

CHAPTER 5

Prudential Concerns (II): Political Process

There are two typical process-based attacks on the use of regulation. First, regulations are thought to be unduly opaque to voters: since they know neither who is really paying for nor who is receiving the benefits of the regulatory scheme, the programs are not adequately scrutinized. Second, critics of regulation fear that it is all too easy to unduly focus the costs of regulatory compliance on narrow, relatively politically powerless constituencies rather than the population as a whole. Thus, in process terms, voters will not scrutinize whether the benefits of the regulation outweigh compliance costs, since most voters know they will not bear any of these costs. I believe those voicing these concerns quite seriously overstate both the transparency and the inevitable breadth of most tax-and-spend programs. Those expressing these concerns may also mildly understate the distributive transparency of regulation.

The claim that broad public-mindedness can radically be encouraged by mandating tax-and-spend programs seems extremely peculiar. The two sorts of rent-seeking constituencies that have typically received the most attention—those soliciting localist pork-barrel legislation and interest-group entitlement mongers—traditionally seek tax-financed, legislatively appropriated expenditures, for example, public-works projects or indexed Social Security grants, rather than regulatory beneficence. Moreover, the idea that there is either significant fiscal illusion or a bureaucratic bias to regulate more and spend less is dubious. If one believes bureaucrats are less public-minded than self-regarding, it is plausible that they seek to maximize budgets rather than regulatory efficacy.¹

There is, though, in my view, a more serious process concern that leads me to be rather critical of some fairly uncontroversial regulatory programs.

1. I do not mean to dismiss the idea that in a political climate hostile to taxation and wary of deficit financing, there is political pressure on legislators to satisfy constituent demands through unfunded regulatory mandates. I simply believe that this pressure is both counter-balanced in part and less determinative of behavior than those who focus on its salience may believe.

While regulation may, on many occasions, be the best governmental option for pragmatic efficiency reasons, it is common within this political culture to believe, mistakenly, that parties are (and should be) regulated only when they are, in a moralistic sense, wrongdoers or rights violators.

This moralistic view of regulation can lead to two suboptimal results. First, society may refuse to regulate even when doing so would entail fewer social costs (e.g., monitoring costs) than the tax-and-spend alternative because the party to be regulated is not viewed as a wrongdoer. The second point, however, is more important: the moralistic view of regulation may lead to overregulation. The sense that the regulation's beneficiaries have a right to be free from wrongdoing by the regulated party precludes analysis of whether the costs of the implicit spending program the regulation enacts are justified compared to alternative spending programs.

Assume, for example, that public-accommodation owners rather than the state are required to provide services to those with mobility impairments dominantly to limit the costs of providing a certain level of access. If, though, it is nonetheless widely believed that the costs can be imposed on private parties only because the failure to provide such access is a rights violation, the disabled will be believed to have a superior, higher-priority, rights-based claim to social resources than they ought to have. Had the state directly provided the services, justifying their provision as a mechanism for collectively meeting need (including the group-specific need for social inclusion as well as the more individualistic need for more consumer goods), the decision to expend funds on the services would, in my view, more likely be seen to compete with decisions to fund programs that would benefit other needy citizens.

In this view, the cultural problem is that each form of government action has an accepted, ideal-typical set of characteristic functions. Instead of recognizing that each form of government action can and does meet all the characteristic functions, depending on the setting in which it is employed, and that the choice among forms of action may (or should) be made on purely prudential grounds, the action-types tend to be reified. It is common to ascribe general features to each act of regulation or each act of taxation without regard to its actual, more particularized role.

