(representing two-thirds of total tonnage) and representatives of a majority of workers. The Court struck this down. It did so on the theory that the law exceeded Congress's power to regulate interstate commerce, not on nondelegation grounds, but in the course of its opinion it expressed real hostility to delegation to nongovernmental actors: "This is legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936). We return to the question of private delegations later in this chapter.

3. If there *is* a nondelegation problem here, would it have been possible for the *Schechter* Court to have avoided the problem by construing the executive branch's authority narrowly? Could the executive branch have construed its own authority narrowly?

The Court's 1935 enthusiasm for the nondelegation doctrine proved short-lived. For example, Yakus v. United States, 321 U.S. 414 (1944), upheld a World War II price control statute authorizing the Office of Price Administration (OPA) "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents." The statute required the administrator to set prices that were "generally fair and equitable," giving consideration to prices prevailing in October 1941. In Lichter v. United States, 334 U.S. 742 (1948), the Court sustained the validity of the Renegotiation Act, which provided for the recovery of "excessive profits" by government officers. As originally enacted, the law made no effort to guide the officers' determination of what was excessive; a later amendment contained a host of often conflicting "considerations" for the administrator to take into account.

Still, the nondelegation doctrine never sinks beneath the waves entirely. The following case is an important example of it resurfacing.

Industrial Union Department, AFL-CIO v. American Petroleum Institute (The Benzene Case)

448 U.S. 607 (1980)

Mr. Justice STEVENS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Mr. Justice STEWART joined and in Parts I, II, III-A, III-B, III-C, and III-E of which Mr. Justice POWELL joined.

[Industry challenged a regulatory standard limiting occupational exposure to benzene. Under the Occupational Safety and Health Act, the Occupational Safety and Health Administration (OSHA), within the Department of Labor, is responsible for developing such standards, which are formally adopted by the secretary of labor.] The Act delegates broad authority to the Secretary to promulgate different kinds of standards. The basic definition of an "occupational safety and health standard" is found in §3(8) [of the Occupational Safety and Health Act], 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, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment. 84 Stat. 1591, 29 U.S.C. §652(8).

Where toxic materials or harmful physical agents are concerned, a standard must also comply with §6(b)(5), 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 exposure to the hazard dealt with by such standard for the period of his working life. 84 Stat. 1594, 29 U.S.C. §655(b)(5).

Wherever the toxic material to be regulated is a carcinogen, the Secretary has taken the position that no safe exposure level can be determined and that §6(b)(5) requires him to set an exposure limit at the lowest technologically feasible level that will not impair the viability of the industries regulated. In this case, after having determined that there is a causal connection between benzene and leukemia (a cancer of the white blood cells), the Secretary set an exposure limit on airborne concentrations of benzene of one part benzene per million parts of air (1 ppm). . . .

Reading the two provisions together, the Fifth Circuit held that the Secretary was under a duty to determine whether the benefits expected from the new standard bore a reasonable relationship to the costs that it imposed. . . . The court noted that OSHA had made an estimate of the costs of compliance, but that the record lacked substantial evidence of any discernible benefits.

We agree with the Fifth Circuit's holding that §3(8) 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." Unless and until such a finding is made, it is not necessary to address the further question whether the Court of Appeals correctly held that there must be a reasonable correlation between costs and benefits, or whether, as the federal parties argue, the Secretary is then required by §6(b)(5) to promulgate a standard that goes as far as technologically and economically possible to eliminate the risk. . . .

I

The entire population of the United States is exposed to small quantities of benzene, ranging from a few parts per billion to 0.5 ppm, in the ambient air.

. . . [O]ne million workers are subject to additional low-level exposures as a consequence of their employment. The majority of these employees work in gasoline service stations, benzene production (petroleum refineries and coking operations), chemical processing, benzene transportation, rubber manufacturing, and laboratory operations.

Benzene is a toxic substance. . . . Persistent exposures at levels above 25-40 ppm may lead to blood deficiencies and diseases of the blood-forming organs, including aplastic anemia, which is generally fatal.

