美國行政法概論 -

第二講 重大證據原則（Substantial Evidence Doctrine）

The Benzene Case

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我們過去對於美國行政程序法(Administrative Procedure Act)的理解，比較偏向非正式程序所作成的行政行為，例如有無經「預告暨評論程序」(notice and comment)、有沒有告知等等，或是行政命令的區別，但其實我國對於行政命令的區別，即法規命令和行政規則是德國的立法體例，在美國並沒有這樣的區別。湯德宗老師認為，行政命令這部分是美國的行政程序法，可是，事實上，在引入法規命令和行政規則的區別之後，美國行政程序法的特色已經蕩然無存。法規命令和行政規則是在我國大法官會議解釋過去所建立的法律保留原則下所產生的，在釋字第443號的階層化法律保留體系，侵害人民權利需要有法律授權，而有些狀況是完全不允許的，甚至要求必須國會保留、憲法保留。這套思維和APA的行政命令制定程序是沒什麼關係的，APA的行政命令制定程序比較像湯德宗老師在《行政程序法》論裡寫的，正式作成程序和非正式作成程序，其中兩者間最大的差別在於是否要經過聽證。司法針對經過聽證的行政行為進行審查時，會給予比較多的尊重、法官會比較尊重行政機關作成的行政行為。過去台灣在討論美國行政法、行政程序法，比較偏重在聽證程序、非正式作成程序這方面，比較少注意到行政程序法第706條，因為這已經到行政程序法後端了。我自己到美國學習美國行政程序法，當時非常驚訝地發現說，整個行政法的教科書從頭到尾幾乎是圍繞著第706條為討論。

美國沒有行政訴訟法，它的訴訟程序完全是併入民事訴訟程序，所以，只有在民事訴訟法裡涉及政府行為(Governmental action)的部分，是屬於美國的行政訴訟法。但是，這也會產生一個誤解，以為行政法沒有獨立地對於行政訴訟的討論。其誤解的來源就是在於不了解行政程序法第706條的存在，以及其對於美國行政法的重大影響。之後我們會討論包括嚴格檢視原則(Hard look)，與*Chevron*案的司法謙讓，這一套全都是從第706條開始。

一、美國行政程序法第706條 Administrative Procedure Act §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret （註1）**constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action**（註2）.

（受訴法院需要決定所有的法律問題、解釋憲法以及法律的條文規定，要去決定行政行為的意義是什麼、要去定性行政行為。）

The reviewing court shall—

(1) **compel agency action unlawfully withheld or unreasonably delayed**

（如果行政機關不作為，法院必須強制要求行政機關採取一定的行政行為。關鍵點是在於"unlawfully"和"unreasonably"，前者是"withheld"，行政機關的不作為是要達到違法(unlawful)的程度，法院才能發動去強制它為一定的作為。而後者，如果行政機關刻意地拖延，拖延不一定是要達到違法的程度，而是在事實上可以判斷該程序就是不合理地拖延的時候，受訴法院也可以強制行政機關加速行政行為的作成）**; and**

(2) **hold unlawful and set aside agency action, findings, and conclusions found to be—**

（第二點是最重要的。第二點常常作為訴訟的主要基礎。確認它違法，以及撤銷行政行為、事實調查和作成的結論。以下列了可以被撤銷、或確認違法的六種情形。）

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

（恣意、專斷（沒有考慮到各種應該考慮到的因素）、濫用裁量，或者是所有不符合法律的；）

(B) contrary to constitutional right, power, privilege, or immunity;

（違背憲法所保障的權利、權力、特權或豁免的範圍；）

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

（欠缺法定的管轄權、行政機關本身的職權或限制，或是缺少法律賦予它的權利；）

(D) without observance of procedure required by law;

（沒有遵守法律規定的程序；）

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

（在涉及第556、557條或特定法律規定須經聽證程序的行政行為未獲實質、重大的證據支持。）（註3）

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

（這個決定所根據的事實是不可靠的、沒有任何事實基礎的。“de novo”的意思是重新審理，視為從來沒有發生過的，自始未發生的，把它的事實部分全部審理過一次。這類的案子其實非常少，除非這是有法律的規定。）

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

（在作前述決定的時候，法院不是只有針對法律問題而已，它必須看所有的紀錄，或者是當事人一方所引用到的部分，必須遵照 rule of prejudicial error 賦予它正當的考慮。）

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

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:

這個案子是與職業安全及健康署(Occupational Safety and Health Administration)有關，它要制定一個標準(standard)，針對有毒性的物質去公布一個職業安全及健康標準(occupational safety and health standard)，它的基礎是來自於職業安全及健康法(Occupational Safety and Health Act)的第 3 條第 8 項。

“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).

