Congress intended OSHA to pursue the desirable goal of risk-free workplaces to the extent that the

107. Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 706 (1980) (Marshall, J., dissenting).

108. *Id.* at 655 n.62 (plurality opinion).

109. 467 U.S. 837 (1984).

110. *See Indus. Union Dep't, AFL-CIO*, 448 U.S. at 655 n.62 (plurality opinion).

111. *Id.* at 667 (Powell, J., concurring).

112. *Id.*

113. *Id.* at 669 n.6.

economic viability of particular industries—or significant segments thereof—is threatened."[114] This is a specification of the view, associated with the legal process school, that members of Congress should be taken to be reasonable people acting reasonably.[115] So too, he "would not lightly assume that Congress intended OSHA to require reduction of health risks found to be significant *whenever* it also finds that the affected industry can bear the costs."[116]

One reason involves priority setting: "[A] standard-setting process that ignored economic considerations would result in a serious misallocation of resources and a lower effective level of safety than could be achieved under standards set with reference to the comparative benefits available at a lower cost."[117] One more time, Justice Powell stated that he "would not attribute such an irrational intention to Congress."[118] Notably, he referred to but bracketed the nondelegation doctrine, at least raising the possibility that some imaginable interpretations of the statute would violate it.[119]

VII. THE NONDELEGATION PROBLEM

The most surprising opinion in the Benzene Case came from Justice Rehnquist, who began his analysis by quoting John Locke:

> The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.[120]

In Justice Rehnquist's view, the Court said the same thing in 1892: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of

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114. *Id.* at 669.

115. *See* THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, *supra* note 42 ("legal process school" refers to a generation of legal thought which sought to absorb and temper the insights of Legal Realism after the triumph of the New Deal).

116. *Id.* at 669 (Powell, J., concurring) (emphasis original).

117. Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 670 (1980) (Powell, J., concurring).

118. *Id.*

119. *Id.*

120. *Id.* at 672–73 (Rehnquist, J., concurring); *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 87 (Richard Howard Cox ed., Harlan Davidson 1982) (1690). On whether that statement really suggests a nondelegation doctrine, there is a continuing dispute. It might not. *See* Mortenson & Bagley, *supra* note 30 (arguing that the original public meaning of the Constitution did not include what we have come to understand as the modern nondelegation doctrine, in that it contained no discernible prohibition on the grant of discretion to the Executive Branch).

government ordained by the Constitution."[121] To be sure, this principle allows for exceptions. In light of "the practicalities," Justice Rehnquist urged, there is a "balance that has to be struck."[122] Thus, the

> later decisions that have upheld congressional delegations of authority to the Executive Branch have done so largely on the theory that Congress may wish to exercise its authority in a particular field, but because the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the area in which they choose to legislate, the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to particular cases.[123]

One might see this statement as an effort to domesticate the cases that had appeared to turn the nondelegation doctrine into a dead letter. Attempting to revive the doctrine, Justice Rehnquist read the prior cases not to authorize Congress to grant open-ended discretion but to cabin the Executive Branch in some way (for example, by allowing for refinement of a general but sufficiently specific term).[124]

The provisions at issue in the Benzene Case were, in Justice Rehnquist's view, beyond the pale. In his account, the "no employee will suffer" language "is completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot."[125] That language "gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line."[126] In his view, "the feasibility requirement . . . is a legislative mirage, appearing to some Members but not to others, and assuming any form desired by the beholder."[127]

To explain the problem, Justice Rehnquist identified what he saw as the "three important functions" of the nondelegation doctrine.[128] The first is to ensure "to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."[129] That is, of course,

121. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 673 (Rehnquist, J., concurring) (citing Field & Co. v. Clark, 143 U.S. 649, 692 (1892)).

122. *Id.* at 674.

123. *Id.* at 675.

124. Rehnquist's opinion can easily be seen as a precursor, indeed as the precursor, to Justice Gorsuch's dissenting opinion in *Gundy v. United States*. *See* 588 U.S. 128, 165–67 (2019) (Gorsuch, J., dissenting).

125. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 675 (Rehnquist, J., concurring).

126. *Id.*

127. *Id.* at 681.

128. *Id.* at 685.

129. *Id.*

an imaginable reading of Article I.[130] The second is "to guide the exercise of the delegated discretion."[131] That may or may not be duplicative of Justice Rehnquist's first goal; if it is not, it is a shorthand reference to the goal of promoting the rule of law by disciplining administrative discretion. The third goal is to make it possible for "courts charged with reviewing the exercise of delegated legislative discretion . . . to test that exercise against ascertainable standards."[132]

On all these counts, Justice Rehnquist concluded that the relevant provisions of the Act failed. In his view, the Court "ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era."[133] His plea:

> If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it. It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge. Far from detracting from the substantive authority of Congress, a declaration that the first sentence of § 6(b)(5) of the Occupational Safety and Health Act constitutes an invalid delegation to the Secretary of Labor would preserve the authority of Congress.[134]

Before the Benzene Case, the nondelegation doctrine was essentially a dead letter. It belonged in a category with other discredited doctrines of the era.[135] Justice Rehnquist's opinion put the nondelegation doctrine right back on the table; he did a great deal to legitimize it. He made it seem fresh and appealing, in a sense even young. Though he wrote only for himself, the plurality opinion fortified his view, which treated *Schechter Poultry*[136] as good law and acted as if acceptance of the government's interpretation would create a serious nondelegation problem. Would the modern revival of the

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130. *See* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (arguing that the nondelegation doctrine is justified by the original public meaning).

131. Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring).

132. *Id.* at 686. We might quibble here; it is not clear why enabling judicial review is an *independent* goal of the nondelegation doctrine, if it exists.

133. *Id.*

134. *Id.* at 687.

135. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 133 (1980), which notes and deplores the idea of "death by association." *See also Indus. Union Dep't, AFL-CIO*, 448 U.S. at 686 (Rehnquist, J., concurring).

136. 295 U.S. 495 (1935) (requiring a reasonably intelligible principle to constrain the Executive Branch).

nondelegation doctrine[137] have been possible without the Benzene Case? Maybe. Maybe not.

VIII. COSTS, BENEFITS, AND MAJOR QUESTIONS

Before the Benzene Case, it was not at all clear how the Supreme Court would treat legislation designed to protect safety, health, and the environment.[138] The decision expressed a mood. It gave a clear signal: Assume that Congress is reasonable and interpret regulatory statutes to void absurdity, where absurdity is understood to include the imposition of high costs in return for little or no benefit. Remarkably, this signal *preceded* the Reagan Administration's commitment to the defining idea, accepted by all subsequent presidents, that to the extent permitted by law, agencies should act only when the benefits justify the costs.[139] Within the courts, the signal in the Benzene Case helped spur a large number of decisions calling for cost-benefit default principles.[140]

Those principles culminated in *Michigan v. EPA*,[141] establishing that where Congress has been silent, agencies are not merely permitted but required to take account of costs.[142] Sounding more than a little like the plurality, and a

137. Gundy v. United States, 588 U.S. 128, 165–67 (2019) (Gorsuch, J., dissenting). To be sure, the nondelegation doctrine has not yet been used, in the post-*Schechter* period, to strike down an Act of Congress. The doctrine continues to have had only one good year. Still, it is noteworthy that five justices have now indicated receptivity to use of the doctrine "by different names." *See id.*

138. The leading case was Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), which was in a very different spirit—using what has been called a "hard look" standard (as opposed to deference). *Id.* at 420–21.

139. *See* Exec. Order 12,291, 3 C.F.R. 127 (1982) (Reagan, mandating the creation of a Regulatory Impact Analysis, containing a "description of the potential benefits of the rule," as well as a "description of the potential costs of the rule." Section (3)(d)(1)–(2)); Exec. Order 12,866, 3 C.F.R. 638 (1994) (Clinton, affirming that the "American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society," and concluding that "[w]e do not have such a regulatory system today."); Exec. Order 13,563, 3 C.F.R. 215 (2012) (Obama, affirming that the regulatory system "must take into account benefits and costs, both quantitative and qualitative.").

140. *See* Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651 (2001) (Part II of the article outlines the rise of cost-benefit analysis, resulting in default cost-benefit rules in federal law).

141. 576 U.S. 743 (2015).

142. Holding that the "Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary." *Id.* at 759.

lot like Justice Powell, the Court announced:

> Read naturally in the present context, the phrase "appropriate and necessary" requires at least some attention to cost. One would not say that it is even rational, never mind "appropriate," to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.[143]

This is a clear echo of the Benzene plurality's incredulousness that "the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit."[144]

Did the Benzene Case create the major questions doctrine?[145] The Court signaled the existence of the doctrine as early as 2014.[146] In Justice Neil Gorsuch's elaborate narrative, it played a crucial and even defining role. He urges that the doctrine has long roots but that "the explosive growth of the administrative state since 1970" gave the doctrine "special importance."[147] Justice Gorsuch's principal exhibit (actually his only exhibit!) is the Benzene Case, in which (he said) "this Court held it 'unreasonable to assume' that

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For elaboration, see, in particular, Justice Kagan's words in her dissent:

> If the regulatory process ended as well as started there, I would agree with the majority's conclusion that [U.S. Environmental Protection Agency (EPA)] failed to adequately consider costs. Cost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing "a standard-setting process that ignore[s] economic considerations." Industrial Union Dept., AFL–CIO v. American Petroleum Institute, 448 U.S. 607, 670 (1980) (Powell, J., concurring in part and concurring in judgment). At a minimum, that is because such a process would "threaten[ ] to impose massive costs far in excess of any benefit." Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 234 (2009) (Breyer, J., concurring in part and dissenting in part). And accounting for costs is particularly important "in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Id.*, at 233; see *ante*, at 753. As the Court notes, that does not require an agency to conduct a formal cost-benefit analysis of every administrative action. See *ante*, at 759. But (absent contrary indication from Congress) an agency must take costs into account in some manner before imposing significant regulatory burdens.