[As authorized by the act, the secretary in 1971 adopted as the federal standard the American National Standards Institute "consensus standard" for occupational exposure to benzene of 10 ppm averaged over an eight-hour period. The National Institute for Occupational Safety and Health (NIOSH), OSHA's research arm, concluded, on the basis of epidemiological studies correlating exposure levels of 150-600 ppm over extended periods and increased cancer incidence by exposed workers, that benzene caused leukemia. Although the studies failed to establish dose-response relations that would predict cancer incidence at lower exposure levels, NIOSH

recommended that the exposure limit be set as low as possible.] [OSHA proposed a "permanent" standard of 1 ppm. It] did not ask for comments as to whether or not benzene presented a significant health risk at exposures of 10 ppm or less. Rather, it asked for comments as to whether 1 ppm was the minimum feasible exposure limit. As OSHA's Deputy Director of Health Standards, Grover Wrenn, testified at the hearing, this formulation of the issue to be considered by the Agency was consistent with OSHA's general policy with respect to carcinogens. Whenever a carcinogen is involved, OSHA will presume that no safe level of exposure exists in the absence of clear proof establishing such a level and will accordingly set the exposure limit at the lowest level feasible. . . .

The permanent standard is expressly inapplicable to the storage, transportation, distribution, sale, or use of gasoline or other fuels subsequent to discharge from bulk terminals. This exception is particularly significant in light of the fact that over 795,000 gas station employees, who are exposed to an average of 102,700 gallons of gasoline (containing up to 2% benzene) annually, are thus excluded from the protection of the standard.

As presently formulated, the benzene standard is an expensive way of providing some additional protection for a relatively small number of employees. According to OSHA's figures, the standard will require capital investments in engineering controls of approximately $266 million, first-year operating costs (for monitoring, medical testing, employee training, and respirators) of $187 million to $205 million and recurring annual costs of approximately $34 million. 43 Fed. Reg. 5934 (1978). The figures outlined in OSHA's explanation of the costs of compliance to various industries indicate that only 35,000 employees would gain any benefit from the regulation in terms of a reduction in their exposure to benzene. Over two-thirds of these workers (24,450) are employed in the rubber-manufacturing industry. Compliance costs in that industry are estimated to be rather low with no capital costs and initial operating expenses estimated at only $34 million ($1,390 per employee); recurring annual costs would also be rather low, totaling less than $1 million. By contrast, the segment of the petroleum refining industry that produces benzene would be required to incur $24 million in capital costs and $600,000 in first-year operating expenses to provide additional protection for 300 workers ($82,000 per employee), while the petrochemical industry would be required to incur $20.9 million in capital costs and $1 million in initial operating expenses for the benefit of 552 employees ($39,675 per employee).

Although OSHA did not quantify the benefits to each category of worker in terms of decreased exposure to benzene, it appears from the economic impact study done at OSHA's direction that those benefits may be relatively small. Thus, although the current exposure limit is 10 ppm, the actual exposures outlined in that study are often considerably lower. For example, for the period 1970-1975 the petrochemical industry reported that, out of a total of 496 employees exposed to benzene, only 53 were exposed to levels between 1 and 5 ppm and only 7 (all at the same plant) were exposed to between 5 and 10 ppm. . . .

II

Any discussion of the 1 ppm exposure limit must, of course, begin with the Agency's rationale for imposing that limit. The written explanation of the standard fills 184 pages of the printed appendix. Much of it is devoted to a discussion of the voluminous evidence of the adverse effects of exposure to benzene at levels of concentration well above 10 ppm. This discussion demonstrates that there is ample justification for regulating occupational exposure to benzene and that the prior limit of 10 ppm, with a ceiling of 25 ppm (or a peak of 50 ppm) was reasonable. It does not however, provide direct support for the Agency's conclusion that the limit should be reduced from 10 ppm to 1 ppm.

The evidence in the administrative record of adverse effects of benzene exposure at 10 ppm is sketchy at best. [The Court reviewed the studies.] [OSHA concluded] that some benefits were likely to result from reducing the exposure limit from 10 ppm to 1 ppm. This conclusion was based, again, not on evidence, but rather on the assumption that the risk of leukemia will decrease as exposure levels decrease. Although the Agency had found it impossible to construct a dose-response curve that would predict with any accuracy the number of leukemias that could be expected to result from exposures at 10 ppm, at 1 ppm, or at any intermediate level, it nevertheless "determined that the benefits of the proposed standard are likely to be appreciable." It is noteworthy that at no point in its lengthy explanation did the Agency quote or even cite §3(8) of the Act. It made no finding that any of the provisions of the new standard were "reasonably necessary or appropriate to provide safe or healthful employment and *places* of employment."

III

[The Court noted industry's argument that OSHA's statute requires it to use a cost-benefit approach to setting standards, but concluded that it need not decide the issue.]

A

. . . [W]e think it is clear that the statute was not designed to require employers to provide absolutely risk-free workplaces whenever it is technologically feasible to do so, so long as the cost is not great enough to destroy an entire industry. Rather, both the language and structure of the Act, as well as its legislative history, indicate that it was intended to require the elimination, as far as feasible, of significant risks of harm.