該條的重點在於什麼是合理地需要或適合(reasonably necessary or appropriate)？另外一個關鍵是在於當標準公布的時候，必須要依照第 6 條第 b 項第 5 款的規定。

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（在可行的範圍內）, on the basis of the best available evidence（可以獲得的最佳證據的基礎之上）, that no employee will suffer material impairment of health or functional capacity（實際健康或是工作能力的損害）even if such employee has regular 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." 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)….

Reaching 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.

OSHA針對苯(Benzene)的化學物質，原先公布10ppm作為管制標準，但是後來改變這個標準，把它變成是1ppm，這裡就有一個爭論，從10ppm降到1ppm，OSHA當然會說對於人類的健康會有所改善，避免人類暴露在更多的有毒化學物質之下，但是，為什麼是1ppm？OSHA花了非常多的篇幅，說明10ppm的管制標準是有害的、10ppm會讓更多的人、勞工得到血癌等等，也舉了流行病學上的證據。但是，聯邦最高法院在本案中採取原告的主張，似乎並未考量可行性(feasibility)。

I 為事實的部分。

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. （它沒有針對為何要將管制標準從 10ppm 降到 1ppm 提供直接的支持。）

The evidence in the administrative record of adverse effects of benzene exposure at 10 ppm is sketchy at best（充其量只是概論的說明）. [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（臆測）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." 法院把問題收束到 OSHA 規定的第 3 條第 8 項。

III

Our resolution of the issues in these cases turns, to a large extent, on the meaning of and the relationship between § 3(8), which defines a health and safety standard as a standard that is "reasonably necessary and appropriate to provide safe or healthful employment," and § 6(b)(5), which directs the Secretary in promulgating a health and safety standard for toxic materials to "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 . . . ."

法院認為在本案中不需討論成本效益分析。一開始就把第 3 條第 8 項和第 6 條第 b 項第 5 款的規定列出來，因為法院認為解決問題的方法就是轉向來討論這兩個系爭規定的意義與其關係，因為畢竟這是法院最擅長的工作。

In the Government's view, § 3(8)'s definition of the term "standard" has no legal significance or at best merely requires that a standard not be totally irrational（註 4）.（站在政府機關的角度，第 3 條第 8 項的規定對於標準的規定沒有任何法律的重要性，或者最多只要求這個標準不要是完全地不合理。）It takes the position that § 6(b)(5) is controlling（最重要的；主要適用的條文） and that it requires OSHA to promulgate a standard that either gives an absolute assurance of safety for each and every（每一個）worker or reduces exposures to the lowest level feasible（可行範圍之最低程度）. The Government interprets "feasible" as meaning technologically achievable at a cost（經濟上的成本） that would not impair the viability of the industries subject to the regulation. The respondent industry representatives, on the other hand, argue that the Court of Appeals was correct in holding that the "reasonably necessary and appropriate" language of § 3(8), along with the feasibility requirement of § 6(b)(5), requires the Agency to quantify both the costs and the benefits of a proposed rule and to conclude that they are roughly commensurate.

產業代表認為第五上訴巡迴法院的判決是正確的，它將第 3 條第 8 項的"reasonably necessary and appropriate"和第 6 條第 b 項第 5 款"feasibility"結合在一起，"reasonable"是在"feasible"的範圍之內，如何決定是否可行，並非像政府機關所說的是科技上可達到(technologically achievable)，而是必須要針對擬提出的管制標準所帶來的效益和成本進行量化，並獲得效益和成本兩者幾乎是相當的結論，才是符合"reasonably necessary and appropriate"的程度。

In our view, it is not necessary to decide whether either the Government or industry is entirely correct. For（因為）we think it is clear that § 3(8) does apply to all

permanent standards promulgated under the Act and that it requires the Secretary（勞動部部長）, before issuing any standard, to determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment. Only after the Secretary has made the threshold determination that such a risk exists with respect to a toxic substance, would it be necessary to decide whether § 6(b)(5) requires him to select the most protective standard he can consistent with economic and technological feasibility （註 5）, or whether, as respondents argue, the benefits of the regulation must be commensurate（相當的）（註 6）with the costs of its implementation. Because the Secretary did not make the required threshold finding in these cases, we have no occasion（沒有機會）to determine whether costs must be weighed against benefits in an appropriate case.