The Usual Case against Uncompensated Regulations and Its Discontents

Those who would attempt to induce governmental entities to use tax-and-spending programs rather than to regulate to improve legislative function-

ing generally make four basic arguments. They argue first that the regulatory tax base may be unduly narrow compared to the bases that would be employed if the entity were forced to use tax-and-spending programs. Giving governmental entities the option of concentrating costs on subgroups compromises their capacity to do reasonable cost-benefit calculations about the programs they enact, since one group (the politically dominant) will receive the benefits, while another group, whose welfare the beneficiaries may discount, will bear the costs. In this regard, the problem with regulatory taxation is that it is all too obvious how its benefits and burdens are distributed so that those with legislative power (whether majorities or a minority group distinct from those targeted to comply with regulatory mandates) see the distributive pattern clearly and enact poor legislation. Legislative bodies would improve their deliberative capacity to assess legislation if the beneficiaries and victims of legislation were always either the same people, randomized samples of the same group, or altruistically linked. At the very least, situations should be avoided in which a group imposes burdens on others for its own benefit; if gains must accrue to groups that are radically separate from those that bear costs, it is vital that politically dominant groups bear the costs.

The second purported problem essentially grows out of a quite different concern. Because the legislature does not budget a certain amount of money to be spent on a particular program, it does not adequately assess whether the program is worthwhile.² A third, closely related concern is

2. This was one of the reasons that traditional opponents of tax expenditures believed the state should collect and expend money directly on desired projects rather than encouraging or funding certain activities by failing to collect the taxes it would ordinarily collect from taxpayers when they spent money in a favored way. For the classic discussion, see Stanley Surrey, "Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures," *Harvard L. Rev.* 83 (1970): 705, 728–31. The belief that "implicit" expenditures are not subjected to adequate political scrutiny has also given rise to proposals for Congress to state an explicit regulatory budget in which the costs of private compliance with regulations are listed in the same way that direct expenditures would be. See, e.g., Robert E. Litan and William D. Nordhaus, *Reforming Federal Regulation* (New Haven: Yale University Press, 1983), 133–58; Lance D. Wood, Elliot P. Laws, and Barry Breen, "Restraining the Regulators: Legal Perspectives on a Regulatory Budget for Federal Agencies," *Harvard J. on Legislation* 18 (1981): 1.

This same process concern gave rise to the movement against unfunded mandates, the imposition on states and localities of regulatory directives, which culminated in the passage of the Unfunded Mandates Reform Act of 1995, P.L. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. §§ 658–58g, 1501–71 [Supp. 1995]) (requiring that Congress follow special procedures to enact new unfunded mandates, essentially requiring cost estimates whenever unfunded mandates are proposed, and requiring recorded approval of both houses when states and localities must spend more than fifty million dollars to comply with a federal mandate). For a good description of the law, see, e.g., "Recent Legislation: Federalism—Inter-

that beneficiaries and victims of regulation are simply not clearly known and labeled. At times, critics of regulation offer a particular variant of this argument: regulations too typically mandate that benefits be provided quasi-universally, distributing benefits without the sorts of income qualifications that more tailored spending programs would have. Thus, for example, rent-control subsidizes both rich and poor tenants, though housing vouchers would likely be directed only at the poor.³ The legislature enacts regulatory programs in a haze, not so much to benefit insiders and discount outsiders but without much sense at all of what is happening.

The legislators may be readily manipulated by the beneficiaries of the regulatory regime and not much dissuaded by its victims (who, for some reason, are either less aware that they are hurt than the beneficiaries know they are helped or are simply less able to exert influence) or may simply operate naively. The ultimate political-process problem, in both cases, is opacity. The legislators never know how much money will be spent (it is the hard-to-estimate sum of private compliance costs) and whether that amount is desirable to spend on that problem rather than on some alter-

governmental Relations—Congress Requires a Separate Recorded Vote for Any Provision Establishing an Unfunded Mandate,” *Harvard L. Rev.* 103 (1996): 1469. For articles advocating stricter control on such unfunded mandates, see, e.g., Paul Gillmor and Fred Eames, “Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates,” *Harvard J. on Legislation* 31 (1994): 395; Edward A. Zelinsky, “Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services,” *Vanderbilt L. Rev.* 46 (1993): 1355; for articles more skeptical of the attacks on unfunded mandates, see, e.g., David A. Dana, “The Case for Unfunded Environmental Mandates,” *Southern California L. Rev.* 69 (1995): 1; Makram B. Jaber, “Unfunded Federal Mandates: An Issue of Federalism or a ‘Brilliant Sound Bite,’” *Emory L. J.* 45 (1996): 281.

