In Defense of Absolutes: Combating the Politics of Power in Environmental Law

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ABSTRACT: The tragedy of the commons has become the central and defining parable of environmental law. Once the environmental problem is thus defined in the terms of welfare economics, it is only natural to view the solution in those terms—i.e., as cost-benefit analysis. But market failure is only part of the problem. Environmental degradation also results from a kind of political failure. The endemic power imbalance between the diffuse, individual, non-economic interests favoring environmental protection and the concentrated, corporate, economic interests opposing it distorts agency decision making. Accordingly, what is needed is a decision making standard that accounts for and counteracts this power disparity. Cost-benefit analysis fails to do this. It explicitly avoids distributional issues and actually exacerbates the problem of power imbalance because it is indeterminate and, therefore, endlessly manipulable. I suggest we look for guidance in theories of constitutional rights, which are fundamentally grounded in concerns about power imbalance and its distorting effects on government decision making. Theories of rights routinely reject the utilitarian notion that decisions should be made by balancing costs and benefits to society as a whole, instead replacing the utilitarian balance with blunt prophylactic rules that counteract power imbalance by placing a thumb on the scale in favor of the weaker party. By analogy, in crafting statutory standards for agency decision making in environmental law, we should also reject cost-benefit analysis in favor of a trumping approach. The Endangered Species Act provides an example in which Congress has taken just such an approach. Its absolute standards operate as trumps: not by actually delivering absolute results, but by putting a thumb on the scale—giving the diffuse and powerless interests that favor species protection a

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credible threat of injunction and, thus, power in the political negotiating process through which such issues are ultimately resolved.

> *They exhaust themselves in exchanging and citing figures for pollutant levels in the air, water, and food, figures comparing population growth, energy consumption, nutritional requirements, raw material shortage, and so on, with as much ardor and intensity as if there had never been anyone—a certain Max Weber for instance—who (apparently) wasted his time proving that this debate is either senseless or vacuous, and probably both, unless one also considers society's power structures and distribution structures, its bureaucracies, and its prevailing norms and thought patterns.*†

I. INTRODUCTION

Despite decades of critique, cost-benefit analysis is increasingly becoming the standard of choice in environmental law. In the past several decades, it has emerged from the dusty corridors of the Army Corps of Engineers and the relatively obscure writings of right-wing academics onto the center stage of mainstream thought. Otherwise moderate voices like Cass Sunstein now chime in supporting the use of cost-benefit analysis in virtually all government decision making.[1] And the Office of Management and Budget currently subjects all proposed federal regulations to a cost-benefit analysis, sending them back to the agency for revision if the bean counters can't show more dollars of benefit than cost.[2] We have even begun to make decisions about protecting endangered species by putting a dollar value on extinction and holding it up next to the financial losses imposed on developers by species conservation measures.[3]

This hegemony of cost-benefit analysis ("CBA") in environmental law is the inevitable result of viewing environmental problems through the lens of welfare economics, which virtually everyone does, regardless of where they stand in the larger debate about treating economics as a normative framework for law. Thus, the "Tragedy of the Commons" has become the central and defining parable of environmental law and the starting point for virtually every conversation about environmental degradation.[4] And indeed, it is a compelling and powerful thought experiment. It lucidly illustrates the incentive structures that operate to make groups of people squander

† ULRICH BECK, ECOLOGICAL ENLIGHTENMENT 39 (Mark A. Ritter trans., Humanities Press Int'l, Inc. 1995) (1991).

1. *See generally* CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT 191–228 (2002) [hereinafter SUNSTEIN, RISK & REASON].

2. *See* Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted in* 5 U.S.C. § 601 (1988 & Supp. V 1993).

3. *See* 16 U.S.C. § 1533(b)(2) (2000). *See generally* Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 192–208 (2004).

4. An excerpt of Garrett Hardin's pivotal essay, *The Tragedy of the Commons*, 162 SCI. 1243 (1968), appears in the introductory chapter of virtually every textbook on environmental law.

commonly held resources, even when doing so is against their collective self-interest. And it explains the concept of externalities and how they lead to market failure.

But if the problem is conceived of solely in market terms, it should be no surprise that the solution is also viewed in those terms. Cost-benefit analysis, after all, is the economist's solution to market failure.[5] By measuring costs and benefits and proceeding only where benefits outweigh costs, government officials can, according to the theory, mimic the outcome that a perfectly functioning market would have produced and thereby optimize overall social welfare.[6]

But while it is certainly an important aspect of the problem, market failure does not account for the full story. Environmental degradation also results, in large part, from a kind of political failure. The parties to environmental disputes are often vastly mismatched in terms of wealth and power. On one side, those who stand to benefit from environmental regulation are usually large, diffuse groups of individuals, each of whom shares a relatively small, often non-economic stake in the controversy. On the other side, those who stand to lose from regulation tend to be relatively small groups, made up primarily of corporations, each with a large economic stake in the outcome of the dispute. This mismatch produces substantial distortions in the political process and in associated government decision making.

Administrative law scholars have long recognized the ways in which such power disparities can distort agency decision making. But all too often, the scholars who think and write about environmental standard-setting have failed adequately to account for the role this kind of power imbalance plays in creating and perpetuating environmental degradation.

Cost-benefit analysis, aimed as it is, specifically at the problem of market failure, fails entirely to address the problem of power imbalance. It quite self-consciously avoids issues concerning the distribution of wealth. And it assumes that the process of conducting a cost-benefit analysis is untainted by politics, such that disparities in wealth and power among affected groups have no distorting effects on the agency decision making process.

Indeed, CBA not only ignores the problem of power imbalance, it actually exacerbates it. As many commentators have effectively demonstrated, CBA is indeterminate, both because of intractable theoretical difficulties (like wealth effects and discount rates) and because of practical problems (like inadequate data and scientific uncertainty). This indeterminacy renders CBA not only ineffectual, but also endlessly manipulable. That is to say, for any claim that the benefits of a particular

5. Privatization, another oft-cited solution, may not always be practicable. *See infra* note 126.

6. *See infra* notes 13–22 and accompanying text.

project outweigh its costs, another economist can make a credible argument that the costs outweigh the benefits. In this way, CBA sets the stage for a contest over which side can hire more or better experts, rather than which side has the better argument. Accordingly, CBA provides no standard for decision at all, but rather abandons decision making to the untempered political process. Moreover, by framing the discussion in the esoteric technical terms of economic theory and thereby putting a premium on the ability to hire expensive experts, CBA exacerbates the extent to which that political process is inaccessible to the average citizen and skewed in favor of powerful, monied, corporate interests.

Accordingly, what is needed is a decision making standard that accounts for and counteracts the power disparities that prevent agencies from adequately addressing environmental degradation. I suggest we look for guidance in other areas of law concerned with combating disparities of power. Much of our constitutional-rights jurisprudence is grounded in such concerns. For example, the rights of criminal defendants are designed to counteract the vast disparities of power between the individual and the state. Similarly, First Amendment rights arise from a concern for checking state power. And the equal protection guarantee seeks to correct or counteract distortions in the political process that result from the power disparities occasioned by the subordinated status of certain groups in society.