行政機關寫了一百多頁 OSHA 的分析報告，說明苯(Benzene)的管制標準應該要從 10ppm 調降到 1ppm，結果法院認為分析報告不算數，不是 commensurate。所以，Stevens 不想要涉入成本效益分析(cost-benefit analysis)的原因，有一個很深層的考量是他不認為法院有能力去處理成本效益分析。他在此所想出來法律上的解套方法就是，先看法條結構，法條結構是先有第 3 條，再有第 6 條，所以，先適用第 3 條，第 3 條是“reasonably necessary and appropriate"，決定之後，才會看第 6 條的可行性(feasibility)。在可行性的部分，才要去處理經濟上是否可行，以及衡量成本效益的部分。這是 Stevens 的解套方法，以及他逃脫成本效益分析的方式。其背後深層的原因在於，法院不想要在本案取代行政機關作成本效益分析的評量。聯邦最高法院在這裡使用該方法解釋為什麼在本案的 purality opinion 不去討論成本效益，但是 Justice Powell 認為應該要納入討論。

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.（法院不認為政府部門所說的“technologically feasible”是法條所要求的。）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（法律上明確的授權）, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented（史無前例的） 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（微小的） the exposure and no matter how many experts testified that they regarded the risk as insignificant.（只要能夠去建立那個因果關係，也就是說該物質在動物實驗上已經造成了癌症，或者人類經過高劑量的曝曬、暴露之後會感染癌症，它就可以被當成是人體的致癌物。）That conclusion would in turn justify pervasive（普遍的、廣泛的） regulation limited only by the constraint of feasibility.（也就是說，行政機關必須先作到一件事情，也就是先證明苯的確是致癌物質，才可以去作各式各樣的管制。這樣的管制只有受到可行性的限制。）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（可資辨別的利益）. 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（定性） 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)]. （註7）A construction （論理、解釋） of the statute that avoids this kind of open-ended grant should certainly be favored.（這就叫做合憲性解釋。從事法律解釋的時候要避免這種開放式的授權出現，法院較樂於採用此種解釋方法。）

法院認為，行政機關的見解都不成立，OSHA 不需要去作任何的量化分析，這樣的話等於是說，行政首長愛怎麼定就怎麼定，不需要提出科學上的數據，而且是量化的數據，來說明為什麼該物質對於人體會有嚴重的傷害。法院在此主要是去反駁行政機關的見解。

C

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

法院支持它前面所提到的，法條並沒有要求一個絕對安全的工作環境，只是要求消除重大的危害、損害。在這裡，法院解釋法律的時候，也參酌了立法資料，

到後面這會變成是一個爭議的焦點。但是在本案中，法院似乎採取一個立法史的解釋是沒有問題的。

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（重大的）health impairment. Ordinarily, it is the proponent of a rule or order who has the burden of proof in administrative proceedings.（此處的 proceedings 並不是說現在進行的這個訴訟程序，而是指在制定命令的過程當中。）

法院認為行政機關至少要在“substantial evidence”的基礎上，建立長期暴露在 10ppm 苯的有毒物質之下，它對於人體造成重大損害此種狀況會發生。該舉證責任是屬於行政機關。也就是說，法院認為在本案中行政機關並未去證明這樣的一件事情。

In this case OSHA did not even attempt to carry its burden of proof（履行舉證責任）….

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.