Id. at 769 (Kagan, J., dissenting).

143. *See id.* at 752.

144. Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 645 (1980).

145. *See, e.g.*, West Virginia v. U.S. Env't Prot. Agency, 142 S. Ct. 2587, 2619 (2022).

146. Util. Air Regul. Grp. v. U.S. Env't Prot. Agency, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" (first quoting U.S. Food & Drug Admin v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000); then citing to MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U. S. 218, 231 (1994))).

147. *Id. (*citing *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 645).

Congress gave an agency 'unprecedented power[s]' in the 'absence of a clear [legislative] mandate.'"[148] Justice Amy Coney Barrett understands the major questions doctrine very differently from Justice Gorsuch, but she also gives the Benzene Case pride of place.[149]

As we have seen, these are palpably revisionist readings of what the plurality said and did in the Benzene Case. The case was emphatically not about unprecedented powers as such or large or transformative decisions or major questions writ large. It was about a more specific problem. Still, it is noteworthy that the case has been enlisted as a foundation stone of a doctrine that has greatly expanded on its more targeted insistence on clear congressional authorization.

In many ways, the Benzene Case launched contemporary administrative law; its various seeds have produced trees of diverse kinds. If the decision is understood in its context, however, its principal theme is unitary.[150] If Congress seeks to require an agency to impose costly regulation for little or no

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148. *West Virginia*, 142 S. Ct. at 2619 (citing *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 645).

149. Biden v. Nebraska, 143 S. Ct. 2355, 2379–81 (2023) (Barrett, J., concurring) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324) (citing *Nebraska*, 143 S. Ct. at 2397, 2399–2400 (Kagan, J., dissenting)) (standing for the proposition that "an interpreter should 'typically greet' an agency's claim to 'extravagant statutory power' with at least some 'measure of skepticism,'" and emphasizing that this "skepticism is neither 'made-up' nor 'new'").

150. For what is along one dimension a close analog, see *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009), where the Court had to work hard with the statutory language to permit consideration of costs. The relevant language of the Clean Water Act's provisions for cooling water intake structures was (and is) this: "Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the *best technology available* for minimizing adverse environmental impact." *Id.* at 213 citing (33 U.S.C. § 1326(b) (emphasis added)). Does "best technology available" allow consideration of cost? Because those words are followed by "for minimizing adverse environmental impact," the obvious answer is no. Nonetheless, the Court said yes, concluding that it "may also describe the technology that *most efficiently* produces some good." *Id.* at 218 (emphasis in original). The Court, represented by an opinion by Justice Scalia, was obviously motivated by the possibility that if "best" meant "best available," regardless of cost, the government might impose a massive economic burden for little, if any, discernible gain. The parallel to the Benzene Case should be clear, though *Entergy* merely permitted consideration of cost without requiring it. *See* Daniel A. Farber, *Taking Costs into Account: Mapping the Boundaries of Judicial and Agency Discretion*, 40 HARV. ENV'T. L. REV. 87, 90, 99–108 (2016) (discussing the complex and often conflicting rulings about discretion to consider costs, ultimately concluding that the Court "seems to have settled on a reasonably coherent approach to cost considerations," but granting—at the time of the writing of that article—broad agency discretion in how to account for said costs).

benefit, it must say so unambiguously. Costs create risks of their own.[151] This specification of the Absurdity Canon is the least contentious understanding of the Benzene case and may be its most enduring legacy.

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151. *See, e.g.*, JOHN D. GRAHAM & JONATHAN BAERT WIENER, RISK VS. RISK (1997); JOHN D. GRAHAM, THE GLOBAL RISE OF THE MODERN PLUG-IN ELECTRIC VEHICLE (2021) (discussion of how different political-cultural perception of costs—namely economic development, energy security, urban air quality, and global climate change, among others—will affect regulation of and the pace of the global rise of electric vehicles in the United States, Japan, China, the European Union, Germany, France, and Norway); Matthew J. Neidell, Shinsuke Uchida & Marcella Veronesi, *The Unintended Effects from Halting Nuclear Power Production: Evidence from Fukushima Daiichi Accident*, 79 J. HEALTH ECON. (2021) (examining the unintended health effects that stemmed from the cessation of nuclear power production after the Fukushima Daiichi nuclear accident and consequential increased import of fossil fuels, which led to increases in energy prices, to, in part, contribute to the debate around "regulatory policy approaches implemented during periods of scientific uncertainty about potential adverse effects."); Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. CHI. L. REV. 649 (2022) (discussing cost-benefit analysis in the context of the Department of Transportation's issued guidance on the elasticity of the "value of a statistical life," observing that "[m]uch of law involves tragic trade-offs between dollars and lives," citing GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES 17–21 (1978), and noting that the academic and moral debate over redistributive tort rules in the context of courts, but immediate in the agency context).