In these areas of law, the utilitarian notion that decisions should be made by balancing costs and benefits to society as a whole is routinely rejected. Thus, for example, many of the rights we accord criminal defendants are squarely premised on the decidedly anti-utilitarian notion that it is better to let ten guilty people go free than to imprison one innocent person. Similarly, many prominent and respected First Amendment theorists reject an approach that balances the costs and benefits of suppressing speech in favor of an absolutist approach. And the equal protection guarantee emphatically rejects a utilitarian approach that would permit discrimination as long as, in the aggregate, the majority benefits from it more than the minority suffers.

Instead, many theories of rights view them as rejecting utilitarian balancing. Rights operate instead as "trumps" that prevail over countervailing interests, except in extraordinary circumstances, essentially putting a thumb on the scale in favor of the weaker party, and thus counteracting power imbalance. Although my concern here is specifically with *statutory* standards that operate to constrain *agency* decision making, rather than *constitutional* standards that operate to constrain *legislative* decision making, a rough analogy is nonetheless instructive. Thus, just as many influential theorists view rights as rejecting utilitarianism and cost-benefit balancing in favor of a trumping approach where power imbalances in society threaten to grossly distort government decision making, so too should statutory standards in environmental law adopt a trumping (or

absolutist) approach instead of cost-benefit analysis. A trumping approach in environmental law seeks to counteract the power imbalance between diffuse citizen interests and monied corporate interests by treating environmental-protection interests as trumps that override considerations of economic cost except in extraordinary circumstances.

The Endangered Species Act ("ESA")[7] provides a prominent example of an environmental-protection statute in which Congress has chosen exactly such an approach. Accordingly, the final Section of this Article uses the ESA to illustrate how absolute standards actually operate as trumps in environmental law.[8] Like certain constitutional rights, though phrased in absolute terms, the ESA's standards do not necessarily deliver strictly absolute results. Implementation of the ESA occurs not through the mechanical application of rigid, unyielding standards, but through a process of negotiation in which diffuse citizen interests favoring species preservation and concentrated corporate interests favoring unrestricted development compete to influence agency decision making. Though the disparity in power between the parties would otherwise subject this process to significant distortion, the ESA's absolute standards help to level the playing field. By making explicit appeals to economic costs off-limits and giving citizen groups a threat of injunction, the ESA's absolute standards place a thumb on the scale in favor of the weaker party. This thumb on the scale gives environmental-protection interests power in the political arena—a seat at the negotiating table. Thus, rather than literally defining substantive outcomes, the ESA's cost-blind standards serve a crucially important power-shifting function. This power shift ultimately leads to politically negotiated outcomes that—while perhaps less protective of species than a literal reading of the ESA's standards might dictate—are nonetheless substantially more protective of species and more consistent with widely shared public values than are the outcomes that would result from the political free-for-all that a cost-benefit standard would produce.

7. 16 U.S.C. §§ 1531–1544.

8. By "absolute" I mean a standard that is gauged only to the protection of human health or the environment and prohibits any consideration of economic costs. Another term would be "cost-blind." Other examples include the National Ambient Air Quality Standards under the Clean Air Act, 42 U.S.C. § 7409, the anti-degradation policy under the Clean Water Act, 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. § 131.12(a)(3) (2004), the Maximum Contaminant Level Goals under the Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(4)(A), and the Wilderness Act, 16 U.S.C. §§ 1131–1136. One subcategory of absolute standards includes those that are gauged to a zero level of risk rather than to a more loosely qualitative description of the level of human or ecological health to be maintained. The Delaney Clause, which prohibits approval of food or color additives "found to induce cancer in man or animal," 21 U.S.C. § 348(c)(3)(A), is an example of this type of standard. *See infra* note 361. This contrasts with the more flexible, qualitative descriptions contained in the ESA or the other provisions cited above.

This discussion serves in part to justify the ESA's absolute standards against recent attempts to amend the statute.[9] But while the ESA is often ghettoized as an anomalous special case—a statute that addresses the irreversible harm of extinction and therefore warrants an unusual approach—I intend this example to be suggestive of how absolute standards might work successfully to combat power imbalance in other areas of environmental law as well. In fact, Congress has enacted absolute standards in response to problems that go well beyond the realm of irreversible ecological harm. The National Ambient Air Quality Standards that form the centerpiece of the highly successful Clean Air Act are probably the most prominent example.[10] Furthermore, to the extent there is something about irreversible ecological harm that particularly warrants an absolutist approach, it is important to recognize that such harm is not just limited to species extinction, but is implicated by a broad range of more "mainstream" environmental issues, including air pollution (global warming) and water pollution (wetlands loss).

Part II begins by describing the evolution of CBA from an obscure and specialized standard used by the Army Corps of Engineers to evaluate flood-control projects to the ubiquitous standard of regulatory legitimacy that it has become today. It then provides an overview of the major critiques of CBA and the limited efforts that have so far been undertaken to develop a theoretical defense of alternative decision making standards. Part III defends the claim that environmental disputes pit concentrated, monied, corporate interests against diffuse and powerless public interests, explores the various mechanisms by which this power imbalance operates to distort government decision making, and examines how this issue has been treated in administrative law. Part IV explains how CBA ignores and exacerbates the problem of power imbalance. Part V draws the analogy to constitutional rights, describing how that jurisprudence is fundamentally concerned with combating power imbalance and its distorting effects on government decision making. Part VI demonstrates how prominent theories of rights reject utilitarian balancing in favor of a trumping approach. Part VII then develops my thesis that in order to counteract the problem of power imbalance, environmental statutes should, like rights jurisprudence, reject CBA in favor of a trumping approach. Finally, Part VIII considers the

9. *See, e.g.*, Julie Cart, *Species Protection Act "Broken"; A Top Interior Officer Says the Law Should be Revised to Give Economic and Other Interests Equal Footing with Endangered Animals and Plants*, L.A. TIMES, Nov. 14, 2003, at B6 (quoting Assistant Secretary of Interior Craig Manson). Numerous bills that would replace the ESA's absolute standards with a cost-benefit test have been introduced over the years. *See, e.g.*, H.R. 1490, 103d Cong. (1993); *see also* Nancy K. Kubasek et al., *Cross-examining Market Approaches to Protecting Species*, 30 ENVTL. L. REP. 10,721, 10,724 (2000); Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127, 1150–54 (1999).

10. *See* 42 U.S.C. § 7409. For other examples, see *supra* note 8.

Endangered Species Act as a case study in how absolute environmental standards actually operate as trumps. Specifically, this Part examines how the Act's absolute standards perform a crucial power-shifting function, thereby reducing the distortions in agency decision making that result from the power imbalance between concentrated monied corporate interests and diffuse public interests.

II. COST-BENEFIT ANALYSIS

A. ORIGINS: FROM ENGINEERS TO ECONOMISTS

As a tool for government decision making, cost-benefit analysis began in relative obscurity in the early twentieth century at the Army Corps of Engineers in the evaluation of flood-control projects.[11] Engineers at the Corps attempted to quantify in monetary terms the overall costs and benefits of proposed projects, recommending implementation only where the projected benefits outweighed the projected costs. The engineers took a highly pragmatic, common-sense approach to these estimates, making no effort to develop a theoretical grounding for such methods and shying away from any attempt to assess in monetary terms values that were considered intangible (like, for example, the recreational benefits associated with building a reservoir).[12] In the 1950s and 1960s, however, a new interest in CBA began to develop in another quarter—among academic economists. They set about using the new welfare economics to build a theoretical foundation for cost-benefit analysis.

