

Opinion of BREYER, J.

SUPREME COURT OF THE UNITED STATES

Nos. 99–1257 and 99–1426

CHRISTINE TODD WHITMAN, ADMINISTRATOR
OF ENVIRONMENTAL PROTECTION
AGENCY, ET AL., PETITIONERS
99–1257 *v.*
AMERICAN TRUCKING ASSOCIATIONS,
INC., ET AL.

AMERICAN TRUCKING ASSOCIATIONS,
INC., ET AL., PETITIONERS
99–1426 *v.*
CHRISTINE TODD WHITMAN, ADMINISTRATOR
OF ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February 27, 2001]

JUSTICE BREYER, concurring in part and concurring in
the judgment.

I join Parts I, III, and IV of the Court’s opinion. I also agree with the Court’s determination in Part II that the Clean Air Act does not permit the Environmental Protection Agency to consider the economic costs of implementation when setting national ambient air quality standards under §109(b)(1) of the Act. But I would not rest this conclusion solely upon §109’s language or upon a presumption, such as the Court’s presumption that any authority the Act grants the EPA to consider costs must flow from a “textual commitment” that is “clear.” *Ante*, at 7. In order better to achieve regulatory goals— for exam-

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ple, to allocate resources so that they save more lives or produce a cleaner environment— regulators must often take account of all of a proposed regulation’s adverse effects, at least where those adverse effects clearly threaten serious and disproportionate public harm. Hence, I believe that, other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation.

In this case, however, other things are not equal. Here, legislative history, along with the statute’s structure, indicates that §109’s language reflects a congressional decision not to delegate to the agency the legal authority to consider economic costs of compliance.

For one thing, the legislative history shows that Congress intended the statute to be “technology forcing.” Senator Edmund Muskie, the primary sponsor of the 1970 amendments to the Act, introduced them by saying that Congress’ primary responsibility in drafting the Act was not “to be limited by what is or appears to be technologically or economically feasible,” but “to establish what the public interest requires to protect the health of persons,” even if that means that “*industries will be asked to do what seems to be impossible at the present time.*” 116 Cong. Rec. 32901–32902 (1970), 1 Legislative History of the Clean Air Amendments of 1970 (Committee Report compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–18, p. 227 (1974) (hereinafter Leg. Hist.) (emphasis added).

The Senate directly focused upon the technical feasibility and cost of implementing the Act’s mandates. And it made clear that it intended the Administrator to develop air quality standards set independently of either. The Senate Report for the 1970 amendments explains:

“In the Committee discussions, considerable concern

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was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) *the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible*; and, 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health. . . .

“Therefore, the Committee determined that *existing sources of pollutants either should meet the standard of the law or be closed down . . .*” S. Rep. No. 91–1196, pp. 2–3 (1970), 1 Leg. Hist. 402–403 (emphasis added).

Indeed, this Court, after reviewing the entire legislative history, concluded that the 1970 amendments were “expressly designed to force regulated sources to develop pollution control devices that *might at the time appear to be economically or technologically infeasible*.” *Union Elec. Co. v. EPA*, 427 U. S. 246, 257 (1976) (emphasis added). And the Court added that the 1970 amendments were intended to be a “drastic remedy to . . . a serious and otherwise uncheckable problem.” *Id.*, at 256. Subsequent legislative history confirms that the technology-forcing goals of the 1970 amendments are still paramount in today’s Act. See Clean Air Conference Report (1977): Statement of Intent; Clarification of Select Provisions, 123 Cong. Rec. 27070 (1977) (stating, regarding the 1977 amendments to the Act, that “this year’s legislation retains and even strengthens the technology forcing . . . goals of the 1970 Act”); S. Rep. No. 101–228, p. 5 (1989) (stating that the 1990 amendments to the Act require ambient air quality standards to be set at “the level that ‘protects the public health’ with an ‘adequate margin of safety,’ *without regard to the economic or technical feasibility of attainment*”

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(emphasis added)).

To read this legislative history as meaning what it says does not impute to Congress an irrational intent. Technology-forcing hopes can prove realistic. Those persons, for example, who opposed the 1970 Act's insistence on a 90% reduction in auto emission pollutants, on the ground of excessive cost, saw the development of catalytic converter technology that helped achieve substantial reductions without the economic catastrophe that some had feared. See §6(a) of the Clean Air Act Amendments of 1970, amending §§202(b)(1)(A), (B), 84 Stat. 1690 (codified at 42 U. S. C. §§7521(b)(1)(A), (B)) (requiring a 90% reduction in emissions); 1 Leg. Hist. 238, 240 (statement of Sen. Griffin) (arguing that the emissions standards could "force [the automobile] industry out of existence" because costs "would not be taken into account"); see generally Reitze, *Mobile Source Air Pollution Control*, 6 *Envtl. Law* 309, 326–327 (2000) (discussing the development of the catalytic converter).