OSHA 的反對論點為，如果行政機關要負舉證責任的話，OSHA 在進行任何管制會變得很困難。如前面所討論的，管制標準從 10ppm 調降到 1ppm，OSHA 沒有辦法去建立劑量的反應(dose-response)。但是，眾所皆知苯是一個有毒物質，以常理的推斷來說，愈少愈好，對 OSHA 來說亦是如此。可是，法院現在要求 OSHA 必須很精確地衡量，前面已經說明，如果沒有量化的話，等於是空白授權，行政機關只要自己認定苯愈少愈好，就可以盡量地制定，此會違反空白授權原則。如果要精確地進行量化並衡量，行政機關反駁，此會剝奪其管制致癌物的能力，或是行政機關必須等待有人死亡之後，才能進行管制，但法院不同意行政機關這樣的說法。

法院說明，首先，要求行政機關證明它是“significant risk”，並非是束縛行政機關的數學遊戲，這是行政機關的責任去決定何謂是重要的風險。若行政機關沒有辦法說清楚，如何採取後續的管制行為。其次，OSHA 也沒有被要求採用科學上幾近完全地確定的程度支持其調查和發現。即便上述兩點皆成立，OSHA 要作的也沒有它所想像的那麼嚴重。法院只是要求行政機關必須提出“substantial evidence”去證明，長期暴露在 10ppm 苯的有毒物質之下，非常可能發生對於人體造成重大損害的情形。在本案中，行政機關連這麼低的門檻要求，都沒有達到。所以，聯邦最高法院維持下級審法院的判決，該判決是將產業團體要求重新審查管制標準的訂定是否合理，發回給行政機關去採取更進一步的程序。

歸納一下，法院基本上認為在 OSHA 的規定裡，第 3 條的“reasonably necessary and appropriate”必須要透過充分的“substantial evidence”來證明，的確存在一個重大的風險，對於人體會造成實質的傷害。在此建立之後，才能進行管制。但是，在本案中，OSHA 並沒有去討論，將苯的管制標準從 10 ppm 降到 1 ppm 是否符合這樣基礎的、門檻的發現(threshold finding)。

在本案中，聯邦最高法院採取了一個非常狹隘而限縮的解釋方法，它不去討論成本效益分析，也不去討論禁止授權原則，因為它用合憲性解釋的方式迴避。也就是說，法院在解釋的時候，盡量不要把這個條文解釋成是空白授權，而是把它解釋成法律已經有明確地要求行政機關應該採取何種行為。在法院的解釋之下，行政機關應該採取“substantial evidence”，來決定是不是 1ppm 的管制標準才會消除風險。在這樣的狀況之下，其他的大法官並非皆同意該見解，Justice Powell 認為本案沒有辦法迴避成本效益分析，而 Justice Rehnquist 認為沒有辦法迴避禁止授權原則的問題，因為他認為系爭條文本身就是一個不確定法律概念，何謂“reasonably necessary"，此會構成空白授權。如果按照 Justice Rehnquist 的看法，很多涉及管制的行政法都會構成這樣的問題，行政機關就不用進行管制了，國會也無法通過法律，就會回到之前的 *A.L.A. Schechter* 案和 *Panama* 案。1935 年之後，聯邦最高法院再也沒有任何一個案子提到所謂的「禁止授權原則」。本案的判決是 1980 年作成的，*ATA* 案是 2000 年言詞辯論，2001 年作成判決。在 *ATA* 案的判決裡，聯邦最高法院也不採取禁止授權原則的論點。

接下來是兩份協同意見書的部分。

Mr. Justice Powell, concurring in part and in the judgment（主文）....

[Justice Powell found that OSHA had not relied solely on its assumption that no safe threshold exposure（最低限度的暴露）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.]

這段主要的意思就是說，Justice Powell 認為 OSHA 並非像他自己所說的，沒有這樣一個所謂的安全致癌物的曝曬量存在，因為在科學上來說，你只要接觸、暴露在任何致癌物的輻射之下，可能都有健康上的風險。所以，沒有所謂安全的最低標準存在。此為 OSHA 所主張的，它會認為管制標準從 10ppm 到 1ppm，是一種 Trade-off，就是什麼樣的狀況才能夠保障更多數的人，若要完全地安全，就是 0，但事實上也不可能是 0。Justice Powell 認為 OSHA 其實也不見得能自圓其說，因為它並沒有完全地建立在這樣的一個基礎之上。那 OSHA 怎麼做呢?在它所提出的這些特定事實的資料裡，也包括超過 10ppm 的釋放量所產生的健康副作用的證據，證明採取 1ppm 的管制標準是合理必須的，去處理這樣一個重大的健康風險。Justice Powell 認為這樣一個透過比較的證明方式，無法建立實質、重大的證據。

…But even if one assumes that OSHA properly met this burden（訴訟上的證明）, 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 that 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….