Welfare economics is the normative branch of economics. It traces its roots to utilitarianism and is built on the normative principle of efficiency—that is, the maximization of the overall utility of members of society in the aggregate.[13] The definition of "utility" is of course problematic. While utilitarians of the nineteenth century viewed pleasure or happiness as the standard of intrinsic value to be maximized, welfare economists rejected the

11. *See* THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE 148–89 (1995). This practice became a statutory requirement in the Flood Control Act of 1936, ch. 688, § 1, 49 Stat. 1570, 1570 (codified as amended at 33 U.S.C. § 701a), which conditioned the approval of federal flood-control projects on a finding that "the benefits to whomsoever they may accrue are in excess of the estimated costs." *See* AJIT K. DASGUPTA & D.W. PEARCE, COST-BENEFIT ANALYSIS: THEORY AND PRACTICE 12 (1972).

12. PORTER, *supra* note 11, at 160–61; *see, e.g.*, Namekagon Hydro Co., 12 F.P.C. 203, 206 (1953) ("[T]he [Federal Power] Commission realizes that in many cases where unique and most special types of recreation are encountered a dollar evaluation is inadequate as the public interest must be considered and it cannot be evaluated adequately only in dollars and cents.").

13. *See* Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 5 REGULATION 33, Jan.–Feb. 1981, at 33 (characterizing CBA as a form of utilitarianism); Amartya Sen, *The Possibility of Social Choice*, 89 AM. ECON. REV. 349, 351–52 (1999). *But see* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 129–30 (1979) (explaining the distinctions between welfare economics and utilitarianism).

notion that utilities or levels of happiness could be compared across individuals.[14] Accordingly, they avoided that problem by adopting "preference satisfaction" or "willingness to pay" as the currency of individual well-being.[15] Thus, by simply observing people's willingness to pay for things as expressed in markets, economists could avoid the philosophical conundrums of having to make interpersonal welfare comparisons.[16]

In its purest form, economic efficiency is defined by the Pareto principle. One state of affairs is a "Pareto improvement" over another if it would result in at least one person being better off and no one being worse off. A situation is "Pareto optimal" or "Pareto efficient," therefore, if there is no alternative state of affairs that would be a Pareto improvement.[17] Putting aside the rather significant problem of defining well-being or "better off," the goal of Pareto efficiency seems intuitively appealing to many people.[18]

Under the laws of economics, Pareto efficiency will be produced by a perfectly functioning market—that is, one in which participants act rationally (consumers maximize utility and producers maximize profits), there are no transaction costs, information is perfect, and all social costs and benefits are accounted for in private costs and benefits (i.e., there are no externalities).[19] Where the market is imperfect, however—where, for example, a tragedy of the commons produces externalities—economists may view government intervention to try to correct the market failure as appropriate. But, economists argue, when government does step in, it should calibrate its intervention to mimic the economically efficient outcome that a perfectly functioning market would have produced.

The problem is that any attempt to use Pareto efficiency as the standard for judging the efficiency of government intervention is impractical. First, it is very difficult to find a government action that does not cause harm to at least one person. Thus, virtually all government intervention would fail a Pareto-efficiency test. Second, the informational burden of trying to break down aggregate costs and benefits into individual costs and benefits is insurmountable. Accordingly, for these purposes, economists turn to a

14. *See* Oscar Lange, *The Foundations of Welfare Economics*, 10 ECONOMETRICA 215, 215 (1942); Sen, *supra* note 13, at 352. *But see* Sen, *supra* note 13, at 356–60 (arguing that interpersonal welfare comparisons are possible).

15. Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 549–50 (1939).

16. *See* Posner, *supra* note 13, at 129–30.

17. Gerard Debreu, *Valuation Equilibrium and Pareto Optimum*, 40 PROC. NAT'L ACAD. OF SCI. 588, 588 (1954).

18. *But see* Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 188 (1999) (describing objections to the Pareto standard); Amartya Sen, *Liberty Unanimity and Rights*, 43 ECONOMICA 217, 235 (1976) (arguing that the Pareto principle is inconsistent with basic liberal rights).

19. *See* ANTHONY E. BOARDMAN ET AL., COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE 53 (1996).

slightly different definition of efficiency with "somewhat less conceptual appeal, but much greater feasibility":[20] "potential Pareto" or "Kaldor-Hicks" efficiency. Under this definition, a government regulation is efficient if those who stand to benefit from the regulation could fully compensate those who stand to lose from it and still be better off. Or, put another way, a regulation is Kaldor-Hicks efficient if, following a hypothetical transfer of wealth from the winners to the losers, the resulting state of affairs would be a Pareto improvement.[21]

Thus, a government regulation that meets the Kaldor-Hicks efficiency standard is one for which the overall social benefits exceed the overall social costs, i.e., one that meets a cost-benefit test. In this way, welfare economists defend cost-benefit analysis as a normative standard for judging government intervention.[22] By mimicking the results of a perfectly functioning market, government intervention that meets a cost-benefit test is thought to optimize overall social welfare.

Note that welfare economics single-mindedly pursues the goal of maximizing overall social utility and takes no position as to the distribution of utility or wealth.[23] Thus, a change in the status quo might well be Kaldor-Hicks efficient (i.e., meet a cost-benefit test) and yet leave many or even most people worse off.[24] A weakening of pollution regulations might, for

20. *Id.* at 32*; see* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L.Q. 545, 580 (1997) ("[D]ecisions producing Kaldor-Hicks efficiency do not have the virtues associated with free market exchange" because they do not involve consensual transactions.).

21. *See* BOARDMAN ET AL., *supra* note 19, at 32; E.J. MISHAN, COST-BENEFIT ANALYSIS 390 (1976).

22. *See* MISHAN, *supra* note 21, at 382–96. *But see* Adler & Posner, *supra* note 18, at 190 (noting that "[m]ost economists appear to concede that the Kaldor-Hicks standard is not, by itself, normatively desirable," but defend it nonetheless on the grounds that benefits to winners and costs to losers will wash out in the end).

23. *See* Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550–51 (1939); Sen, *supra* note 13, at 351–52; *see also* Adler & Posner, *supra* note 18, at 186 ("The purpose of CBA, as typically understood, is to separate out the distributional issue and isolate the efficiency issue, so that the agency will evaluate projects solely on the basis of their efficiency."); Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 594–95 (1985) ("[The] disregard of the *distributional* dimension of any given problem is characteristic of the entire law-and-economics school of thought, which assumes a world in which no one is economically coerced and in which individuals who do not 'buy' things are said to be 'unwilling,' rather than unable, to do so."). *But see* Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis when Preferences are Distorted, in* COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES 269, 269–311 (Matthew D. Adler & Eric A. Posner eds., 2001) (describing a distributively weighted form of CBA); Adler & Posner, *supra* note 18, at 224 (same); Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 HARV. L. REV. 961, 992–95 (2001) (arguing that welfare economics need not ignore distributional issues, but that in many instances ignoring them is "the most sensible course").