3. See, e.g., Richard Epstein, “Rent Control and the Theory of Efficient Regulation,” *Brooklyn L. Rev.* 54 (1988): 741, 777, 779. Similarly, the minimum wage benefits any employee whose wages are raised by it, even if the employee is part of a well-off family unit. See, e.g., Shaviro, “Minimum Wage,” 405, 433–36.

Naturally, there are a number of reasons, including the desire to destigmatize the receipt of government support, to provide at least certain government services more universally rather than limiting them to the poor. For a standard, historical discussion of the tensions between those who believe that welfare should be targeted for efficiency’s sake and those who believe that political support for welfare will erode in the absence of greater level of universalization of benefits and that means-tested, more targeted social welfare is unduly stigmatizing, see, e.g., Derek Fraser, *The Evolution of the British Welfare State*, 2d ed. (London: Macmillan, 1984), 194–95, 206–22.

Naturally, too, the goal of certain regulatory programs is less to redistribute by class than to solve some entirely distinct social problem (e.g., rent control may be aimed more at maintaining community continuity or at protecting partial noncommodity relationships with housing than at increasing access to fungible housing services). See Margaret Jane Radin, “Residential Rent Control,” *Philosophy and Pub. Affairs* 15 (1986): 350.

native problem (including tax-burden reduction). Moreover, the legislators never identify precisely who is being hurt by a particular amount. Instead of levying a tax whose size and impact on distinct parties is known, parties are told to act without regard to cost. Checks are never sent to particular beneficiaries (and it is never assessed whether they are the ideal recipients), and a funded program whose users are readily identified is never established.

The fourth story is one in which the bureaucratic managers who suggest regulatory options do so because they appear, from a bureaucratic vantage point, free. In one version of this story, a bureaucratic manager is given a quasi-fixed budget and then seeks to maximize influence and power given that budget constraint. In such a world, he will always choose a power-expanding option that does not use up his budget over an alternative that uses up scarce funds, even when that alternative is more effective in meeting the agency's legitimate policy goals. In the other version, the manager is simply cognitively unaware that regulated parties bear costs in the same way that taxpayers who fund the agency's spending programs do. Bureaucrats suffer from fiscal illusion. Believing that off-budget programs are costless or nearly so, the programs inevitably appear to generate more benefits than costs.⁴

It is not clear that these stories are either especially compatible with one another or internally persuasive, though I do not doubt that each has elements of truth. What appears most troubling about the stories, if meant to guide the choice between taxing and spending and regulation, is that they so drastically understate the public-administration problems inherent in the tax-and-spending programs that might substitute for the regulatory mandates and are supposedly superior along these dimensions.

This phenomenon is most obvious when dealing with the purported problem that the benefits and burdens of regulation may so clearly fall on distinct groups that legislation will be driven to too great an extent by the desire to redistribute, rather than meet broader collective goals. It may be the case that pathological tax-and-spending programs seem to be prone to involve transfers from broad taxpayer groups to narrow constituencies and that it is presumed (however naively) that (even disorganized) broad

4. For typical arguments to this effect, see, e.g., Blume and Rubinfeld, "Compensation," 569, 620–22; Michelman, "Property, Utility, and Fairness," 1165, 1218; Sax, "Takings," 36, 62–67. For an academic dissent from the mainstream position that fiscal illusion unambiguously leads to excessive, unwarranted government action and that compensation requirements will restrain such action, see Kaplow, "Economic Analysis," 509, 567–70.