退一步言，即便 OSHA 已經符合舉證責任的要求，Justice Powell 還是認為系爭規定(OSHA)也要求行政機關去決定安全標準的經濟效益必須與預期效益之間為合理的關係。如果這樣的一個職業健康管制標準需要的開銷、花費與預期的健康、安全收益之間是完全地不成比例，即非合理必要、也非可行。此處，Justice Powell 完全不採取二階的區分，他覺得一開始即必須踐行成本效益分析，如果它不符合成本效益，即未符合合理必要和可行的標準。相信國會會要求、希望 OSHA 去追求一個完全沒有風險的工作場所的設定目標，而導致特定產業或是其重要部門的經濟活力受到威脅的情形是顯不合理。Justice Powell 說，國會在這裡有個意圖，是希望它可以在產業經濟可以承受的範圍之內進行管制。但是，恐怕 plurality opinion 是無法同意此見解，因為從條文上來看，完全沒有提到經濟的部份。Justice

Powell 沒有辦法從文義解釋去導出經濟上平衡的需求，所以他從國會的意圖、立法目的去推導。

[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.

這種政策會損害美國工業與其他外國經濟有效地競爭、提供就業機會的能力。也許更重要的是，依照 OSHA 對於第 6 條第 b 項第 5 款的法律解釋，會讓它自己陷於一個困境，即 OSHA 將會去採取一種管制措施，與我們今天所論理的法條所蘊含重要的健康安全的目標相違背、不一致。數以千計的有毒物質呈現出有風險，可以被定性成重大的。就算 OSHA 能夠成功地挑選出最嚴重的風險而採取最早期的管制，制定標準的程序如果忽略了經濟的考量，將導致一個嚴重的資源錯置，且較無效率的安全標準。如果採取一個比較利益的判斷標準的話，在成本較低的狀況之下去達到收益。Justice Powell 假設國會是一個理性的國會，因此，他不會將這樣一個不合理的意圖歸屬於國會、將之認為是國會所欲達成的目的。

這段說明國會不可能會做出這樣一個要求，要以不惜任何代價的方式去達到安全的標準。因為如果要這樣做的話，世界上有太多的有毒物質會被定性成重要的，而 OSHA 要花很多的力氣和資源去管制。

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….

在本案中，OSHA 認為管制苯所需的重大成本是可被證立的。但是，本院認為 OSHA 所提出的這些資料，不僅未具充足的文件來證立結論，也未提出究竟其考量、權衡哪些相關因素的資料。所以，Justice Powell 同意本案應發回給 OSHA，為進一步的說明和調查。

很明顯地，Justice Powell 是採取一個成本效益分析的立場，他認為之所要發回給 OSHA，是因為 OSHA 沒有提出成本效益分析的證據和相關資料。

Mr. Justice REHNQUIST, concurring in the judgment….

William Rehnquist 他在 1972 年的時候，被提名為大法官，1986 年接任首席大法官。在政治意識形態的光譜上，他向來被認為是保守派。他在這裡，算是自 *Panama Refining Co.*案和 *A.L.A. Schechter* 案、禁止授權原則(non-delegation doctrine)在 1930 年代作成之後，第一次有聯邦最高法院的大法官再一次提到禁止授權原則，在本案中的協同意見書裡。

In considering these 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.（在考量該法條的其他解釋方法，我的同僚指出許多不確定性，最終在勞動部部長對於欲公布的苯的管制標準產生可資理解的利益是否提出充足的證據產生分歧。很明顯地，這是在回應 Justice Powell 的論據。)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.（本案呈現出來的是決策者可能遇到的最困難議題：在將預防死亡的經濟成本納入考量之情形之下，未來致死結果統計上的蓋然率是否應該被忽略。）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.（我同時也認為，在兩造的書狀裡和這些大法官提出的意見所呈現出的不同立場，也許比任何事實更容易彰顯一件事情，即在本案所爭議的焦點，國會是最適合作這個決定的政府組織，而且最有義務去作選擇，但國會已經不適當地將該權力授權予勞動部部長，且衍生地將該權力交給了法院，變成由法院來為選擇。）

