LABOR LAW—THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 PLACES WORKER HEALTH ABOVE ALL OTHER CONSIDERATIONS AND DOES NOT REQUIRE THE SECRETARY TO CONDUCT A COST-BENEFIT ANALYSIS BEFORE SETTING STANDARDS WHICH LIMIT WORKER EXPOSURE TO TOXIC SUBSTANCES OR HARMFUL PHYSICAL AGENTS.—*American Textile Manufacturers Institute, Inc. v. Donovan*, (U.S. Sup. Ct. 1981).

A common disease suffered by thousands of American cotton mill workers is the often serious and potentially fatal disease known as byssinosis.[1] In its most severe manifestations, this distinct occupational malady has been diagnosed as brown lung disease.[2] In 1970 Congress, concerned over both the delays encountered in regulating exposure to cotton dust and the lack of protective safeguards for the nation's workers, enacted the Occupational Safety and Health Act, (OSH Act)[3] which is administered by the Occupational Safety and Health Administration (OSHA).[4] The express purpose and intent of the OSH Act is to assure "so far as possible" that all working men and women have "safe and healthful working conditions."[5] The OSH Act authorizes the Secretary of Labor to promulgate mandatory nationwide standards which govern "health and safety in the workplace."[6]

In 1978, the Secretary issued a revised, permanent health standard[7] in an effort to reduce levels of occupational exposure to cotton dust — airborne particles created by the preparation and manufacture of cotton products.[8]

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1. *See* Harris, Merchant, Kilburn & Hamilton, *Byssinosis and Respiratory Diseases of Cotton Mill Workers*, 14 J. OCCUPATIONAL MED. 199, 201-202 (1972).

2. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. 2478, 2483-84 (1981).

3. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651(b) (1976) [hereinafter referred to as OSH Act]. In enacting the OSH Act Congress was aware of the serious occupational diseases suffered by the American cotton workers. *See* S. REP. No. 1282, 91st Cong., 2d Sess. 3 *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177, 5179.

4. 36 Fed. Reg. 8,754 (1971).

5. American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. at 2482 (quoting Occupational Safety and Health Act of 1970, 29 U.S.C. § 651(b) (1976)).

6. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. at 2482. The Secretary of Labor has since delegated his authority to promulgate health and safety standards to the Assistant Secretary of Labor for Occupational Safety and Health, who is the chief executive officer for the Occupational Safety and Health Administration (OSHA). *See* 29 C.F.R. § 1910.4 (1980). The Secretary appoints an Assistant Secretary. 29 U.S.C. § 553 (1976) [the Secretary of Labor shall hereinafter be referred to as the Secretary].

7. *See* 29 C.F.R. § 1910.1043 (1981). This section contains the Standard for Occupational Exposure to Cotton Dust. The prior standard regulating worker exposure to cotton dust is found at 34 Fed. Reg. 7953 (1969).

8. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. at 2483 n.6. Cotton dust is defined as:

> dust present in the air during the handling or processing of cotton, which may contain a mixture of many substances including ground up plant matter, fiber, bacteria,

The Secretary established this new standard because a marked linear relationship between worker exposure to cotton dust and the prevalence of byssinosis had been observed.[9]

The petitioners, representing the interests of the American cotton industry,[10] contested the validity and the need for the new "Cotton Dust Standard" (the Standard).[11] Relying on sections 655(b)(5) and 652(8) of the OSH Act,[12] the petitioners in *American Textile* urged that the Secretary was required not only to demonstrate that "a standard addresses a significant risk of material health impairment," but more importantly to show that the Standard must accurately reflect "a reasonable relationship between the costs and benefits associated with [its promulgation]."[13] In response to the petitioners' contentions, the Secretary argued that he was not required to conduct a cost-benefit analysis since by enacting the OSH Act Congress itself had struck the balance between costs and benefits.[14] The Secretary claimed that under the terms of the OSH Act he was required to set standards which would reduce or eliminate significant risks of material health impairment "to the extent . . . technologically and economically fea-

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> fungi, soil, pesticides, non-cotton plant matter which may have accumulated with the cotton during the growing, harvesting and subsequent processing or storage periods. Any dust present during the handling and processing of cotton through the weaving or knitting of fabrics, and dust present in other operations or manufacturing processes using new or waste cotton fiber by-products from textile mills are considered as cotton dust.

Id.

9. *Id.* at 2485. Estimates showed that at least 35,000 employed or retired cotton mill workers suffered from the most severe manifestations of brown lung disease. *Id.* The Court also noted that: "The Senate Report accompanying the [OSH] Act cited estimates that 100,000 active and retired workers suffer from some grade of the disease." *Id.* The Court referred to another study which found that over 25% of those cotton workers sampled, members of a group involved "in active cotton preparation and yarn manufacturing," suffered from some form of brown lung disease, prior to the Standard's adoption. *Id.*

10. The petitioners' included 12 individual cotton textile manufacturers, the National Cotton Council of America and two labor organizations. 101 S. Ct. at 2483 n.2-3.