groups should be able to protect themselves. (Naturally, though, in standard public-choice models, dispersed majorities are at particular risk of expropriation by well-organized minority groups who care little about aggregate social welfare.) But even if it were believed easier to burden minority groups through regulation than taxation, the pattern of explicit appropriations (on the spending side) may well reflect the devaluation of minority interests. Minorities are just as harmed by broadly financed spending programs that ignore their interests as by taxes that single them out. It is correct to be concerned, for example, that electorally dominant aging baby boomers will impose undue support costs on outvoted Gen Xers by increasing conventional payroll taxes. Even localist pork-barrel legislation may be seen not so much as a series of raids on the fisc by concentrated minority interests exploiting majorities that somehow ought to be able to do better to guard against the theft of their tax money but as majority coalitions of successful pork barrelers exploiting minorities unable to join the dominant coalitions.

Claims that the costs and benefits of regulation are more opaque than those of tax-and-spend programs are also doubtful. Polling evidence, for example, on the popularity of distinct forms of taxation suggests, though it cannot prove, that popular awareness of both the incidence and relative distributive burdens of explicit taxes is low.⁵ Moreover, it is doubtful that most legislators recognize that the incidence and distribution of most explicit taxes is contested (whether property taxes, excise taxes, corporate income taxes, or capital gains taxes). Similarly, while it may be obvious how much money a government program basically costs, there are enormous disputes over the net costs of every program and the degree to which beneficiaries other than the most obvious ones really gain. When a municipality funds a sports stadium from an increase in the sales tax, the stadium's costs are transparent, but the level of subsidy to players, team owners, fans, local merchants, and tourist-dependent workers is hotly debated. In fact, some stadium proponents will deny that the stadium has a positive

5. Thus, for example, in a 1991 survey, 26 percent of those polled believed that the federal income tax (which is, in fact, mildly progressive) was the least fair tax (including 18 percent of those with incomes under fifteen thousand dollars per year), while only 19 percent thought that state sales taxes (which are, in fact, mildly regressive) were the least fair, including 18 percent of those with incomes under fifteen thousand dollars per year. See *Changing Public Attitudes on Governments and Taxes* (Washington, D.C.: Advisory Commission on Intergovernmental Relations, 1991), 20. In the early 1980s, annual polls revealed that 35 percent or more of those surveyed thought that the federal income tax was the least fair tax, while only 15 percent or fewer thought the state sales tax the least fair. *Id.*, 4.

net cost at all, arguing that increases in sales tax revenues generated by increased visits to the municipality will ultimately make up for initial tax shifts.⁶

At the same time, there are reasons to believe that the costs of regulatory compliance are often clear to legislatures and that these costs, if anything, are overstated by those who will be asked to comply.⁷ The idea seems extremely peculiar that actual implicit taxpayers will silently suffer regulation so that legislatures can maintain the belief that regulation is costless. In standard public-choice accounts, concentrated constituencies, like those who bear the costs of regulation, at least at first, are far more likely to note and organize against the imposition of these costs than would dispersed taxpayers facing a small increase in their broad-based taxes.

Similarly, the idea that paying compensation serves to improve government decision making by blunting fiscal illusion seems largely though not wholly unpersuasive for reasons that Rose-Ackerman has highlighted.⁸ There appears to be no plausible theory of policy formation in which policymakers would consider the opportunity costs of their proposed actions if and only if they were forced to pay compensation. If they are public-interested cost-benefit calculators, they will account for all costs and benefits regardless of whether they show up in budgets. If policymakers are imperfect agents of the public, they will not be well deterred from improper takings since the expenditures come out of taxpayers' pockets rather than the policymakers' own.⁹ If decision making results from the

6. For an academic discussion of this issue that concludes that municipalities ultimately subsidize professional sports franchises by building them stadiums, see Dean V. Bain, *The Sports Stadium as a Municipal Investment* (Westport: Greenwood Press, 1994).