I

In his 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 (1892). （二百年之後，本院明示地肯認對國會授權予行政部門代表必須採取限制判決所提到：國會不能將立法權授予總統，是舉世接受的原則，該原則對於憲法所制定的政府體系的完整性和維持運作是非常重要。）

The rule against delegation of legislative power is not, however, so cardinal（最為根本的、至為重要的、顛撲不破的）of principle as to allow for no exception. The Framers of the Constitution were practical statesmen….（禁止授權原則並非最為根本、顛撲不破的原則，以致不允許任何例外。制憲者是務實的政治家。）

[Justice Rehnquist discussed the history of the doctrine that Congress mat 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.（基於前述的禁止授權原則來看系爭規定，我相信它是無法過關的。）Read literally, the relevant portion of §6(b)(5) is completely precatory（有關連的）, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot. （從字面上來看，第 6 條第 b 項第 5 款關於「可行性」規定是有所關聯的，一方面訓誡勞動部部長在他可以的情形之下，必須採取最為保護人民的標準，但也在他無法做到的狀況下免除其義務。）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.（在有毒物質的狀況之下，要去建立安全的標準，是不確定或不切實際的。第 6 條第 b 項第 5 款對於如何在相對安全的連續動態過程劃出界線，並無給予勞動部部長任何的指示。）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.（鑑於在本案中所繫利益之重要性，獨立地來看，我毫無疑問地認為系爭規定會違反禁止無限制授予立法權的原則。）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.（對我來說，剩下的問題是，是否從第 6 條第 b 項第 5 款的立法史或條文脈絡裡辨析出其他可能的安全標準，如果不可能的話，是否可能出於本質、內在之必須，而證立此沒有標準的授權，也就是，能不能單純只用它是很必要的情形，去說明授予一個沒有任何標準的立法權是可以被允許的。）

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.（法院著眼的主要來源是系爭條文的立法史，以此立法史來加以掩飾非常空泛的立法權授予。）

[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.]（Justice Rehnquist 檢視第 6 條第 b 項第 5 款的立法史，發現原來該條文在草擬階段，並無考量可行性的部分。「必須要在可行範圍之內(to the extent feasible)」的文字是在參議院全院的辯論才加入的。)…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.（我相信前述的立法史，已經展現第 6 條第 b 項第 5 款中所使用的可行性要求是一種立法的幻覺，這種幻覺只有出現在某些國會議員的眼中，並非其他人。）

該段是從立法史去說明，可行性(feasibility)的要求不是所有國會議員的意思。但這不是很弔詭嗎？國會議員已經通過這個法案，可行性的文字也已經寫進法條裡，Justice Rehnquist 說這只是部分國會議員的意思，但這也是他自己說的，又非立法者，司法者可以這樣說嗎？這也是一個問題。

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….

Section II 的目的在說明"to the extent feasible"是一個很空洞的文字。

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….
（有些時候，聯邦最高法院遵守必要性的原則，當如果要求國會對於一個特定的政策或情形去規定非常鉅細靡遺的規則是不合理也不切實際的時候，聯邦最高法院容許廣泛的立法權授予。）

…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.（在草擬第 6 條第 b 項第 5 款的條文時，國會面對一個很清楚，同時也是困難的選擇，在平衡統計上的人命和產業的資源，或是授權部長將人命視為最重要的，而忽略受影響產業的資源不當配置的情形之間為選擇。）

…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."（立法當時的那個國會，有意或無意地將困難的選擇交給勞動部部長，從第 6 條第 b 項第 5 款這麼不清楚的原則以及透過 Saxbe 參議員所說的這句話具體而微地呈現出來。）

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.