24. Even the concept of Pareto efficiency is indifferent to distributional issues to the extent that it takes the existing distribution of wealth as a given. *See* FRANK ACKERMAN & LISA

example, increase an industry's profits by more than the aggregate dollar value of the adverse health impacts suffered by a large population of people. While acknowledging that such perverse distributional effects are possible, proponents of CBA argue that distribution is a separate issue that can be addressed through the tax system once efficiency-enhancing policies have been adopted.[25] Indeed, they argue that increasing aggregate social wealth will indirectly lead to a more egalitarian distribution of wealth because richer societies are more likely to help their poorest members.[26]

Thus, in the 1960s, economists began touting CBA as the bright new hope for a scientifically based public policy—a politically "neutral" means for resolving controversial public issues.[27] Rather than engaging in messy debates about values and policy, regulators would be able to choose socially optimal policies through the clean and objective mechanisms of science—by simply plugging numbers into a mathematical formula. To be sure, the new method presented challenges. Since the definition of economic efficiency requires absolutely all societal costs and benefits to be accounted for and compared, intangible values—like life and death or clean air over the Grand Canyon—would also have to be monetized.[28] These were the kinds of valuations that the engineers at the Army Corps had declined to attempt. But the new welfare economists rose eagerly to the challenge. They set to work immediately putting the theory into practice by developing methods

HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 32–34 (2004).

25. *See* BOARDMAN ET AL., *supra* note 19, at 33. In the third edition of his classic book, *Cost-Benefit Analysis*, E.J. Mishan added an appendix discussing distributional concerns. In it he acknowledged that cost-benefit analysis itself, as derived from the Kaldor-Hicks efficiency principle, is agnostic as to questions of distribution and equity, but urged economists to take such ethical considerations into account nevertheless. *See* E.J. MISHAN, COST-BENEFIT ANALYSIS 433–41 (3d ed. 1982). Mishan also argued that distributional concerns can directly influence CBA outcomes if CBA is performed so as to account for the marginal utility of money (in simple terms, the principle that a dollar is worth more to a poor person than it is to a rich person). Under that type of CBA, an equal distribution of income should result in a higher overall utility than a less equal distribution. *See* E.J. MISHAN, WELFARE ECONOMICS: TEN INTRODUCTORY ESSAYS 166–67 (2d ed. 1969) [hereinafter MISHAN, WELFARE ECONOMICS]; *see also* Kaplow & Shavell, *supra* note 23, at 990 (making the same argument). *But see* Adler & Posner, *supra* note 18, at 193, 198 (accounting for the marginal utility of money in CBA is not practicable); *infra* note 79.

26. BOARDMAN ET AL., *supra* note 19, at 33.

27. Many commentators have pointed out that this claim to neutrality is a myth. *See, e.g.*, Tribe, *supra* note 23, at 597 (arguing that cost-benefit analysis is "engineered, whether intentionally or not, to serve a specific agenda. The intellectual and social heritage of these ideas, as well as their natural tendency, lies in the classical eighteenth and nineteenth century economics of unfettered contract, consumer sovereignty, social Darwinism, and perfect markets . . . ."); *see also infra* notes 223–27 and accompanying text.

28. *See* MISHAN, WELFARE ECONOMICS, *supra* note 25, at 180–81 (observing the need for welfare economics to value non-market goods).

for monetizing intangible, non-market values.[29] Several of these methods have since become well-established in academic and government circles.

Hedonic surveys, for example, attempt to infer a dollar value for things not traded in markets by observing things that *are* traded in markets and are thought to reflect the unpriced value.[30] Thus, an economist might attempt to measure the value people attach to unspoiled open space by comparing the prices of otherwise comparable properties located adjacent to spoiled and unspoiled areas.[31] Or an economist might measure the recreational "use value" attached to natural resources by measuring the admission fee hikers pay to gain access to a national park or the amount recreational anglers pay for a fishing license.[32]

Alternatively, the "contingent valuation method" attempts to determine people's willingness to pay for non-market goods by simply asking them.[33] In what is essentially a sophisticated public-opinion poll, respondents are given information about a particular natural resource or medical condition and then asked how much they would be willing to pay to preserve the natural resource or to avoid the particular disease. One such "willingness-to-pay survey," for example, concludes that the average American household is willing to pay $257 to prevent the extinction of bald eagles.[34] Another concludes that the average person is willing to pay $457,000 to avoid contracting chronic bronchitis.[35]

29. *See* DAVID W. PEARCE & R. KERRY TURNER, ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT 141–58 (1990); PORTER, *supra* note 11, at 188.

30. *See generally* BOARDMAN ET AL., *supra* note 19, at 318–24; David S. Brookshire et al., *Valuing Public Goods: A Comparison of Survey and Hedonic Approaches*, 72 AM. ECON. REV. 165 (1982).

31. *See, e.g.*, RICHARD READY & CHARLES ABDALLA, PA. STATE UNIV., STAFF PAPER 363, THE IMPACT OF OPEN SPACE AND POTENTIAL LOCAL DISAMENITIES ON RESIDENTIAL PROPERTY VALUES IN BERKS COUNTY, PENNSYLVANIA (June 2003), http://landuse.aers.psu.edu (on file with the Iowa Law Review).

32. *See* Shi-Ling Hsu & John Loomis, *A Defense of Cost-Benefit Analysis for Natural Resources Policy*, 32 ENVTL. L. REP. 10,239, 10,242 (2002). *But see* BOARDMAN ET AL., *supra* note 19, at 52 (stating that admission fees to national parks are not set by the market and thus are unlikely to reflect the value visitors actually place on the parks).

33. *See* DAVID W. PEARCE & ANIL MARKANDYA, ENVIRONMENTAL POLICY BENEFITS: MONETARY VALUATION 35–40 (1989); Hsu & Loomis, *supra* note 32, at 10,242 (defending the contingent valuation method); Thomas H. Stevens et al., *Measuring the Existence Value of Wildlife: What Do CVM Estimates Really Show?*, 67 LAND ECON. 390, 392–93 (1991). For a critique, see generally John Heyde, *Is Contingent Valuation Worth the Trouble?*, 62 U. CHI. L. REV. 331 (1995).

34. John B. Loomis & Douglas S. White, *Economic Benefits of Rare and Endangered Species: Summary and Meta-analysis*, 18 ECOLOGICAL ECON. 197, 199 tbl.1 (1996).

35. *See* W. Kip Viscusi et al., *Pricing Environmental Health Risks: Survey Assessments of Risk-Risk and Risk-Dollar Trade-offs for Chronic Bronchitis*, 21 J. ENVTL. ECON. MGMT. 32, 47, 50 (1991). Although the Viscusi study stated that these results were only preliminary and that "much further research [was] needed before applying the methodology to give estimates precise enough to be used in regulatory analyses," *id.* at 50, the EPA used this number (adjusted to 1999 dollars) as its estimate of willingness to pay to avoid non-fatal bladder or lung cancer in its CBA of its proposed standard for arsenic in drinking water. *See* National Primary Drinking

Thus, what began at the beginning of the century as a simple, common-sense method used by engineers to evaluate federal flood-control projects had by mid-century begun to evolve into a highly theorized and extensively elaborated branch of welfare economics aimed at providing a broad normative standard for the evaluation of virtually all aspects of public policy.