11. *Id.* at 2483 (referring to American Fed'n of Labor v. Marshall, 617 F.2d 636 (D.C. Cir. 1979) *aff'd in part, vacated in part sub nom.* American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. 2478 (1981).

Section 655(f) of the OSH Act provides that persons adversely affected by OSHA's Standards may file a petition in the United States Court of Appeals, "for the circuit wherein such person[s]" live or maintain their principal place of business. 29 U.S.C. § 655(f) (1976).

12. 29 U.S.C. §§ 655(b)(5), 652(8) (1976). *See* text accompanying notes 22-27 *infra.*

13. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. at 2489. *See also* Petitioners' Brief for Certiorari at 16, 17, American Textile Mfrs. Inst. Inc. v. Donovan, 101 S. Ct. 2478 (1981) (the petitioners' argued that at a minimum, OSHA must "base its economic analysis on a reasonably accurate estimate of the cost to comply with the standard . . . [and] . . . demonstrate that there exists a reasonable relationship between costs . . . and . . . benefit[s]. . . ."). *Id.*

14. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. at 2490.

sible."[15] While vigorously contesting the petitioners' claim that the OSH Act required a cost-benefit analysis, the Secretary conceded that the language of the OSH Act mandated a consideration of practical concerns, including costs, in setting such standards.[16]

Agreeing with the respondent's interpretation of the OSH Act, the District of Columbia Court of Appeals noted that the substantial legislative history of the Act makes no reference to any requirement of formal cost-benefit analysis.[17] On certiorari, the United States Supreme Court, in a 5-3 decision, also rejected the petitioners' argument that the OSH Act required the Secretary to conduct cost-benefit analysis, and *held* affirmed.[18] The clear language and legislative history of the Occupational Safety and Health Act of 1970 places worker health above all other considerations and does not require the Secretary to conduct a cost-benefit analysis before setting standards which limit worker exposure to toxic substances or harmful physical agents. *American Textile Manufacturers Institute, Inc. v. Donovan*, 101 S. Ct. 2478 (1981).

The Occupational Safety and Health Act of 1970 was enacted after Congress had determined that personal injuries and illnesses, incurred and contracted while at the employer's place of business, substantially impeded the flow of interstate commerce "in terms of lost production, wage loss, medical expenses, and disability compensation payments."[19] The OSH Act imposes on employers the general duty to maintain workplaces "which are free from recognized hazards that are causing or are likely to cause death or serious physical harm . . . ."[20] The most controversial provision of the OSH Act, section 655(b)(5),[21] governs the promulgation of health and safety standards, which are designed to limit or reduce exposure to toxic substances or harmful physical agents. Section 655(b)(5) provides, in relevant part: "The Secretary . . . shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity. . . ."[22]

Section 655(b)(5) was designed to afford workers the maximum possible

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15. *See* Respondent's Brief at 38, American Textile Mfrs. Inst. Inc. v. Donovan, 101 S. Ct. 2478 (1981).

16. *See id.* at 45.

17. American Fed'n of Labor v. Marshall, 617 F.2d 636, 663, 666 (D.C. Cir. 1979) *aff'd in part, vacated in part sub nom.* American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. 2478 (1981).

18. American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. 2478 (1981).

19. 29 U.S.C. § 651(a) (1976). *See also* Dale M. Madden Constr. Co. v. Hodgson, 502 F.2d 278, 278-79 (9th Cir. 1974) (OSH Act was prompted by Congress' concern about the alarming number of perennial work-related injuries and illnesses).

20. 29 U.S.C. § 654(a)(1) (1976). *See also* National Realty and Constr. Co. v. OSHRC, 489 F.2d 1257, 1265-66 (D.C. Cir. 1973) (workplaces must be as free as possible from serious health and safety hazards).

21. 29 U.S.C. § 655(b)(5) (1976).

22. *Id.* (emphasis added).

protection against significant risks of material health impairment, particularly where workers have "regular exposure to the hazard dealt with . . . for the period of [their] working [lives]."[23] In attaining this lofty degree of protection for the nation's workforce, section 655(b)(5) requires the Secretary to consider the "feasibility" of health standards.[24] This feasibility criterion has generally been interpreted to require only minimal economic and technological limitations on the permissible stringency of OSH Act standards.[25] Section 655(b)(5), however, must be read in conjunction with section 652(8),[26] a general definitional provision, which provides: "The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices . . . *reasonably necessary* or appropriate to provide safe or healthful employment and places of employment."[27]

On its face, the OSH Act is conspicuously silent concerning the proper interrelationship between the "feasibility" language of section 655(b)(5), and the "reasonably necessary" language found in section 652(8). The federal circuit courts of appeal have had a difficult time reconciling these two provisions as exemplified by *Industrial Union Department AFL-CIO v. American Petroleum Institute*,[28] a complex opinion which heavily foreshadowed the outcome in *American Textile*.