7. See Nicholas A. Ashford and Charles C. Caldart, *Technology, Law, and the Working Environment*, 2d ed. (Washington, D.C.: Island Press, 1996), 251–52; U.S. Congress, Office of Technology Assessment, *Gauging Control Technology and Regulating Impacts in Occupational Safety and Health—An Appraisal of OSHA's Analytic Approach* (Washington, D.C., 1995) (postregulatory compliance costs were frequently lower than preregulatory compliance costs as a result of unanticipated technology shifts).

8. Susan Rose-Ackerman, "Against Ad-Hocery: A Comment on Michelman," *Columbia L. Rev.* 88 (1988): 1697, 1706–7. See also, Kaplow, "Economic Analysis of Legal Transitions."

9. Rose-Ackerman's argument here would seem stronger if one assumed that public bureaucrats dominantly seek to maximize the size of the bureaus they govern and that bureau size and budget size are correlated: it is seemingly plausible then that bureaucrats would prefer to increase agency budgets by compensating all owners adversely affected by their programs. But this contention and her more general argument appear no more determinate than the counterclaims made by the proponents of fiscal-illusion theory: to the extent that budgets

conflict of more and less well-organized constituencies, takings law will counteract illusion only if it protects the disorganized whose interests will otherwise be given short shrift. Not only is there little reason to believe that victims of regulation are atypically disorganized in some general sense, one would believe they would be more prone to organize to block regulations than dispersed proponents of regulation would typically organize to seek benefits. In fact, Lunney argues that as a result of the relative ease of organizing those facing concentrated regulatory losses, these owners must be compensated largely to prevent them from blocking socially beneficial regulation, not to prevent socially valueless regulation from coming to pass.¹⁰

Rights and Prudence

I believe, although I cannot prove, that there is a distinct political-process problem that typically arises when regulation is chosen rather than tax-and-spend programs.

One of the central antilegalist insights of early critical legal studies (CLS) scholars was that legalism encouraged high levels of reification.¹¹ When making formal legal arguments or culturally persuasive lay variants of such arguments, lawyers seek to attach a general label to some social situation, attribute features to that particularized social situation typical of situations given the same label, and assert that the consequences that should befall the parties in most similarly labeled situations should also befall them in this particular situation. No one in CLS denied the inevitability of reification—to speak is to reify—but critical scholars simply noted that legalist habits led to more reification than was necessary given linguistic constraints (and that the ability to describe, in language, less reified accounts of the relevant events demonstrated that legalism demanded, or at least seemed to facilitate, higher levels of withdrawal from situation-specific moral discourse than other culturally available

are (semi)fixed—taxpayers resist higher taxes, lenders charge more if the governmental entity attempts to borrow more—governmental programs compete with one another. Officials will choose the best programs (however they frame a social, unduly narrowly personal, or interest-group-influenced welfare function) among those competing for budget funds but will always add programs that are (perceived as) costless.

10. See Glynn Lunney, “A Critical Reexamination of Takings Jurisprudence,” *Michigan L. Rev.* 90 (1992): 1892, 1947–59.

11. See, e.g., Mark Kelman, *Guide*, 269–75.

forms of discourse). Given that the United States has a highly legalistic culture, though, high levels of reification should be expected.

I believe that the essential image of taxing and spending is that it serves to perform two basic functions: the provision of (loosely defined) public goods and the redistribution of resources (to needy individuals and to interest groups). There are certainly disagreements about these issues: Which goods are truly public? (Is subsidizing education providing a public good? College education? High art? Legal services for the poor?) What are the appropriate levels of spending on concededly public goods? (What is the appropriate size of the [concededly public] defense budget? The appropriate level of air quality, given the costs of attaining higher levels?) Who should be covered by relief for the indigent, and at what levels of support? Should groups, rather than needy individuals, be thought of as apt beneficiaries of public largesse? (Is farmers' income important, regardless of their class status? What about homeowners or tenants in possession? Veterans?) But it is imagined, rather naively, that taxation serves solely to raise funds, as fairly as possible, for general spending programs with standard goals.