B. THE GATHERING MOMENTUM OF THE COST-BENEFIT WAVE

During the 1960s and 1970s, this unbridled faith in the capacity of economic analysis to overcome the considerable theoretical and logistical barriers to putting these ideas into practice remained largely confined to academic circles. Lawmakers in Washington, meanwhile, remained highly skeptical of CBA.[36] Members of Congress worried about the indeterminacy problem—that pervasive scientific uncertainties and the difficulties inherent in attempting to monetize intangible values would make any meaningful quantification and comparison of costs and benefits impossible.[37] They worried that agencies would spin their wheels and spend vast resources chasing the holy grail of the accurate, uncontestable, and determinate CBA and produce instead only regulatory paralysis.[38] Thus, in crafting our major environmental statutes, Congress in almost every instance[39] rejected cost-

Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. 6976, 7012 (Jan. 22, 2001); ABT ASSOC., INC., ARSENIC IN DRINKING WATER RULE ECONOMIC ANALYSIS 5–24 (Dec. 2000), http://www.epa.gov/safewater/ars/econ_analysis.pdf (on file with the Iowa Law Review).

36. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 363–64 (4th ed. 2003) ("[T]he climate in Washington in the 1970s was relatively inhospitable to efforts to apply quantitative methods to regulatory issues involving health and safety, especially when those efforts were ultimately directed toward use in a cost-benefit or risk-benefit analysis."). A House subcommittee report issued in 1976 observed that scientific uncertainty from numerous sources plagued efforts to quantify relevant factors and concluded that "[t]he limitations on the usefulness of benefit/cost analysis in the context of health safety, and environmental regulatory decision making are so severe that they militate against its use altogether." FEDERAL REGULATION AND REGULATORY REFORM: REPORT BY THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, HOUSE OF REPRESENTATIVES, H.R. NO. 75-931, at 510–11, 515 (1976); *see also* Adler & Posner, *supra* note 18, at 171 (observing that "the technical and utilitarian flavor of CBA was unappealing to the political culture that prevailed in the 1970s"); Sinden, *supra* note 3, at 184–92 (discussing the congressional skepticism of CBA). One exception was the use of CBA in the 1960s by Robert McNamara and his "Whiz Kids" at the Defense Department. *See* SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE 15 (1992).

37. *See* Sinden, *supra* note 3, at 184–85.

38. *See* Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267, 1283–84 (1985) ("Congress recognized the existence of pervasive scientific uncertainty when it enacted the principal regulatory statutes, and nonetheless chose to emphasize the need for prompt injury prevention over the need for an optimal balance between regulatory benefits and costs.").

39. The Federal Insecticide, Fungicide and Rodenticide Act Amendments of 1972 ("FIFRA"), 7 U.S.C. §§ 136–136y (2000), the Toxic Substances Control Act ("TSCA"), 15 U.S.C.

benefit analysis,[40] and the courts backed up that approach.[41] Instead, Congress frequently directed agencies to set standards via feasibility criteria, which set pollution limits at the lowest level economically and technically feasible, thus providing some sensitivity to costs without entering the dangerous territory of attempting to monetize intangible values.[42] In other instances, Congress called for qualitative cost-benefit balancing, a rough apples-to-oranges comparison aimed not at a precise calculation of net social cost, but at simply ensuring that costs and benefits are not grossly disproportionate.[43] And sometimes Congress opted for absolute standards,

§§ 2601–92, and the Safe Drinking Water Amendments of 1996 ("SDWA"), 42 U.S.C. § 300g-1(b)(3), are the only prominent exceptions. FIFRA and TSCA have been called "two of the least successful statutes of the environmental decade." Thomas O. McGarity, *Professor Sunstein's Fuzzy Math*, 90 GEO. L.J. 2341, 2343 (2002). The cost-benefit criterion has arguably made them unwieldy and difficult to administer, producing exactly the kind of regulatory paralysis that Congress worried about in other contexts. *Id.* Indeed, since the Fifth Circuit overturned EPA's asbestos ban on the basis that its CBA was inadequate in *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1222–23 (5th Cir. 1991), there has been very little regulatory activity under TSCA, and EPA has not banned a single chemical. *See* 3 LAW OF ENVIRONMENTAL PROTECTION § 16.3–.4 (Sheldon M. Novick et al. eds., 2003); *see also* Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1390–95 (2002) (citing FIFRA and SDWA as examples of cost-benefit statutes producing particularly intense lobbying of the agency by regulated industries).

40. *See* SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 46–58 (2003) (drawing on the American philosophical tradition of pragmatism and concept of "bounded rationality" to defend Congress' frequent rejection of CBA); Lynn E. Blais, *Beyond Cost-Benefit: The Maturation of Economic Analysis of the Law and its Consequences for Environmental Policymaking*, 2000 U. ILL. L. REV. 237, 238–40; Thomas O. McGarity, *Media-Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation*, 46 LAW & CONTEMP. PROBS. 159, 160–61 (1983) (defending Congress's rejection of CBA); Sinden, *supra* note 3, at 184–92, 197–210.

41. *See, e.g.*, Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 510–12 (1981) (applying a presumption against CBA: where Congress intends for an agency to engage in CBA, it must "clearly indicate[] such intent on the face of the statute"); Ass'n of Pac. Fisheries v. EPA, 615 F.2d 794, 805 (9th Cir. 1980) (explaining that the language in the Clean Water Act directing the EPA to consider "costs" of pollution reduction technologies "in relation to the effluent reduction benefits to be achieved" requires only qualitative apples-to-oranges balancing and pollution control requirements should only be reduced where the costs are "wholly disproportionate to" the benefits). *See generally* Sinden, *supra* note 3, at 185 n.248, 187–88, 191–92.

42. *See generally* David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1 (2004); Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729; Wendy E. Wagner, *The Triumph of Technology-Based Standards*, 2000 U. ILL. L. REV. 83.

43. *See, e.g.*, Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1045 n.52 (D.C. Cir. 1978); *see also* Driesen, *supra* note 42, at 23–24 (discussing the qualitative cost-benefit balancing required under the Clean Water Act's Best Practicable Control Technology Standard).

which look only at impacts on human or ecological health and prohibit any consideration of costs.[44]

Attitudes began to shift markedly in the 1980s, however.[45] When President Reagan came into office in 1981, with the avowed mission of dismantling the regulatory state, he immediately issued an executive order requiring all federal agencies to prepare cost-benefit analyses of all major rules and to issue regulations only when the analysis showed that "the potential benefits to society . . . outweigh the potential costs to society."[46] It was widely assumed that Reagan's cost-benefit mandate would roll back regulation rather than spur it, and that was in fact largely its effect during the Reagan and Bush I administrations.[47] Thus, the promotion of cost-benefit analysis in government was initially closely associated with a right-wing, anti-regulatory agenda.[48]

Although the Clinton administration pulled back from the aggressively anti-regulatory stance of the Reagan and Bush I administrations, it

44. Two prominent examples of absolute standards are the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2000), and the provision for the establishment of National Ambient Air Quality Standards under the Clean Air Act, 42 U.S.C. § 7409. *See infra* Part VIII.

As CBA-proponent Cass Sunstein acknowledges, these alternatives to CBA have been wildly successful, even by cost-benefit standards. *See* CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 3–4 (2002) [hereinafter SUNSTEIN, COST-BENEFIT STATE]. A recent OMB report estimated the total benefits of federal regulations promulgated over the past ten years at $146 billion to $230 billion and total costs at $36 billion to $42 billion. OFFICE OF INFO. AND REGULATORY AFFAIRS, OFFICE OF MGMT. AND BUDGET, INFORMING REGULATORY DECISIONS: 2003 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 3 (2003) [hereinafter 2003 OMB REPORT], http://www.whitehouse.gov/omb/inforeg/2003_cost-ben_final_rpt.pdf (on file with the Iowa Law Review).