第四部份只有說明何謂禁止授權原則。禁止授權原則擔負三個功能：1.重要的社會決定必須留給國會。2.國會授權必須符合明確性原則。3.由第二點所衍生的，司法者會透過明確性原則去檢驗被授權的權力行使。

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.（Justice Rehnquist 認為系爭規定未符合上述三點，在第 6 條第 b 項第 5 款規定裡的可行性(feasibility)原則，讓有意義的司法審查是不可能的。）

Justice Rehnquist 在協同意見書裡，很明確地把禁止授權原則納入司法審查的標準裡。因為，在此之前，禁止授權原則幾乎已經死亡，Justice Rehnquist 透過前面的這一番論述，包括從立法史去抽繹出立法者的意旨，最後說立法者的意旨是很空泛、很模糊的，因此，這裡違反了禁止授權原則。就算要授權，也必須要有明確的標準，讓被授權者知道如何去行使此立法權。Justice Rehnquist 很明確地宣示禁止授權原則還是美國聯邦最高法院所要適用的司法審查標準之一。其他大法官不見得同意此點，它也沒有被寫入 plurality opinion，也還只是停留在協同意見裡。後來 2000 年 *A.T.A* 的判決裡，聯邦最高法院甚至更明確地拒絕適用禁止授權原則，以至於 Adrian Vermeule 和他在芝加哥大學的同事 Eric A. Posner 兩人寫了一篇 *Interring the Nondelegation Doctrine*（為禁止授權原則送終），認為聯邦最高法院再也不會去適用禁止授權原則。

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.

*eminent 是明顯的、顯著的。我們常常會看到普通法(common law)上的物權法的名詞，叫做“eminent domain”，這個意思是徵收。在美國憲法上的話是“taking”。在美國法上只有三者屬於普通法(common law)，並非所有美國法都是。這三者包括契約法(Contract)、財產法(Property)、侵權行為法(Tort)。所以，在美國，只有民法才是普通法(common law)。刑法(criminal law)也可能是普通法，但美國本身也有刑法典，所以，基本上他們要去解釋刑法的時候，還是必須回到法條，而非案例(Case)。但也有人會說，契約法上已經有美國統一商法典(UCC)，但是美國統一商法典沒有辦法取代在普通法傳統下的契約法。在公法的領域，我們通常會說美國是屬於成文憲法的國家，以便和不成文憲法國家區分，包括英國、大英國協，包括澳洲、紐西蘭、加拿大、以前的南非和印度、新加坡、以前的香港。這些國家在公法上屬於不成文憲法國家，在私法領域是普通法國家。美國有成文憲法、成文的行政程序法，在解釋的時候，他們也不會回溯至英國十五世紀開始的普通法判決。

（註 1）“interpret” 本身就是法適用的活動。

（註 2）“action”包括抽象的行為和具體的行為，同時含括「規則訂定」(rulemaking)和「行政裁決」(adjudication)。

（註 3） 行政程序法第 556 條是規定聽證程序，第 557 條第(a)項規定：“This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title. ”第 557 條是和第 556 條結合在一起，兩者都與聽證程序有關。回頭看第 706 條，何種案件需要有“substantial evidence”呢？即是必須經過聽證程序的行政行為，不經過聽證程序的，就不需要有“substantial evidence”。為什麼呢？因為非正式制定的行政行為，它本來就不會產生“substantial evidence”。該規定的“substantial evidence”，它既是實質的意思，在程序方面也是達到一定的程度，才有可能去作成、產生。一般的非正式行政行為，並不要求有“substantial evidence”，可能因為程序上無法產生“substantial evidence”，所以也無從進行審查。第 556、557 條是針對一般聽證的要求，而“provided by statute”是指特定的法律裡規定必須要進行聽證的行政行為，它也必須獲得“substantial evidence”的支持。

（註 4）“rational” 和 “reasonable”是否相同？因為這兩個字翻譯成中文都可能變成「合理」。但是在討論上，我們很少看到針對“rational”的討論，大部份都是針對“reasonable”。在英國上有所謂的 Wednesbury unreasonableness，而

APA 第 706 條第 2 項第 a 款的 “arbitrary and, capricious, an abuse of discretion” 是英國行政法上的 Wednesbury unreasonableness 具體成文化。“reasonable”和 “rational” 到底有什麼不一樣的區別？還是他們其實是一樣的，後續的課程將會討論。