Regulation, in the standard reified picture, simply supplements the private law of torts and contracts, insuring that wrongdoers do no harm. Instead of relying on ex post damage judgments to restore parties to the status quo ante in which all entitlements were respected, entitlement breaches are prohibited ex ante. Regulated parties violate rights; beneficiaries are not the objects of redistributive largesse (or consumers of general public goods) but people protected against breaches of entitlement. Zoning and environmental law simply supplement nuisance (and mainstream environmental law casebooks typically first establish the torts/nuisance background for that reason);¹² Title VII brings to the private workplace rights against discriminatory mistreatment; consumer product safety regulations and workplace safety standards supplement product-liability suits and tort suits against employers in a world that disdains assumption-of-risk defenses; sellers' conduct may be regulated in ways that parallel (or mildly expand) buyers' contract rights against fraud (breaches of obligations to engage in appropriate levels of information disclosure), duress, and unconscionability (including undue market power). Regulation, properly done, has liberal priority over taxation and spending; it purifies the

12. See, e.g., Frederick R. Anderson, Daniel R. Mandelker, and A. Don Tarlock, *Environmental Protection: Law and Policy*, 2d ed. (Boston: Little, Brown, 1990), 58–65.

private sphere of rights violations, a task to be achieved before redistribution (through taxing and spending).¹³

The problem is that regulations and tax-and-spend programs are alternative means to redistribute and reallocate resources. There may be particular reasons to choose regulation over tax-and-spend programs that have little or nothing to do with protecting the beneficiary class against the violation of its rights. Regulations may be tailored to cause fewer untoward allocative effects than more general taxes that might raise funds sufficient to fund programs generating parallel benefits. Dispersed private parties may be forced by regulation to provide services, uncompensated, because they can do so more cheaply than the state but would not do so if compensated. But in a world that has historically associated the regulatory option with correction of rights violations, there is the tendency to assume that if regulation has occurred, it has been to protect a beneficiary class against a breach of its rights.

Given that rights are ordinarily thought of as (at least partial) side constraints, capable of trumping mere interests or distributive desires, beneficiaries of regulation will not compete directly with redistributive claimants but rather trump their claims. In this view, then, it is a lucky happenstance if distributive claims are best met through regulation, since if they are, it may seem inappropriate either to limit the scope of these claims or to balance them against the distributive claims of competing claimants. In this sense, there is a powerful secondary effect to the fact that as an administrative matter, it is most sensible to implement most programs that aid those with disabilities—whether pupils, consumers, or

13. I have no confident moral intuitions about a significant issue implicitly raised in the text: is it proper, in a moral sense, to maintain a substantial sphere (defined by the law of contract, tort, and crime) in which the remediation of rights violations takes priority over alternative forms of welfare-improving state action? Thus, is it morally right that tort plaintiffs have priority over other medically untreated accident victims in claiming the funds that the state charges tort defendants (to deter their malfeasance, as punishment for wrongdoing)? Even trickier, should the state be obliged to take costly, affirmative steps to prevent rights violations by others (e.g., by hiring extra police who might prevent clearly rights-violative crimes) when it could allocate those funds to programs that reduce suffering not caused by what would generally be thought of as rights violations? (If the state could reduce hunger with a food bank program that is cheaper to run than it would be to provide extra police who would reduce violence that is disvalued by its victims no more or less than the hunger the food bank will alleviate, must the state nonetheless first do all it can to reduce crime?)

For purposes of discussing the process defects in using the regulatory option, though, I need simply note two points. First, there is a widespread belief in the priority of remedying, if not preventing, rights violations. Second, this trumping effect may be invoked in situations when rights-violation remedies are employed, even when it is not agreed that the party benefited is really making a persuasive rights claim.

workers—by mandating that dispersed parties meet appropriate accommodation goals: claims that the dollars society allocates to accommodation could be spent meeting the distributive demands of other claimants appear inapt. First, the social world is purified of rights violation—and the cost of remedying (rights violative) discrimination is not a defense—and then redistribution occurs.