45. *See* SUNSTEIN, COST-BENEFIT STATE, *supra* note 44, at 10.

46. Exec. Order No. 12,291, at § 2(b), 3 C.F.R. § 128 (1982), *reprinted in* 5 U.S.C. § 601 (Supp. V 1981). The anti-regulatory mission of the executive order was made clear in its preamble, which stated that the purpose of the executive order was, *inter alia*, "to reduce the burdens of existing and future regulations." *Id.*

47. *See* Pub. Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1481–84 (D.C. Cir. 1986) (describing the Office of Management and Budget's ("OMB"—the White House office responsible for implementing the executive order) objection to OSHA's proposed rule lowering the exposure limits for Ethylene Oxide); GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 122 (1984) (discussing the practices of the OMB); Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT'L RES. L. 1, 54 (1984) (describing OMB's practice during the Reagan years of issuing waivers for rules that relaxed or deferred regulatory requirements or for rules that delegated authority to the states: "A close look at OMB's use of exemptions and waivers demonstrates that if an EPA action *relaxes* a standard, there is likely to be no effort on OMB's part to assess the costs and benefits of the action").

While some argue that, at least in theory, CBA has the capacity to spur as much regulation as it blocks, *see* SUNSTEIN, COST-BENEFIT STATE, *supra* note 44, at 7, in practice CBA tends to be decidedly anti-regulatory. *See infra* notes 223–27 and accompanying text.

48. *See* ROSE-ACKERMAN, *supra* note 36, at 15–16; Latin, *supra* note 38, at 251.

continued to implement the same basic cost-benefit mandate. President Clinton issued a new executive order that softened a few edges but left in place the central requirement that regulations pass a cost-benefit test.[49] Thus, while the new administration was far less aggressive in using this authority to defeat regulatory initiatives, the formal authority remained in place.

With the Clinton administration's embrace of it in the 1990s, CBA gradually lost its association with the right-wing policies of Ronald Reagan and began to enter the mainstream. Numerous academics began advocating the widespread adoption of CBA as a standard for judging the desirability of environmental health and safety regulation,[50] and government agencies increasingly began to make use of it.[51] Some of its most controversial methods for pricing intangible values even began to receive governmental imprimatur. The Department of Interior, for example, explicitly endorsed the use of contingent-valuation methods in its regulations governing the assessment of natural resource damages.[52] Some courts also began to view CBA more sympathetically.[53] And the CBA fever finally hit Congress too, which, in 1995, came within two votes of passing a cost-benefit super-

49. Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted in* 5 U.S.C. § 601 (Supp. V 1993). The Clinton executive order replaced the language of the Reagan order requiring that benefits "outweigh" costs, Executive Order 12,291, 3 C.F.R. § 128 (1982), with "a reasoned determination that the benefits of the intended regulation *justify* its costs." Exec. Order No. 12,866, 3 C.F.R. § 638 (1994).

50. *See generally* Adler & Posner, *supra* note 18; Robert W. Hahn, *Regulatory Reform: What Do the Government's Numbers Tell Us?, in* RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATIONS 208 (Robert W. Hahn, ed. 1996); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995); W. Kip Viscusi, *Regulating the Regulators*, 63 U. CHI. L. REV. 1423 (1996).

51. *See generally* RICHARD D. MORGENSTERN, ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT (1997).

52. *See* 43 C.F.R. § 11.83 (2004) (codifying use of contingent valuation methods to calculate natural resource damages under CERCLA); 15 C.F.R. § 990.53 (codifying use of contingent valuation methods under the Oil Pollution Control Act); *see also* Ohio v. U.S. Dept. of Interior, 880 F.2d 432, 474–78 (D.C. Cir. 1989) (upholding the CERCLA regulations).

53. *Compare* Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Marshall, 617 F.2d 636, 665 (D.C. Cir. 1979) (calling CBA "arbitrary" and accusing it of "hid[ing] assumptions and qualifications in the seeming objectivity of numerical estimates"), *with* Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1216–30 (5th Cir. 1991) (striking down the EPA's asbestos ban for failure to conduct adequately quantified CBA). Indeed, Cass Sunstein has argued that the federal courts have begun to develop a set of "cost-benefit default principles," under which they apply a presumption in favor of CBA to their review of agency decision making. *See* SUNSTEIN, COST-BENEFIT STATE, *supra* note 44, at 31–53. In my view, however, that claim is overstated. In fact, the U.S. Supreme Court has on several occasions applied a presumption *against* agency use of CBA. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 467 (2001); Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 510–12 (1981). *See generally* Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENVTL. L. 191, 228–40 (2004). Moreover, most of the D.C. Circuit court opinions from which Sunstein purports to identify this trend were authored by a small group of arch-conservatives on that court (primarily Judges Stephen F. Williams, Douglas H. Ginsburg, and Robert Bork). *See* SUNSTEIN, COST-BENEFIT STATE, *supra* note 44, at 31–53.

mandate that would have imposed a binding requirement that all federal health, safety and environmental regulation pass a cost-benefit test, overriding any statutory requirements to the contrary.[54] Although that far-reaching measure was narrowly defeated, Congress did successfully include a cost-benefit mandate in the Safe Drinking Water Amendments of 1996.[55]

When the second Bush administration came into office in 2001, it began implementing the Clinton administration's cost-benefit mandate in an aggressively anti-regulatory manner. This was largely a result of Bush's appointment of John Graham to head the Office of Information and Regulatory Affairs ("OIRA"), the White House office responsible for administering the cost-benefit mandate. Graham, former director of Harvard's Center for Risk Analysis, has produced a large body of academic writing that uses cost-benefit analysis to argue for the roll-back of environmental, health and safety regulation.[56] Under Graham's leadership, the OIRA has used its cost-benefit mandate more aggressively than ever

54. Part of the Republican Party's "Contract with America," the Risk Assessment and Cost-Benefit Act of 1995 would have essentially codified the Reagan executive order, requiring agencies to perform formal cost-benefit analyses of all proposed major "health, safety, and environmental" rules (those with annual costs of $25 million or more), and prohibited promulgation of any final rule unless the agency "certified" that the benefits justify the costs. H.R. 9, 104th Cong, tit. III, division D (1995). The bill explicitly stated that its provisions were to "supplement and, to the extent there is a conflict, supersede" the decision criteria for rulemaking otherwise applicable under the statute pursuant to which the rule is promulgated. *Id.* After it passed the House by 277 to 141, the Senate counterpart fell just two votes short of overcoming a filibuster. Final Vote Results for Roll Call 199, Job Creation and Wage Enhancement Act of 1995, http://clerk.house.gov/evs/1995/roll199.xml (on file with the Iowa Law Review); U.S. Senate, Roll Call Votes for 104th Congress-1st Session, S.343, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=1&vote=00315 (last visited Apr. 8, 2005) (on file with the Iowa Law Review).