In *American Petroleum*, the United States Supreme Court was called upon for the first time to scrutinize the kinds of health and safety standards OSHA is authorized to promulgate.[29] In *American Petroleum* the Secretary determined that current levels of occupational exposure to benzene (a chemical carcinogen used in the manufacture of motor fuels, solvents, detergents and pesticides)[30] created a risk of cancer, chromosonal damage and an otherwise grim variety of potentially fatal blood disorders.[31]

Subsequent to this determination, the Secretary concluded that since no safe level of occupational exposure could be accurately measured, he was required under section 655(b)(5) to set the standard "at the level that has been demonstrated to be safe or at the lowest level feasible, whichever is

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23. *Id.*

24. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. at 2490.

25. *See* Comment, *Cost-Benefit Analysis For Standards Regulating Toxic Substances Under The Occupational Safety and Health Act: American Petroleum Institute v. OSHA*, 60 B.U.L.R. 115, 124 n.63 (1979) [hereinafter cited as *Cost-Benefit Analysis*].

26. 29 U.S.C. § 652(8) (1976).

27. *Id.* (emphasis added).

28. 448 U.S. 607 (1980) (plurality decision per Stevens, J.). The case will be referred to as *American Petroleum* throughout this Case Note.

29. *See* Note, *The Billion Dollar Benzene Blunder: Supreme Court Scrutinizes OSHA Standards In Industrial Union Department AFL-CIO v. American Petroleum Institute*, 16 TULSA L.J. 252 (1980) [hereinafter cited as *Billion Dollar Benzene Blunder*].

30. 448 U.S. at 615. *See also* 43 Fed. Reg. 5918 (1978).

31. 448 U.S. at 615-20.

higher."[32] Further, the Secretary apparently assumed that section 652(8)'s definition of the term "standard" did not, when read in conjunction with section 655(b)(5), require OSHA to conduct a cost-benefit analysis.[33] In fact, the Secretary went so far as to conclude that section 652(8)'s "definition of the term 'standard' has no legal significance or at best merely requires that a standard not be totally irrational."[34] The Fifth Circuit Court of Appeals, however, concluded in *American Petroleum* that OSHA had exceeded its authority under the OSH Act.[35] The Fifth Circuit noted that the revised benzene standard, limiting worker exposure to one part benzene per million parts of air (1ppm), was not shown to be "reasonably necessary," as required under section 652(8).[36] The Fifth Circuit relied upon the assumption that if an OSH Act standard falls short of section 652(8)'s requirement of reasonable necessity, "it is not one that OSHA is authorized to enact."[37] To support its conclusion that section 652(8) functions as a check and balance on section 655(b)(5) standards, the Fifth Circuit in *American Petroleum* engaged in an odd analogy by stating that since the OSH Act's purpose—to protect workers from dangerous conditions of employment—was substantially similar to the purpose of the Consumer Product Safety Act—to protect consumers from defective products—its prior holding in *Aqua Slide 'N' Dive Corporation v. Consumer Product Safety Commission*,[38] must control.[39]

In *Aqua Slide*, a pool manufacturer challenged the Commission's safety standard for swimming pool slides.[40] A requirement of the standard was that certain warning labels be posted and that slide ladder chains be affixed.[41] On the basis of the substantial evidence standard of review the Fifth Circuit in *Aqua Slide* held that the Commission failed to show that the safety standard was "reasonably necessary to eliminate or reduce an unreasonable risk of injury,"[42] as required by section 2056(a)(2) of the Consumer Product Safety Act.[43] Therefore, by analogizing the "reasonably necessary" provision of the Consumer Product Safety Act with that of OSH Act section 652(8), the Fifth Circuit in *American Petroleum* determined that the Secretary's benzene standard must be invalidated on the basis of the Secretary's failure

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32. *Id.* at 637.

33. *Id.* at 638. Somewhat bemused by the Secretary's unfounded assumption, the *American Petroleum* Court stated: "It is noteworthy that at no point . . . did the [Secretary] quote or even cite to [section 652(8) of the OSH Act]." *Id.*

34. *Id.* at 639.

35. American Petroleum Inst. v. OSHA, 581 F.2d 493, 505 (5th Cir. 1978) *aff'd sub nom.* Industrial Union Dept. AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980).

36. American Petroleum Inst. v. OSHA, 581 F.2d at 505.

37. *Id.* at 502.

38. 569 F.2d 831 (5th Cir. 1978).

