
A NOTE ON THE BENZENE CASE

Antonin Scalia

THE INTENSE ANTICIPATION on the part of regulatory reform buffs that preceded the Supreme Court's benzene decision (*Industrial Union Department, AFL-CIO v. American Petroleum Institute*) seems at first blush hardly to have been rewarded. The mountain brought forth a mouse—a three-one-one-four split decision that literally provides no conclusive answer to any legal question more general than whether the benzene exposure regulation promulgated by the Occupational Safety and Health Administration (OSHA) on February 10, 1978, is valid.

A scorecard on the major issues presented would look something like this:

(1) *Cost-benefit analysis.* This was thought to be the centerpiece of the production since it had been the basis of the lower court's action in setting the regulation aside. Essentially the issue involves whether the Occupational Safety and Health Act of 1970 requires OSHA to consider the disproportionateness of benefits to expenditures in issuing standards relating to toxic substances. (OSHA conceded that its standard could not lawfully produce "massive economic dislocation" in the affected industry, but acknowledged no obligation or ability to consider economic factors for any other purpose.) Score: NO-4, YES-1, NOT VOTING-4 (because these four justices found it unnecessary to reach the issue).

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(2) *The requirement of significant risk.* This involves the question whether, before OSHA can issue a toxic standard, it must establish as probable that the condition which the standard addresses presents a significant risk of material health impairment. (OSHA contended that in order to overturn a standard the burden was on the industry to establish the absence of risk.) Score: YES-4, NO-4, NOT VOTING-1.

(3) *OSHA's carcinogen policy.* This involves the question whether—assuming the agency must establish significant risk—it may do so by appealing to a general presumption that there is no safe exposure level for carcinogens. (On OSHA's carcinogen policy, see "Regulating Cancer," from Perspectives in *Regulation*, March/April 1980.) Score: YES-4, NO-3, MAYBE-1, NOT VOTING-1.

Supreme Court palmists with an interest in deregulation will now turn their attention to the coke-oven emissions case on the Court's docket, *American Iron and Steel Institute v. OSHA*, which in anticipatory hoopla will be the benzene case of the 1980-1981 term. That case appears to present the same cost-benefit issue in a less evadable form—though where there's a will there's a way. It is hard to say what the present case portends as to the disposition of the cost-benefit issue if and when it is reached. There are four justices (the four dissenters) squarely committed against the principle, and only one (Lewis F. Powell) squarely committed in favor.

The three justices joining in the plurality opinion (Warren E. Burger, John Paul Stevens, and Potter Stewart) presumably feel that regulation has gone too far (of which, more below); but if they were willing to give vent to that feeling to the extent of imposing a cost-benefit requirement, why did they not do so in the case before them, as Powell did, so as to provide immediate guidance for the agency on remand? The chances would seem good that at least one of these three was not willing to go that far—making all that is necessary for a five-four majority against the cost-benefit requirement. For that matter, even Justice William Rehnquist might provide the necessary shift vote. If he persists in his position (also discussed below) that the statute is unconstitutional, and if there are four other votes *in favor of* a cost-benefit requirement, his vote will in effect impose that requirement—because only by observing it will OSHA be able to obtain a majority (eight-to-one, the one being Rehnquist) sustaining its action. But if Rehnquist puts aside his constitutional objection (on *stare decisis* grounds) and reaches the interpretation of the statute, the tenor of his opinion suggests that he would not discern a cost-benefit requirement, any more than he could find the less restrictive requirement asserted by the plurality opinion. So the chances for mandated cost-benefit analysis in OSHA regulation would appear slim.