（註 5）只有在行政首長已經作了基礎、門檻的判斷，確定關於有毒物質的風險的確存在，即先按照第 3 條第 8 項的規定，決定是否真的存在有毒物質所造成危害的前提之下，才有需要進一步決定第 6 條第 b 項第 5 款是否適用。如果在前提─第 3 條第 8 項─就不存在的話，就不需要去考慮第 6 條第 b 項第 5 款的規定。第 6 條第 b 項第 5 款是要求行政首長去選擇一個保護程度最高的標準。所以，法院在此解釋，第 6 條第 b 項第 5 款的“to the extent feasible”是同時包括經濟上和科技上的可行性，並非像政府機關所主張的只有科技上的可行性。

（註 6）commensure (v.) 比較；共量 commensurate (adj.) 相當
commensuration (n.) 比較 commensurability (n.) 共量性
incommensurability(n.) 不可共量性

要如何比較兩個人的生命，這中間如果沒有把它轉換成同樣的單位，例如以時間或金錢為單位，以一條人命值多少錢為計算，恐怕無法進行衡量。又例如在環境上，它可以獲得多少的收益，有多少人可以因此受益，在勞工的工作環境條件也是一樣，有多少人可以因此受益。如果是以“dollar”為單位，就是成本效益分析(cost-benefit analysis, CBA)。另外一種是 QALYs(Quality-Adjusted Life Years)，此為在衛生醫療方面很常使用的品質校正生活年，類似餘命的概念。例如健保局要納入哪些藥物為健保的範圍，它必須要作一個分析，例如投入該藥物以後，糖尿病患可以獲得多少的 QALYs，例如投入 A 藥之後，QALYs 是 11 年，而投入 B 藥，QALYs 是 30 年。所以，就成本效用(cost utility analysis, CUA)來說，會選擇 B 藥。在經濟學上的定義，效益(Benefit)通常是和錢有關係，與健康有關的品質校正生活年，它是和效用(utility)有關。這些都和比較、共量(commensure)有關，必須要先讓它化約到同一個單位以後，不管是在健康領域的品質校正生活年，或是在經濟領域的成本效益分析所使用的金錢，都是要先化約，才能進行比較。

比例原則能否說是“commensurate”恐怕也有問題。因為在狹義比例原則裡，我們所衡量的利益，通常要保障的是權利，例如人民的財產權是否受到侵害，無論採取的是行政處分或行政命令等行政行為，大法官在進行解釋的時候，從來沒有辦法把所受損害和所得利益講清楚，狹義比例原則到底如何操作是一個謎。從來沒有人可以講得清楚，到底這個規範，例如都更條例制定之後，到底對人民的財產權造成何種的損害，是否符合狹義比例原則，它所保障的利益是多大。如果

沒有辦法共量的話，永遠講不清楚這件事情，因為無從比較。所以，狹義比例原則在這裡可能不見得是“commensurate”，因為它在單位上沒有被統一成 dollars 或 QALYs 這些單位。牽涉到更複雜的理論問題是，權利和權利之間如何去交換。因為，有時候，一個案子它同時涉及工作權和居住權，或是財產權和居住權，到底哪一個比較重要。在德國聯邦憲法法院的解釋裡，必須要先有個固定的價值體系，也就是我國釋字第 443 號所建立的階層化保留體系，例如最嚴格的為憲法第 8 條所保障的人身自由，其核心不能侵害，有定序出來之後，才知道權利的優先順序。但這是否為共量呢？可能也不見得是一種共量，它只是說明優先順利而已。因為，如果牽涉兩個居住權和一個工作權，或是十個居住權和一個工作權，到底誰先誰後？一個人身自由和十個財產權，到底要如何衡量？因為可能一個都更案裡牽涉一百個居民，這一百個居民的財產權和另外的人如果主張古蹟維護、古蹟保留，那麼一個古蹟權和一百個居民的生存權，到底要如何衡量，即便定出階層化的體系，也很難去作 commensuration。而所謂的價值取捨變成是個案衡量，可能會被批評是法官在創造新的秩序。這是美國法院念茲在茲的，因為他不斷被批評是太上立法。

（註 7）行政機關認為第 3 條第 8 項或第 6 條第 b 項第 5 款的規定皆未要求有毒物質所造成的風險必須被量化，足以讓勞動部部長在可理解的方式下定性該有毒物質擁有嚴重的風險。如果行政機關的見解是正確的話，系爭法條就會出現違反過去聯邦最高法院在 *A.L.A. Schechter* 案和 *Panama* 案所建立的禁止授權原則，因而有違憲的疑慮。