39. American Petroleum Inst. v. OSHA, 581 F.2d at 502.

40. 569 F.2d at 835-37.

41. *Id.* at 836.

42. *Id.* at 844.

43. 15 U.S.C. § 2056(a)(2) (1976).

to show that benefits, in terms of improved worker health, justified the industry's cost of compliance.[44] What troubled the court in particular was that the Secretary made no attempt to calculate the amount of illnesses and premature deaths which would be avoided as a result of the nearly $500 million costs of compliance.[45] In concluding that the Secretary did not make the required threshold finding of significant risk,[46] the Fifth Circuit reasoned that even though section 655(b)(5) contemplates the maximum possible protection for the nation's workforce, "it does not give OSHA the unbridled discretion to create absolutely risk-free workplaces regardless of cost."[47]

On certiorari, a plurality of the United States Supreme Court in *American Petroleum* supported the Fifth Circuit's holding that section 652(8) required the Secretary to find, as a threshold matter, "that the toxic substance in question [posed] a significant health risk in the workplace and that a new, lower standard [was] therefore 'reasonably necessary . . . to provide safe or healthful employment and places of employment.' "[48] Thus, before determining whether the Secretary was bound under section 655(b)(5) to undertake a cost-benefit analysis the Court focused on whether the Secretary had made the required threshold finding of signifcant risk.[49] Agreeing with the Fifth Circuit that the Secretary failed to make the required threshold finding, the *American Petroleum* Court did not address the question of whether the OSH Act required the Secretary to conduct a cost-benefit analysis.[50]

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44. American Petroleum Inst. v. OSHA, 581 F.2d at 503-04.

It should be noted that section 655(f) of the OSHA Act provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record as a whole." 29 U.S.C. § 655(f) (1976). The Fifth Circuit concluded that on the basis of a lack of substantial evidence the Secretary had failed to justify his findings - that benefits of the new benzene standard were reasonably related to the costs associated with its implementation. 581 F.2d at 503.

On the issue of the "substantial evidence" standard of review the *American Textile* Court took a tough stance, looking only at whether the District of Columbia Court of Appeals "misapprehended or grossly misapplied" the substantial evidence standard. 101 S. Ct. at 2497 (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951)). Applying this "misapprehended or grossly misapplied" standard, the *American Textile* Court could find nothing wrong with the Secretary's decision to select from two cost preparation studies, one of which was commissioned by OSHA, the other by the cotton industry. *See* 101 S. Ct. at 2501. Justice Stewart, however, believed that the Secretary "failed to justify [his] estimate of the cost of the Cotton Dust Standard on the basis of substantial evidence. . . ." 101 S. Ct. at 2507 (Stewart, J., dissenting). Justice Stewart was displeased with the Secretary's manner of borrowing select portions from the cost preparation studies. *Id.* For a fuller discussion concerning the propriety of the substantial evidence standard of review consult *Cost-Benefit Analysis, supra* note 25 at 131.

45. *See* American Petroleum Inst. v. OSHA, 581 F.2d at 503.

46. *Id.* at 505.

47. *Id.* at 502.

48. Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 614-15 (1980) (quoting 29 U.S.C. § 652 (1976)).

49. 448 U.S. at 615.

50. *Id.* The Court stressed that "[u]nless and until such a finding is made, it is not necessary to address the further question whether the [Fifth Circuit] correctly held that there must

That portion of the Fifth Circuit's holding which declared that the Secretary was required to conduct a cost-benefit analysis was left dangling until *American Textile*.[51]

The plurality opinion in *American Petroleum* strongly rejected the Secretary's bold contention that under section 655(b)(5) he was empowered to impose standards that guarantee workplaces free from *any* material risk of health impairment "or that come as close as possible to doing so without ruining entire industries."[52] The plurality stressed that the OSH Act did not sanction the creation of an "absolutely risk-free" world of employment simply because it may be economically or "technologically feasible to do so."[53] Rather, in concurring with the Fifth Circuit's analysis, the *American Petroleum* Court noted that section 652(8)'s "reasonably necessary or appropriate" definition of the term "standard" did not specify or otherwise indicate that the term "standard" was to be defined, construed or interpreted any differently than done elsewhere in the OSH Act.[54]

Therefore, the *American Petroleum* Court's conclusion was that section 652(8)'s definition of the term "standard" should be deemed "incorporated by reference" into section 655(b)(5).[55] The impact of this conclusion was significant in that the Secretary was obligated to accept the imposition of section 652(8)'s "reasonably necessary or appropriate" language on standards issued under section 655(b)(5).[56] On close examination, however, the requirement of a threshold finding of significant risk appears to be the safest alternative. For both the industry and the Secretary, such a requirement works an equitable balance between imposing a cost-benefit analysis on the one hand, and ignoring substantial compliance costs on the other hand.