B

Therefore, before he can promulgate any permanent health or safety standard, the Secretary is required to make a threshold finding that a place of employment is unsafe — in the sense that significant risks are present and can be eliminated or lessened by a change in practices. . . .

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. If the Government were 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 Court's reasoning in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 [(1935)] and Panama Refining Co. v. Ryan, 293 U.S. 388 [(1935)]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.

C

The legislative history also supports the conclusion that Congress was concerned, not with absolute safety, but with the elimination of significant harm. . . .

D

. . . As we read the statute, the burden was on the Agency to show, on the basis of substantial evidence, that it is at least more likely than not that long-term exposure to 10 ppm of benzene presents a significant risk of material health impairment. Ordinarily, it is the proponent of a rule or order who has the burden of proof in administrative proceedings. . . .

In this case OSHA did not even attempt to carry its burden of proof. . . .

Contrary to the Government's contentions, imposing a burden on the Agency of demonstrating a significant risk of harm will not strip it of its ability to regulate carcinogens, nor will it require the Agency to wait for deaths to occur before taking any action. First, the requirement that a "significant" risk be identified is not a mathematical strait-jacket. It is the Agency's responsibility to determine, in the first instance, what it considers to be a "significant" risk. . . .

Second, OSHA is not required to support its finding that a significant risk exists with anything approaching scientific certainty. . . .

The judgment of the Court of Appeals remanding the petition for review to the Secretary for further proceedings is affirmed.

Mr. Justice POWELL, concurring in part and in the judgment. . . .

[Justice Powell found that OSHA had not relied solely on its assumption that no safe threshold exposure for a carcinogen exists, but had also claimed that the specific facts of record, including evidence of adverse health effects of levels of benzene exposure substantially higher than 10 ppm, established that the 1 ppm standard adopted was reasonably necessary to deal with a significant health risk. The Justice concluded that the record failed to establish "substantial evidence" for such a finding.]

. . . But even if one assumes that OSHA properly met this burden, 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. 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. . . . It is simply unreasonable to believe the Congress intended OSHA to pursue the desirable goal of risk-free workplaces to the extent that the economic viability of particular industries — or significant segments thereof — is threatened. . . .

[Such a policy] would impair the ability of American industries to compete effectively with foreign businesses and to provide employment for American workers. . . . Perhaps more significantly, however, OSHA's interpretation of §6(b)(5) would force it to regulate in a manner inconsistent with the important health and safety purposes of the legislation we construe today. Thousands of toxic substances present risks that fairly could be characterized as "significant." . . . Even if OSHA succeeded in selecting the gravest risks for earliest regulation, 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. I would not attribute such an irrational intention to Congress.

In this case, OSHA did find that the "substantial costs" of the benzene regulations are justified. . . . But the record before us contains neither adequate documentation of this conclusion, nor any evidence that OSHA weighed the relevant considerations. . . .

Mr. Justice REHNQUIST, concurring in the judgment. . . .

In considering the alternative interpretations . . . [of the statute,] my colleagues manifest a good deal of uncertainty, and ultimately divide over whether the Secretary produced sufficient evidence that the proposed standard for benzene will result in any appreciable benefits at all. This uncertainty, I would suggest, is eminently justified, since I believe that this litigation presents the Court with what has to be one of the most difficult issues that could confront a decisionmaker: whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths. I would also suggest that the widely varying positions advanced in the briefs of the parties and in the opinions of Mr. Justice Stevens, the Chief Justice, Mr. Justice Powell, and Mr. Justice Marshall demonstrate, perhaps better than any other fact, that Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court.

I

In this Second Treatise of Civil Government, published in 1690, John Locke wrote that "[t]he 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." Two hundred years later, this Court expressly recognized the existence of and the necessity for limits on Congress' ability to delegate its authority to representatives of the Executive Branch: "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 government ordained by the Constitution." Field v. Clark, 143 U.S. 649, 692 (1928).

The rule against delegation of legislative power is not, however, so cardinal a principle as to allow for no exception. The Framers of the Constitution were practical statesmen. . . .

[Justice Rehnquist discussed the history of the doctrine that Congress may not delegate "legislative" power to administrative agencies without adequate standards to guide its exercise.] . . .

Viewing the legislation at issue here in light of these principles, I believe that it fails to pass muster. Read literally, the relevant portion of §6(b)(5) is completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot. In the case of a hazardous substance for which a "safe" level is either unknown or impractical, the language of §6(b)(5) gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line. Especially in light of the importance of the interests at stake, I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power. For me the remaining question, then, is whether additional standards are ascertainable from the legislative history or statutory context of §6(b)(5) or, if not, whether such a standardless delegation was justifiable in light of the "inherent necessities" of the situation.