55. 42 U.S.C. § 300g-1(b)(3) (2000). Congress also passed the Unfunded Mandates Reform Act in 1995, 2 U.S.C. §§ 150–71 (2000), which requires federal agencies to perform cost-benefit analysis of "major" rules (those imposing at least $100 million in costs) for informational purposes, without imposing any substantive mandate. Nonetheless, it would be an overstatement to claim, as some do, that Congress has wholeheartedly endorsed CBA. *See* SUNSTEIN, COST-BENEFIT STATE, *supra* note 44, at 15. The Food Quality Protection Act of 1996 ("FQPA"), Pub. L. No. 104-170, 110 Stat. 1489 (codified in scattered sections of 7 and 21 U.S.C.), was passed the same year as the Safe Drinking Water Amendments, but precludes the use of CBA in setting pesticide tolerances. Instead, tolerances must be set at a level that ensures a "reasonable certainty [of] no harm." *Id.* § 405 (codified at 21 U.S.C. § 346a(b)(2)(A)(ii)). *See generally* Thomas O. McGarity, *Politics by Other Means: Law Science, and Policy in EPA's Implementation of the Food Quality Protection Act*, 53 ADMIN. L. REV. 103, 117–18 (2001).

56. *See, e.g.*, John D. Graham, *Legislative Approaches to Achieving More Protection Against Risk at Less Cost*, 1997 U. CHI. LEGAL. F. 13; Tammy O. Tengs, John D. Graham, et al., *Five-Hundred Life-Saving Interventions and Their Cost-Effectiveness*, 15 RISK ANALYSIS 369 (1995); Tammy O. Tengs & John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Life-Saving*, *in* RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATIONS 167 (Robert W. Hahn ed., 1996). For a critique of some of Graham's studies, see THOMAS O. MCGARITY ET AL., SOPHISTICATED SABATOGE: THE INTELLECTUAL GAMES USED TO SUBVERT RESPONSIBLE REGULATION 126–34 (2004). OIRA is located within the White House's Office of Management and Budget ("OMB").

before, frequently sending proposed rules back to the agencies for inadequate CBAs and systematically devaluing regulatory benefits in its own CBAs so as to defeat regulatory initiatives.[57]

Indeed, as the twenty-first century dawned, the pro-CBA wave had gathered such momentum that Cass Sunstein saw fit to announce that the debate was over, declaring "victory for the proponents of cost-benefit analysis."[58] While there is no question that CBA continues to gain increasing prominence and respect in both academic and government circles,[59] Sunstein's victory speech is no doubt premature. In fact, the recent surge of enthusiasm for CBA has triggered a set of trenchant and compelling critiques.[60] Moreover, there is some irony in the fact that, even as a growing chorus of academics advocate it and government agencies increasingly use it where statutes give them the discretion, the vast bulk of our environmental laws remain grounded in an outright rejection of CBA.

C. CRITIQUES

The concerns that prompted Congress to shy away from CBA in the 1970s when the vast majority of our federal environmental laws were passed remain valid today and have been forcefully and persuasively articulated in a robust literature critiquing CBA. These critiques are complex, multi-layered, and various, and it is not my intent to exhaustively describe them here. For my purposes, it is sufficient to note that they cluster roughly around two broad themes.

The first is the problem of incommensurability. There is a strong argument that certain values are simply incommensurable with money and that it is therefore simply wrong, both descriptively and normatively, to try to

57. *See* ACKERMAN & HEINZERLING, *supra* note 24, at 195–201, 207–08. Graham's OIRA has stirred some controversy, by, for example, arguing that the lives of senior citizens should be valued at a lower level than the lives of younger people. *See* John Tierney, *Life: The Cost-Benefit Analysis*, N.Y. TIMES, May 18, 2003, § 4, at 14 (reporting that, under pressure from the OIRA, the EPA set the value of life at $2.3 million for those over seventy and at $3.7 million for those younger in its initial analysis of its proposed "Clear Skies" initiative).

58. Cass R. Sunstein, *Cost-Benefit Default Principles,* 99 MICH. L. REV. 1651, 1655 (2001).

59. The academic literature advocating the use of CBA in government decision making is extensive. *See, e.g.*, SUNSTEIN, COST-BENEFIT STATE, *supra* note 44; SUNSTEIN, RISK & REASON *supra* note 1; Adler & Posner, *supra* note 18; Shi-Ling Hsu, *Fairness Versus Efficiency in Environmental Law*, 31 ECOLOGY L.Q. 303 (2004); *see also* authorities cited *supra* note 51. *See generally* COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES (Matthew D. Adler & Eric A. Posner eds., 2001) [hereinafter COST-BENEFIT ANALYSIS]. CBA is also increasingly used by government agencies. *See supra* notes 51–52 and accompanying text.

60. *See, e.g.*, ACKERMAN & HEINZERLING, *supra* note 24; MCGARITY ET AL., *supra* note 56; SHAPIRO & GLICKSMAN, *supra* note 40; Driesen, *supra* note 20; Thomas O. McGarity, *A Cost-Benefit State,* 50 ADMIN. L. REV. 7 (1998) [hereinafter McGarity, *Cost-Benefit State*]; s*ee also* Matthew D. Adler & Eric Posner, *Introduction* to COST BENEFIT ANALYSIS, *supra* note 59, at 1 (characterizing the academic literature on CBA as "skeptical").

force them into a monetary metric.[61] Ironically, it was Cass Sunstein, who has since become one of CBA's most ardent cheerleaders, who eloquently explained the incommensurability problem in a classic article in 1994. He argued there that the problem with CBA is that it is "obtuse because it tries to measure diverse social goods along the same metric."[62] He argued that a unitary metric could not possibly provide an accurate description of how human beings actually value goods, things, relationships, and states of affairs because we value such matters in diverse ways. We would never offer a friend a cash payment to "compensate" her for canceling a lunch date because we view friendship as simply incommensurable with money.[63] Similarly, many people balk at the prospect of attaching a dollar figure to the loss of an endangered species, the destruction of a pristine natural area, or the loss of a human life because they view these values as incommensurable with money—not measurable along the same metric.[64] At best, such measurement grossly miscalculates human experience, failing to capture its full depth and spectrum: "it denies the reality of, and fails to nurture, the important aspects of our humanity that markets are incapable of expressing."[65] At worst, it leads to morally unjustified outcomes.[66]

A related argument contends that cost-benefit analysis confuses the preferences people have as consumers with the values they hold as citizens. Thus, one might very well, as a citizen, attend a town meeting and vehemently oppose the proposed construction of a shopping mall on the outskirts of town, and yet, as a consumer, choose to shop at the same mall once built.[67] Because cost-benefit analysis privileges consumer preferences and ignores citizen values, it is an inappropriate tool for evaluating social

61. *See generally* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); MARK SAGOFF, THE ECONOMY OF THE EARTH (1988); Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974). For a particularly thoughtful analysis of the incommensurability problem from a proponent of CBA, see generally Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PENN. L. REV. 1371 (1998).

62. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 841 (1994) [hereinafter Sunstein, *Incommensurability*]; *see also* Cass R. Sunstein, *Conflicting Values in Law*, 62 FORDHAM L. REV. 1661 (1994).

63. Sunstein, *Incommensurability*, *supra* note 62, at 785–86.

64. *Id.* at 835–36.

65. Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431, 432 (1996).

66. *See, e.g.*, ANDERSON, *supra* note 61, at 190–216; SAGOFF, *supra* note 61, at 93–94; Kelman, *supra* note 13, at 33–36. Proponents of CBA respond that placing a dollar value on seemingly priceless values—like human life—is simply a clear-eyed acknowledgement of the necessity and inevitability of making trade-offs among such values. Thus, the argument goes, any useful principle for evaluating policy "must be able to tell us whether it is desirable to spend, say, $1 on safety improvements in order to reduce the expected loss of life by one person, and also whether it is desirable to spend $1,000, $1,000,000, $1,000,000,000, or half the GDP to do so." Kaplow & Shavell, *supra* note 23, at 1368.