In his concurring opinion in *American Petroleum*, Justice Powell took more of a common sense, frank approach than did the other members of the

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be a reasonable relationship between costs and benefits. . . ." *Id.*

51. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 101 S. Ct. at 2483.

52. Industrial Union Dept. v. American Petroleum Inst., 448 U.S. at 641.

53. *Id.*

54. *Id.* at 642.

55. *Id.* The Court expressed its concern over the constitutionality of the Secretary's approach. The plurality warned that if neither section 655(b)(5) nor section 652(8) required "that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an *understandable way*," section 655(b)(5) may be void as an unconstitutional delegation of legislative power to the executive branch. *Id.* (emphasis supplied). *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (Congress cannot delegate legislative power to the President to exercise unfettered discretion to make whatever laws he deems necessary for the rehabilitation and expansion of industry). *See* note 69 *infra*.

56. Industrial Union Dept. v. American Petroleum Inst., 448 U.S. at 642. The Court seems to have implicitly ascribed bad motives to the actions of the Secretary, as though he would seek to put employers out of business in order to protect employees. *But c.f.* Industrial Union Dept. v. Hodgson, 449 F.2d 467, 478 (D.C. Cir. 1974) ("Congress does not appear to have intended to protect employees by putting their employers out of business"). *Id.* at 478.

plurality.[57] Sensitive to the nation's crucial need to maintain a steady rate of employment, Justice Powell stated: "There can be little doubt that Congress intended OSHA to balance reasonably the societal interest in health and safety with the often conflicting goal of maintaining a strong, national economy."[58] Although laudable for his frankness Justice Powell, like the other members of the plurality, assumed that the Secretary if given the opportunity, would pursue his regulatory policies oblivious to the finite resources of industry, ignorant of the needs of the economy and in contempt of the congressional intent underlying the Act.[59] Justice Powell reluctantly agreed with the plurality's view that OSHA failed to carry its burden on the issue of significant risk.[60] Nonetheless, Powell added that "[a]n occupational health standard is neither 'reasonably necessary' nor 'feasible' . . . if it calls for expenditures wholly disproportionate to the expected health and safety benefits."[61]

In contrast, the dissent, led by Justice Marshall, argued forcefully that *nothing* in the language or in the legislative history of the OSH Act compelled the conclusion that section 652(8)'s "reasonably necessary" language required the threshold finding of a significant risk requirement.[62] The dissent refused to accept that merely because the Secretary may have failed to adequately quantify the risk of occupational exposure to benzene above levels of lppm, that the risk must therefore be an insignificant one.[63] Indeed, section 655(b)(5) was designed to allow the Secretary to act immediately on the basis of the "best available evidence."[64] In this manner, the Secretary would be free to take quick action to protect workers without idly sitting by until more definite information on a particular risk could be obtained.[65] The dissent argued that the bitter consequences of the plurality's holding are "to subject American workers to a continuing risk of cancer and other fatal diseases, and to render the Federal Government powerless to take protective action on their behalf."[66] Clearly, the dissent was dismayed by the plurality's insistence that protection of the worker must be subordinated to the

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57. *See* Industrial Union Dept. v. American Petroleum Inst., 448 U.S. at 664-69 (Powell, J., concurring) (agreeing that sections 655(b)(5) and 652(8) should be read together).

58. *Id.* at 669 n.6 (Powell, J., concurring).

59. *See generally The Billion Dollar Benzene Blunder, supra* note 29 at 281.

60. Industrial Union Dept. v. American Petroleum Inst., 448 U.S. at 667 (Powell, J., concurring). Justice Powell stated: "Although I regard the question as close, I do not disagree . . . that OSHA . . . failed . . . to carry its burden of proof. . . ." *Id.*

61. *Id.*

62. *Id.* at 690 (Marshall, J., dissenting).

63. *Id.*

64. *Id.* at 693 (quoting 29 U.S.C. § 655(b)(5) (1976)). Indeed, even Justice Powell agreed that "neither the statute nor the legislative history [of the OSH Act] suggest that OSHA's hands are tied when reasonable quantification cannot be accomplished by any known methods." *Id.* at 666 (Powell, J., concurring).

65. *Id.* at 690 (Marshall, J., dissenting).