II

One of the primary sources looked to by this Court in adding gloss to an otherwise broad grant of legislative authority is the legislative history of the statute in question.

[Justice Rehnquist reviewed the legislative history of §6(b)(5), which originally required OSHA to prevent injury to workers' health without regard to feasibility. The words "to the extent feasible" were added during the Senate floor debates.] . . . I believe that the legislative history demonstrates that the feasibility requirement, as employed in §6(b)(5), is a legislative mirage, appearing to some Members but not to others, and assuming any form desired by the beholder. . . .

In sum, the legislative history contains nothing to indicate that the language "to the extent feasible" does anything other than render what had been a clear, if somewhat unrealistic, standard largely, if not entirely, precatory. There is certainly nothing to indicate that these words, as used in §6(b)(5), are limited to technological and economic feasibility. . . .

III

[I]n some cases this Court has abided by a rule of necessity, upholding broad delegations of authority where it would be "unreasonable and impracticable to compel Congress to prescribe detailed rules" regarding a particular policy or situation. . . .

. . . But no need for such an evasive standard as "feasibility" is apparent in the present cases. In drafting §6(b)(5), Congress was faced with a clear, if difficult, choice between balancing statistical lives and industrial resources or authorizing the Secretary to elevate human life above all concerns save massive dislocation in an affected industry.

. . . That Congress chose, intentionally or unintentionally, to pass this difficult choice on to the Secretary is evident from the spectral quality of the standard it selected and is capsulized in Senator Saxbe's unfulfilled promise that "the terms that we are passing back and forth are going to have to be identified."

IV

As formulated and enforced by this Court, the nondelegation doctrine serves three important functions. First, and most abstractly, it ensures 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. . . . Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. . . . Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

I believe the legislation at issue here fails on all three counts. . . . I would suggest that the standard of "feasibility" renders meaningful judicial review impossible.

We 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. If the nondelegation doctrine has fallen into the same desuetude as have substantive due process and restrictive interpretations of the Commerce Clause, it is, as one writer has phrased it, "a case of death by association." J. Ely, Democracy and Distrust, A Theory of Judicial Review 133 (1980). Indeed, a number of observers have suggested

that this Court should once more take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to politically unresponsive administrators. Other observers, as might be imagined, have disagreed.

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. . . . When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process. . . . Accordingly, for the reasons stated above, I concur in the judgment of the Court affirming the judgment of the Court of Appeals.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN, Mr. Justice WHITE, and Mr. Justice BLACKMUN join, dissenting. . . .

The plurality's conclusion . . . is based on its interpretation of 29 U.S.C. §652(8), which defines an occupational safety and health standard as one "which requires conditions . . . reasonably necessary or appropriate to provide safe or healthful employment. . . ." According to the plurality, a standard is not "reasonably necessary or appropriate" unless the Secretary is able to show that it is "at least more likely than not," . . . that the risk he seeks to regulate is a "significant" one. . . . Nothing in the statute's language or legislative history, however, indicates that the "reasonably necessary or appropriate" language should be given this meaning. . . .

. . . Contrary to the plurality's suggestion, the Secretary did not rely blindly on some Draconian carcinogen "policy." . . .

In this case the Secretary found that exposure to benzene at levels above 1 ppm posed a definite albeit unquantifiable risk of chromosomal damage, nonmalignant blood disorders, and leukemia. . . .

In these circumstances it seems clear that the Secretary found a risk that is "significant" in the sense that the word is normally used [and he appropriately weighed costs and benefits]. . . .

Because the approach taken by the plurality is so plainly irreconcilable with the Court's proper institutional role, I am certain that it will not stand the test of time. In all likelihood, today's decision will come to be regarded as an extreme reaction to a regulatory scheme that, as the Members of the plurality perceived it, imposed an unduly harsh burden on regulated industries. But as the Constitution "does not enact Mr. Herbert Spencer's Social Statics," Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), so the responsibility to scrutinize federal administrative action does not authorize this Court to strike its own balance between the costs and benefits of occupational safety standards. I am confident that the approach taken by the plurality today, like that in *Lochner* itself, will eventually be abandoned, and that the representative branches of government will once again be allowed to determine the level of safety and health protection to be accorded to the American worker.

Notes and Questions

1. Why did Congress create the Occupational Safety and Health Administration? Consider the following possibilities. (a) Because workers lack the information necessary to make informed tradeoffs between health risks and other relevant values, such as wages. (b) Because even if workers have relevant information, they cannot be expected to use it well. People tend to process information poorly and to engage in various forms of wishful thinking. (c) Because Congress wanted