I do not want to overstate the impact of using the regulatory option. Classes that have in fact benefited from regulation may well have succeeded in demanding such regulation rather than explicit tax-and-spend programs because the relevant groups were able to convince legislators that their claims were indeed rights-based according to one or another independent theory of entitlements. The theory might well simply be one in which the claimants demonstrated that their situation bore significant similarities to that of other rights claimants. For example, those with disabilities were, like the classic civil rights constituency, African Americans, a socially subordinated distinct and insular minority group with (relatively) immutable traits about whom the majority had serious misconceptions and toward whom it bore animus. The question of whether nonaccommodation was or was not a rights violation may not have turned very much either on whether there was some convincing independent theory that it was (e.g., based on an affirmative right to social inclusion or a distributive right to treatment independent of uncontrollable traits) or on the mere happenstance that the regulation of dispersed public and private parties would be used to benefit the group. Instead, it may have been far more critical that those who sought regulation closely resembled another group that felt it could reach a seemingly parallel goal (social inclusion, an end to involuntary segregation) if classic rights violations (irrational discrimination) were effectively proscribed.

It is clear, though, that however one ultimately evaluates claims that there are substantial affirmative rights to, for example, adequate welfare support levels or reasonable education, efforts to sustain such claims have been at best legally and politically awkward.¹⁴ Conversely, it is scarcely viewed as awkward at all when disability-rights advocates claim as a matter of right that schools must educate children with disabilities appropriately, although schools need not as a matter of right educate anyone else adequately, or that entities must spare no efforts to accommodate those with disabilities unless it becomes pointless to ask entities to do so since

14. For the classic, eloquent, yet legally awkward effort to translate affirmative claims on resources into a constitutional right, see Frank I. Michelman, "Welfare Rights in a Constitutional Democracy," *Washington U. L. Q.* (1979): 659.

they will cease to exist as entities if they do. The organized-labor movement's resistance to cost-benefit calculations in worker safety programs¹⁵ may have partially reflected the legitimate fear that these inevitably contentious calculations would take place in an inadequately worker-protective manner or may have reflected a reasonable desire to avoid undue commodification in public discourse.¹⁶ But it is hard to escape the conclusion that no explicitly funded safety program (e.g., a highway construction program in which more or fewer, better or worse barriers might be installed) would ever be enacted without some substantial regard to the costs of saving lives. Conversely, cost-based defenses by employers exposing workers to hazards are strongly disfavored, in part, I suspect, because the employers are simply mandated to cease violating workers' rights.

15. Both the AFL-CIO and the Amalgamated Clothing and Textile Workers intervened when the cotton industry unsuccessfully challenged OSHA's cotton-dust regulations. The cotton industry contended that OSHA should not set standards in terms of feasibility but in terms of the regulation's costs and benefits. See *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 493 n. 3 (1981).

16. See Steven Kelman, *What Price Incentives?* (Boston: Auburn House, 1981) 27–83, 95–99, for a discussion of a related phenomenon in relation to environmental quality, the mistrust that some environmentalists and policymakers showed for incentive-based schemes for curtailing pollution. The argument against employing any sort of cost-benefit analysis in relationship to the natural environment is, in a sense, more facially plausible than the argument against employing cost-benefit thinking in the health and safety context. In the environmental context, it is not obvious that humans should act as though as they are entitled to alter the natural world whenever it is worth more to them to do so than it deserves their own interests. In relationship to their own health or safety, though, there are significant prudential arguments against collective cost-benefit analysis—that risks may be imposed by some on others, for example—but it appears difficult to argue seriously that individuals ought never balance the benefits of decreased risk or increased expected longevity against other improvements in life quality. See Richard Abel, “A Socialist Approach to Risk,” *Maryland L. Rev.* 41 (1982): 695 (noting that both market and political decisions about risk allocation at work and in consumption may be problematic in class societies while recognizing that individuals may reasonably balance the costs and benefits of risky activities in ideal settings, some of which exist in certain domains).