66. *Id.*

protection of industry and the economy.[67]

It can reasonably be argued that the *American Petroleum* plurality's requirement that the Secretary make a threshold finding of significant risk thwarts the congressional purpose and intent behind section 655(b)(5), since such a requirement does not appear in the OSH Act itself.[68] The *American Petroleum* Court, however, effectively postponed adjudication of whether the Act requires the Secretary to conduct a cost-benefit analysis by agreeing with the Fifth Circuit that the Secretary had failed to make the required threshold findings.[69] Less than a year later, however, the Court in *American Textile Manufacturers Institute, Inc. v. Donovan*, was finally called upon to expressly decide this issue of cost-benefit analysis.[70]

Perhaps, in order to gain its narrow majority, the *American Textile* Court did not seek to upset the *American Petroleum* plurality holding that the Secretary is required to make a threshold finding of significant risk.[71] The *American Textile* Court determined that a threshold finding of significant risk was properly made by the Secretary, based upon the Court's review of the evidence in the record taken as a whole.[72] The Court seemed firmly convinced that occupational exposure to cotton dust, at currently prescribed levels of exposure, constituted a significant risk of material health impairment to affected employees.[73] Indeed, the data upon which the Secretary relied in making his findings revealed a "strong linear relationship be-

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67. *Id.* at 688. Justice Marshall argued: "Today's decision . . . ignores the plain meaning of the OSH Act in order to bring the authority of the Secretary . . . in line with the plurality's own views of proper regulatory policy." *Id. See* text accompanying notes 94, 95 *infra.*

68. The OSH Act does not contain any such requirement. *See* 29 U.S.C. § 651 *et. seq.* (1976).

69. Industrial Union Dept. v. American Petroleum Inst., 448 U.S. at 639-40.

Justice Rehnquist, providing yet a further alternative, argued that because the underlying congressional intent is subject to infinite interpretations, the first sentence of section 655(b)(5) should be struck as an invalid delegation of legislative authority to the executive branch. *Id.* at 687-88 (Rehnquist, J., concurring). Justice Rehnquist was emphatic in his insistence that neither section 655(b)(5) nor section 652(8) provided the Secretary with any meaningful guidance. Further, Justice Rehnquist suggested a further shortcoming of the OSH Act, specifically "that the standard of 'feasibility' renders meaningful judicial review impossible." *Id.* at 686 (Rehnquist, J., concurring).

70. *See* text accompanying notes 50, 51 *supra.*

71. *See* American Textile Mfrs. Inst. Inc. v. Donovan, 101 S. Ct. at 2489.

72. *Id.* at 2487.

73. *Id.* Although the issue of whether the Secretary had made the required threshold findings was not before the *American Textile* Court, (nor did the point appear to be at issue among the parties), it seems fair to conclude that given the humanitarian tone of the opinion and the great weight of the evidence, the Court was quietly convinced that the prevalence of cotton dust at currently prescribed levels constituted a significant health risk. *See* note 9 *supra.* Because the District of Columbia Court of Appeals in *Marshall* had not "misapprehended or grossly misapplied" the substantial evidence standard of review issue, the *American Textile* Court determined that it had no reason to question the Secretary's findings. 101 S. Ct. at 2500-501. *See* text accompanying note 98 *infra.*

tween the prevalance of byssinosis and the concentration of lint-free respirable cotton dust."[74] The "Cotton Dust Standard" issued as a result of the Secretary's findings sought to lessen the permissible exposure levels to cotton dust.[75]

The petitioners, in *American Textile*, attacked the Standard by advancing the same strategy as that presented by the petitioners in *American Petroleum*.[76] The petitioners in *American Textile* contended that the Secretary, under section 655(b)(5), is required not only to show that a standard addresses a significant risk of material health impairment, but also that the Secretary must conduct a formal cost-benefit analysis to demonstrate to industry and ultimately to a reviewing court, that "the reduction in risk of material health impairment is significant in light of the costs of attaining that reduction."[77]

In analyzing the petitioners' claims, the *American Textile* Court focused upon the "to the extent feasible" language of section 655(b)(5).[78] Subsequent to a review of several dictionary definitions of the word "feasible,"[79] the Court concluded that the plain and simple meaning of the word "feasible" supported the respondent's view that in promulgating health and safety standards, the Secretary is restricted only by the extent to which health and safety standards are "capable of being done, executed or affected."[80] The Court then examined the legislative history of the term "to the extent feasible" to determine its meaning within the context of section 655(b)(5).[81] This analysis of the legislative history was conducted in the light of *American Petroleum*, which had previously examined all possible arguments concerning the meaning of the legislative history.[82]

In its review of the legislative history, the Court did not find the term "to the extent feasible" to be wholly devoid of meaning.[83] The *American Textile* Court concluded that by the use of the word "feasible" in section

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74. American Textile Mfrs. Inst. Inc. v. Donovan, 101 S. Ct. at 2487.

75. *Id.* at 2485. *See also* 29 C.F.R. 1910.1043 (1981).

76. *Cf.* Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607 (1980) (petitioners argued that Secretary must show that benefits outweigh costs).