FOR THOSE INTERESTED in long-term trends rather than immediate answers, however, the benzene case should not so readily be consigned to obscurity. It says a lot about the direction in which the Court is heading. To begin with, one must be impressed (and, depending upon the equanimity with which one regards human foibles, amused) by the dissenters' allegations that the plurality opinion's discussion of the agency record was "extraordinarily arrogant and extraordinarily unfair"; its interpretation of the statute "a fabrication bearing no connection with the acts or intentions of Congress"; and its approach "obviously more interested in the consequences of its decision than in discerning the intention of Congress." Although observations such as these come with ill grace from four of the five justices (William Brennan, Thurgood Marshall, Harry Blackmun, and Byron White) who so recently composed the

tongue-in-cheek statutory interpretation of the 1964 Civil Rights Act in the *Weber* case, still there is some truth in what they say. The plurality opinion is an "activist" opinion, in that it does not give OSHA the benefit of the doubt on the interpretation of either the statute or the agency's findings. Indeed, as not only the four dissenters but also Rehnquist believed, the agency's interpretation was *more* plausible with respect to the requirement of significant risk (issue number two above). Thus, the plurality opinion is a departure from the principle of judicial deference to agency judgment of law and of fact.

But to tell the truth, that principle has frequently been honored in the breach—particularly by the dissenters in the present case—when a different result seemed to the Court better public policy. In the past, however, that judicial activism has generally been applied in the direction of increasing, rather than reducing, agency-mandated restrictions upon economic activity. This fact is nicely represented by the very titles of the three cases cited by the dissenters in a footnote which tempers their call for judicial restraint with the observation that they "do not, of course, suggest that it is appropriate for a federal court reviewing agency action blindly to defer to the agency's findings of fact and determinations of policy"—citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, *Kleppe v. Sierra Club*, and *Environmental Defense Fund v. Ruckelshaus*. But activism is not to be indulged in, the footnote continues, "on behalf of institutions that are by no means unable to protect themselves in the political process"—an apparent veiled allusion, in the present context, to Big Business.

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impositions upon the private sector. In a Court which, many think, has thrown off the Frankfortian shackles of principled decision making, this latest indication of four judges' public-policy views (the three-judge plurality of Burger, Stevens, and Stewart, plus Powell, who concurred with most of the plurality opinion) may be much more important than any legal rule the Court might have adopted.

In one respect, however, the benzene case may foreshadow real legal change. In the early days of the New Deal, the Supreme Court struck down two federal statutes (one of them the famous National Industrial Recovery Act) on the ground that, because of absence of legislated standards controlling the use of the powers conferred, they amounted to authorization for executive officials to write the law—that is, an unconstitutional delegation of legislative authority. The doctrine of unconstitutional delegation has not been applied to strike down a federal law since that time—though some state supreme courts have invoked it to invalidate state legislation. Not long ago, respected commentators pronounced the federal doctrine, for all practical purposes, dead.

But references to the doctrine have continued to crop up in Supreme Court opinions—usually as a justification for giving a statute a narrow construction, lest it be unconstitutional. Such references have increased in recent years, and the doctrine has acquired a renewed respectability. The benzene case greatly reinforces this trend. The plurality opinion, in a portion joined by a fourth justice, Powell, invokes the doctrine (erroneously, it would seem—but that is irrelevant to the present point) as one of the reasons for interpreting the statute to require a finding of significant risk. And the opinion of Rehnquist—the necessary fifth vote for affirmance—is based squarely upon application of the doctrine to invalidate the relevant section of the statute.

There are several problems with revivification of the unconstitutional delegation doctrine. First, it does not square very easily (to put it mildly) with the case law that has developed in the forty-five years since the Supreme Court last used it as a basis of decision. Several agencies have been operating during this period under a legislative mandate no more specific than to pursue the “public interest, convenience and necessity.” During World War II, the

Supreme Court approved emergency price control legislation which empowered the executive to establish “fair and equitable” rates that would “stabilize prices, . . . prevent speculative, unwarranted, and abnormal increases,” and protect persons on fixed incomes against “undue impairment of their standard of living.” And during the first Nixon administration, lower federal courts approved wage-price control legislation that authorized the President to “stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970,” and to make “such adjustments as may be necessary to prevent gross inequities.” It is hard to get much more standardless than that.