At the same time, the statute's technology-forcing objective makes regulatory efforts to determine the costs of implementation both less important and more difficult. It means that the relevant economic costs are speculative, for they include the cost of unknown future technologies. It also means that efforts to take costs into account can breed time-consuming and potentially unresolvable arguments about the accuracy and significance of cost estimates. Congress could have thought such efforts not worth the delays and uncertainties that would accompany them. In any event, that is what the statute's history seems to say. See *Union Elec.*, *supra*, at 256–259. And the matter is one for Congress to decide.

Moreover, the Act does not, on this reading, wholly ignore cost and feasibility. As the majority points out, *ante*, at 6–7, the Act allows regulators to take those concerns into account when they determine how to implement

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ambient air quality standards. Thus, States may consider economic costs when they select the particular control devices used to meet the standards, and industries experiencing difficulty in reducing their emissions can seek an exemption or variance from the state implementation plan. See *Union Elec.*, *supra*, at 266 (“[T]he most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan”).

The Act also permits the EPA, within certain limits, to consider costs when it sets deadlines by which areas must attain the ambient air quality standards. 42 U. S. C. §7502(a)(2)(A) (providing that “the Administrator may extend the attainment date . . . for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures”); §7502(a)(2)(C) (permitting the Administrator to grant up to two additional 1-year extensions); cf. §§7511(a)(1), (5) (setting more rigid attainment deadlines for areas in nonattainment of the ozone standard, but permitting the Administrator to grant up to two 1-year extensions). And Congress can change those statutory limits if necessary. Given the ambient air quality standards’ substantial effects on States, cities, industries, and their suppliers and customers, Congress will hear from those whom compliance deadlines affect adversely, and Congress can consider whether legislative change is warranted. See, *e.g.*, Steel Industry Compliance Extension Act of 1981, 95 Stat. 139 (codified at 42 U. S. C. §7413(e) (1988 ed.)) (repealed 1990) (granting the Administrator discretion to extend the ambient air quality standard attainment date set in the 1977 Act by up to three years for steelmaking facilities).

Finally, contrary to the suggestion of the Court of Appeals and of some parties, this interpretation of §109 does not require the EPA to eliminate every health risk, how-

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ever slight, at any economic cost, however great, to the point of “hurtling” industry over “the brink of ruin,” or even forcing “deindustrialization.” *American Trucking Assns., Inc. v. EPA*, 175 F. 3d 1027, 1037, 1038, n. 4 (CADC 1999); see also Brief for Cross-Petitioners in No. 99–1426, p. 25. The statute, by its express terms, does not compel the elimination of *all* risk; and it grants the Administrator sufficient flexibility to avoid setting ambient air quality standards ruinous to industry.

Section 109(b)(1) directs the Administrator to set standards that are “requisite to protect the public health” with “an adequate margin of safety.” But these words do not describe a world that is free of all risk— an impossible and undesirable objective. See *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U. S. 607, 642 (1980) (plurality opinion) (the word “safe” does not mean “risk-free”). Nor are the words “requisite” and “public health” to be understood independent of context. We consider football equipment “safe” even if its use entails a level of risk that would make drinking water “unsafe” for consumption. And what counts as “requisite” to protecting the public health will similarly vary with background circumstances, such as the public’s ordinary tolerance of the particular health risk in the particular context at issue. The Administrator can consider such background circumstances when “decid[ing] what risks are acceptable in the world in which we live.” *Natural Resources Defense Council, Inc. v. EPA*, 824 F. 2d 1146, 1165 (CADC 1987).

The statute also permits the Administrator to take account of comparative health risks. That is to say, she may consider whether a proposed rule promotes safety overall. A rule likely to cause more harm to health than it prevents is not a rule that is “requisite to protect the public health.” For example, as the Court of Appeals held and the parties do not contest, the Administrator has the authority to determine to what extent possible health

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risks stemming from reductions in tropospheric ozone (which, it is claimed, helps prevent cataracts and skin cancer) should be taken into account in setting the ambient air quality standard for ozone. See 175 F. 3d, at 1050–1053 (remanding for the Administrator to make that determination).

The statute ultimately specifies that the standard set must be “requisite to protect the public health” *“in the judgment of the Administrator,”* §109(b)(1), 84 Stat. 1680 (emphasis added), a phrase that grants the Administrator considerable discretionary standard-setting authority.

The statute’s words, then, authorize the Administrator to consider the severity of a pollutant’s potential adverse health effects, the number of those likely to be affected, the distribution of the adverse effects, and the uncertainties surrounding each estimate. Cf. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 364 (1999). They permit the Administrator to take account of comparative health consequences. They allow her to take account of context when determining the acceptability of small risks to health. And they give her considerable discretion when she does so.

This discretion would seem sufficient to avoid the extreme results that some of the industry parties fear. After all, the EPA, in setting standards that “protect the public health” with “an adequate margin of safety,” retains discretionary authority to avoid regulating risks that it reasonably concludes are trivial in context. Nor need regulation lead to deindustrialization. Preindustrial society was not a very healthy society; hence a standard demanding the return of the Stone Age would not prove “requisite to protect the public health.”

Although I rely more heavily than does the Court upon legislative history and alternative sources of statutory flexibility, I reach the same ultimate conclusion. Section 109 does not delegate to the EPA authority to base the

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national ambient air quality standards, in whole or in part, upon the economic costs of compliance.