77. American Textile Mfrs. Inst. Inc. v. Donovan, 101 S. Ct. at 2489.

78. *See* 29 U.S.C. § 655(b)(5) (1976). The term "feasibility" has developed several meanings, and when the term is used within a standard it is reasonable to devote little consideration to costs in defining the extent to which employees are to be protected. *See generally* Berger & Riskin, *Economic and Technological Feasibility in Regulating Toxic Substances Under the Occupational Safety and Health Act*, 7 ECOLOGY L.Q. 285, 334-35 (1978).

79. American Textile Mfrs. Inst. Inc. v. Donovan, 101 S. Ct. at 2490.

80. *Id.*

81. *Id.* at 2493.

82. *See* Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607 (1980).

83. American Textile Mfrs. Inst. Inc. v. Donovan, 101 S. Ct. at 2493. In *American Petroleum*, Justice Rehnquist concluded that the term "feasibility" is in reality nothing more than a "legislative mirage." Industrial Union Dept. v. American Petroleum Inst., 448 U.S. at 679, 682 (Rehnquist, J., concurring).

655(b)(5), Congress did not intend for the Secretary to conduct a cost-benefit analysis before issuing standards.[84] The Court noted from its review that "Congress understood that the [OSH] Act would create substantial costs for employers," yet intended to impose such costs when necessary to create a safe and healthful working environment.[85] During the legislative debates on the Act, one Senator responded eloquently to criticism that the proposed legislation would prove prohibitively expensive by stating:

> One may well ask too expensive to whom? Is it too expensive for the company who for lack of proper safety equipment loses the services of its skilled employees, . . . for the widow trying to raise her children on meager allowance under workmen's compensation, . . . for a good hardworking man-tied to a wheel chair or hospital bed for the rest of his life?[86]

Echoing the humanitarian concerns of the *American Petroleum* dissent, the *American Textile* Court reaffirmed the view that nowhere in the legislative history of the OSH Act did Congress contemplate imposing the requirement of formal cost-benefit analysis before setting standards which regulate worker exposure to toxic substances or harmful physical agents.[87] Based on numerous congressional statements which maintain that worker health and safety must be protected above all other considerations,[88] as well as the statement of congressional findings and purpose encompassed in the Act itself,[89] Justice Powell's conclusion in *American Petroleum*,[90] that economic necessity dictated that the Secretary should be required to conduct cost-benefit analysis, was erroneous.[91] The *American Textile* Court determined, without question, that "Congress thought that the *financial costs* of health and safety problems in the workplace were as large or larger than the *financial costs* of eliminating these problems."[92]

The *American Textile* Court noted further that when Congress mandates an agency to conduct a formal cost-benefit analysis it has explicitly

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84. 101 S. Ct. at 2493. *See generally* S. REP. No. 1282, 91st Cong., 2d Sess. 1, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177.

85. 101 S. Ct. at 2495-96.

86. *Id.* at 2496 (quoting Senator Yarborough, S. REP. No. 1282, 91st Cong., 2d Sess. (1970), *reprinted in* SEN. COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 510 (1971)).

87. 101 S. Ct. at 2493.

88. *Id.* at 2493-97.

89. *See* text accompanying note 19 *supra*; *see also* 29 U.S.C. § 651(a) (1976) (Congressional Findings and Purposes).

90. 448 U.S. 607, 664 (1980) (Powell, J., concurring).

91. *See* text accompanying notes 58-60 *supra*.

92. 101 S. Ct. at 2496. Given the length and thoroughness of OSH Act's legislative history, the Court of Appeals for the District of Columbia intimated that it would be consistent with the purpose and intent of OSH Act "to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of the employee. . . ." Industrial Union Dept. v. Hodgson, 499 F.2d 467, 478 (D.C. Cir. 1974) (challenge to Secretary's standards regulating occupational exposure to asbestos dust).

endorsed such an intent in other statutory schemes.[93] In *Vermont Yankee Power Corp. v. Natural Resources Defense Council*,[94] a case involving a review of the Atomic Energy Commission's decision to grant petitioner Vermont Yankee a license to operate a nuclear power plant, the Supreme Court stated that fundamental policy questions are to be resolved in the Congress and should not be subject to scrutiny in the federal courts "under the guise of judicial review of agency action."[95] The *American Textile* Court, therefore, was unwilling to offend congressional intent by engrafting its own view of acceptable social and economic policy by imposing a cost-benefit requirement.[96] Congress had already determined that standards promulgated under section 655(b)(5) are to protect workers to the maximum extent possible, consistent with notions of economic and technological feasibility.[97] Further, the *American Textile* Court suggested that the Secretary had done all that was possible to comply with meeting the threshold finding of significant risk requirement.[98]

The Court's conclusion, that the Secretary is not required to conduct a cost-benefit analysis is supported overwhelmingly by the language of the OSH Act,[99] its legislative history[100] and by the better-reasoned case law.[101] The inherent frailty of the cost-benefit argument is underscored by the petitioners' failure to provide the *American Textile* Court with any meaningful guidance as to how a cost-benefit analysis could be undertaken, and if conducted, what a cost-benefit analysis could reasonably be expected to accomplish.[102] Congress said "[e]ven the price of one life is too expensive when a meaningful occupational safety and health law could save many lives. . . . Our efforts must not diminish. The well-being of every American working

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93. 101 S. Ct. at 2491 n.30. *See e.g.*, Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6295(c), (d) (1977); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1312(b)(1)-(2), 1314(b)(1)(B) (1978).