But one might say, presumably, that by-gones will be by-gones—that the Court will leave the questionable legislation of the past in place, while holding new legislation to a stricter test, now that the danger of government by bureaucracy supplanting government by the people has become alarmingly apparent. That is hardly the traditional judicial manner of proceeding, but to engage in such innovation (explicitly or *sub silentio*) is not beyond the present Court. That would still leave, however, the second problem, which is actually the root cause of the first: the difficulty of enunciating how much delegation is too much. The relevant factors are simply too multifarious: How significant is the power in question (for example, fixing customs duties versus fixing prices and wages for the entire economy)? How technical are the judgments left for executive determination (for example, establishing construction criteria for nuclear reactors versus establishing standards for “fair” advertising)? What degree of social consensus exists with respect to those nontechnical judgments committed to the executive (for example, defining “unfair or deceptive trade practices” versus defining acceptable levels of air pollution)? And—most imponderable of all—how great is the need for immediate action (for example, the executive-determined price controls authorized in World War II versus those authorized in 1970, during the Vietnam conflict)?

Rehnquist's opinion—which is the most thorough discussion of this subject to be found in any Supreme Court opinion since 1935—distinguishes some of the earlier cases, but provides no solution to this second problem of

establishing a workable test. It does little more than recite Chief Justice Taft's conclusion that delegations of legislative authority must be judged "according to common sense and the inherent necessities of the governmental coordination." And one can probably not intelligently say much more than that.

A doctrine so vague, it may be said, is no doctrine at all, but merely an invitation to judicial policy making in the guise of constitutional law. This fear is indeed the reason for the alleged demise of the doctrine—because its use in 1935 paralleled the Court's now discredited use of the due process clause to impose its own notions of acceptable social legislation. But surely vague constitutional doctrines are not automatically unacceptable. The Court's opinions from obscenity to church-state relations to the commerce clause are full of them. And the risk of vagueness here is much less than elsewhere. Decisions under the due process clause or the First Amendment, for example, are an absolute impediment to governmental action. A decision based on the unconstitutional delegation doctrine is not; it merely requires the action to be taken in a different fashion. If, for example, the Supreme Court were to declare unconstitutional on this ground the Magnuson-Moss Act's delegation to the Federal Trade Commission of the authority to establish by rule prohibitions of legitimate activity necessary to prevent unfair or deceptive trade practices, the result would only be that such prohibitions, instead of being framed as rules, would have to be proposed as legislation—which could then be enacted by the Congress.

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In fact, the argument may be made that in modern circumstances the unconstitutional delegation doctrine, far from permitting an increase in judicial power, actually reduces it. For now that judicial review of agency action is virtually routine, it is the courts, rather than the agencies, that can ultimately determine the

content of standardless legislation. In other words, to a large extent judicial invocation of the unconstitutional delegation doctrine is a *self-denying ordinance*—forbidding the transfer of legislative power not to the agencies, but to the courts themselves. The benzene case itself is illustrative. In giving content to a law which in fact says no more than that OSHA should ensure "safe places of employment" (whatever that means) and should maximize protection against toxic materials "to the extent feasible" (whatever that means), it was the plurality of the Court, rather than OSHA, that ended up doing legislator's work.

So even with all its Frankenstein-like warts, knobs, and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice. The alternative appears to be continuation of the widely felt trend toward government by bureaucracy or (what is no better) government by courts. In truth, of course, no one has ever thought that the unconstitutional delegation doctrine did not *exist* as a principle of our government. If it did not, the Congress could presumably vote all powers to the President and adjourn. The only issue has been whether adherence to this fundamental principle is properly enforceable by the courts, or rather should be left (except perhaps in extreme cases of the sort just mentioned) to the wisdom of the Congress. As an original matter, there is much to be said for the latter view. The sorts of judgments alluded to above—how great is the need for prompt action, how extensive is the social consensus on the vague legislated objective, and so forth—are much more appropriate for a representative assembly than for a hermetically sealed committee of nine lawyers. In earlier times heated constitutional debate did take place at the congressional level.

Recently, however, the notion seems to have taken root that if a constitutional prohibition is not enforceable through the courts it does not exist. Where that mind set obtains, the congressional barrier to unconstitutional action disappears unless reinforced by judicial affirmation. So even those who do not relish the prospect of regular judicial enforcement of the unconstitutional delegation doctrine might well support the Court's making an example of one—just one—of the many enactments that appear to violate the principle. The educational effect on Congress might well be substantial. ■