94. 435 U.S. 519 (1978).

95. *Id.* at 558.

96. American Textile Mfrs. Inst. Inc. v. Donovan, 101 S. Ct. at 2492.

97. *Id.* at 2492, 2496. Indeed, the Court stated: "Congress did not contemplate any further balancing by the agency for toxic material and harmful physical agent standards. . . ." *Id.* at 2492.

98. *Id.* at 2488-89 n.25.

99. *Id.* at 2490.

100. *Id.* at 2493-97.

101. *See, e.g.*, Dale M. Madden Constr. Inc. v. Hodgson, 502 F.2d 278 (9th Cir. 1974); Industrial Union Dept. v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974); National Realty and Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973).

102. *See* Schuck, *Regulation: Asking the Right Questions*, 11 NAT'L J. 711 (1979). Perhaps the most unpalatable aspect of the petitioners' argument lies in its implication that the pain and suffering of workers and their families is capable of measurement. The petitioners, aware of the inherent callousness of arguing for cost-benefit analysis sheepishly put forth the disclaimer that they "do not mean to suggest any need for a rigidly formal cost-benefit calculation that places a dollar value on employee lives or health." *See* Petitioners Brief for Certiorari at 39, American Textile Mfrs. Inst. Inc. v. Donovan, 101 S. Ct. 2478 (1981).

man and woman is an essential human right which we can no longer deny."[103] In the face of such determined language and on the basis of the overwhelming evidence, the *American Textile* Court's reasoning that the Secretary is not required to conduct a cost-benefit analysis in setting standards under section 655(b)(5) is sound.

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103. H.R. REP. No. 1291, 91st Cong., 2d Sess. 35, *reprinted in* SEN. COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 865.

SECURITIES—RULE 10B-5 PERMITS A REBUTTABLE PRESUMPTION OF RELIANCE UNDER THE DOCTRINE OF FRAUD ON THE MARKET, WHERE A PURCHASER OF INDUSTRIAL REVENUE BONDS RELIES SOLELY UPON THE INTEGRITY OF THE MARKET.—*Shores v. Sklar* (5th Cir. 1981).

Clarence Bishop[1] was the purchaser of industrial revenue bonds[2] issued by an industrial development board.[3] The plaintiff purchased the bonds subsequent to consulting his broker.[4] At no time did the plaintiff examine a prospectus, nor did he know one existed.[5] Following default on the bonds,[6] the plaintiff brought an action for security under Rule 10b-5[7] in the United States District Court for the Northern District of Alabama.[8] Plaintiff alleged that but for the intentional or reckless misrepresentation of certain facts known to the defendants, the bonds would never have been marketed.[9]

The defendants[10] moved for summary judgment contending that be-

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1. While Bishop was the purchaser of the bonds, the named plaintiff is James L. Shores, Jr., the executor of Bishop's estate. Shores v. Sklar, 647 F.2d 462, 462 (5th Cir. 1981).

2. The purpose of the bond issue was to raise revenue for the construction of an industrial facility, in this instance a facility for the construction of mobile homes. *Id.* at 465. They were not general obligation bonds of the municipality. *Id.* Alabama law allows for the issuance of such bonds, although they must be secured by a pledge of income from the lease on the property. *Id.*

3. *Id.*

4. *Id.* at 467. Bishop purchased the bonds in January of 1973. *Id.* The broker was not named as a defendant. *Id.* at 462.

5. *Id.* at 467. Neither the broker nor the defendants provided Bishop with a prospectus prior to his purchase. *Id.*

6. Default occurred on April 15, 1974, when the lessee defaulted under the lease. *Id.*

7. 17 C.F.R. § 240.10b-5 (1981) (originally part of the 1934 securities act). Rule 10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> [1] To employ any device, scheme, or artifice to defraud,
>
> [2] To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> [3] To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id.

8. 647 F.2d at 462.

9. *Id.* at 464. Misrepresentations made by the defendants included the failure to disclose an SEC investigation and a civil action against the underwriters, and the false representation of the amount of the developer's assets and his expertise in the area of modular homes. *Id.* The drafting attorney also knew that information submitted by the CPA in the preparation of the prospectus was false and misleading. *Id.* at 465-66.

10. The named defendant is Jerald H. Sklar, the attorney for the parties who sought