67. *See* SAGOFF, *supra* note 61, at 171–72.

regulation. According to this view, social regulation does and should "express[] what we believe, what we are, what we stand for as a nation, not simply what we wish to buy as individuals."[68]

The second theme of the CBA critiques is the problem of indeterminacy: Even taking CBA on its own terms and assuming it might be desirable to make decisions by measuring and comparing costs and benefits, intractable valuation problems make any attempt to derive meaningful quantifications of the costs and benefits of a particular policy futile.[69] Some of these measurement problems are simply practical. In many instances, for example, we may simply lack the data and scientific understanding necessary to make definitive, non-controversial estimates of costs and benefits.[70] For example, Tom McGarity describes an incident in which an EPA analyst reported that registration of a particular pesticide would cause twenty-seven cancers over a seventy-year period. When pressed for a "confidence interval," however, at a ninety-five-percent degree of confidence the scientist could only state that the number of cancers would be somewhere between zero and 660,000.[71] In a similar vein, Stephen Breyer, in his book *Breaking the Vicious Circle*, describes an attempt to assess the risks associated with the presence of aflatoxin in peanuts or grain: "Two scientifically plausible models . . . may show [the] risk level[] differing by a factor of 40,000."[72]

68. *Id.* at 16–17; *accord* ANDERSON, *supra* note 61, at 209–10.

69. *See, e.g.*, SHAPIRO & GLICKSMAN, *supra* note 40, at 92–120; Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981, 2042–68 (1998); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 422–44 (1981); McGarity, *Cost-Benefit State*, *supra* note 60, at 50–56, 63–72; William H. Rodgers, Jr., *Benefits, Costs, and Risks: Oversight of Health and Environmental Decision Making*, 4 HARV. ENVTL. L. REV. 191, 196–98 (1980).

70. *See, e.g.*, THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 134 (1991) ("Inadequate data, inaccurate models, and the infirmities of quantitative analysis all combine to leave regulatory analysis swimming in a sea of uncertainties."); Heinzerling, *supra* note 69, at 1986–87; Ronnie Levin, *Lead in Drinking Water*, *in* MORGENSTERN, *supra* note 51, at 205, 230. Levin notes:

> Serious gaps in data and methodology constrain the utility of [CBA]. Typically, only a few potential health or other benefits can be quantified, and even fewer can be valued monetarily. Consequently, when the sum of the limited subset of benefits that can be quantified and monetized is shown to be less than the estimated costs, it is often impossible to conclude anything about the relative magnitude of the full benefits.

Id. Proponents of CBA acknowledge these difficulties, but remain undaunted. Parsing mind-bogglingly fine distinctions, they assure us that such uncertainties do not actually produce indeterminacy: "The problem is not that analysts cannot make coherent judgments when available information is meager; instead, the real concern is that conclusions may turn out to be mistaken." Kaplow & Shavell, *supra* note 23, at 1375. I, for one, find mistaken conclusions even more worrisome than indeterminacy. *See infra* notes 215–18 and accompanying text.

71. MCGARITY, *supra* note 70, at 135.

72. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 45 (1993); *see also* Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of*

Uncertainties of this magnitude clearly make any meaningful quantification of risk impossible and render attempts at quantification potentially enormously misleading.

Other measurement problems are theoretical. That is, they stem from conceptual difficulties inherent in the idea of CBA that no amount of scientific study or data collection could solve. These theoretical critiques include the offer/asking problem, wealth effects, the endogeny of preferences, the problem of discount rates, and valuation problems.

CBA values goods according to people's "willingness to pay" for them.[73] For goods traded in markets, this willingness to pay is reflected in market prices. For non-market goods, economists employ various methods for assigning "shadow prices": That is, they try to determine what people *would* pay for such goods if they had to buy them.[74] One critique of this aspect of CBA is commonly referred to as the "offer/asking problem."[75] The problem stems from the empirical fact that the price people attach to a particular good varies, sometimes significantly, depending on whether they are asked how much money they would accept to give up an existing entitlement to the good or how much money they would pay to acquire it.[76] People generally demand more to give up an existing entitlement than they would be willing to pay to acquire that entitlement.[77] Yet no one has been able to come up with a theoretically defensible basis on which to choose one value over the other.

A related problem—often referred to as "wealth effects"—arises from the fact that any measurement of willingness to pay is necessarily dependent on the distribution of wealth.[78] In other words, since a person's willingness to pay depends in part on her ability to pay, a poor person's willingness to pay for a particular good generally will be lower than a rich person's, even if the poor person values the good just as much (or perhaps even more) than the rich person. Another way of conceptualizing this problem is to say that the "marginal utility of money" is larger for the poor than for the rich. In

Comparative Risk Analysis, 92 COLUM. L. REV. 562, 572 (1992) (stating that the National Academy of Sciences has identified nearly fifty "decisional points" in risk assessments, each of which requires a choice among "plausible scientific judgments about uncertain data or theoretical connections").

73. *See* BOARDMAN ET AL., *supra* note 19, at 76.

74. *See supra* notes 30–35 and accompanying text.

75. *See* Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 678–82 (1979); Kennedy, *supra* note 69, at 422.

76. *See* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1227–30 (2003).

77. *Id.* at 1232–35.

78. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 13 (6th ed. 2003); C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 6 (1975); Kennedy, *supra* note 69, at 401–07; Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 478–79 (1974).

other words, a dollar provides more utility to a poor person than the same dollar provides to a rich person. Therefore, measuring preferences in terms of dollars necessarily undercounts the preferences of poor people relative to rich people.[79]

This in part explains the offer/asking problem: A person who already possesses an entitlement is "richer" and can therefore afford to demand more to part with it than one who does not. But, more broadly, any estimate of willingness to pay must necessarily assume some particular distribution of wealth as a starting point. There is, however, no reasoned basis on which to choose one distribution of wealth over another. Indeed, the particular regulatory measure being considered may itself have some effect on the distribution of wealth. This renders willingness to pay a moving target, an inevitably indeterminate value.

These are aspects of a broader problem with the concept of willingness to pay: its mistaken assumption that preferences are exogenous.[80] In fact, a compelling argument can be made that preferences are highly malleable and contingent on a host of factors, including wealth, available information, existing consumption patterns, social pressures, legal rules, race, and gender.[81] Some preferences are clearly distorted—that is, they clearly do not track overall long-term well-being.[82] A drug addict's preference for drugs is an obvious example. In other instances, it may be difficult to say which preferences are "correct" and which are mistaken.[83] More generally, given that preferences are created in part by legal rules and other social conditions that legal rules affect, attempting—as CBA does—to craft legal rules by reference to preferences as expressed through willingness to pay

79. Some economists propose that CBA should correct this problem by weighting a person's willingness to pay by her marginal utility of money. But most economists believe that finding a practical way to accomplish such a weighting presents insurmountable barriers. *See* Adler & Posner, *supra* note 18, at 189, 193; *see also* David A. Hoffman & Michael P. O'Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 363–74 (2002) (arguing that there has been "little practical progress" in improving CBA by "reducing the distortions caused by wealth effects").

80. *See, e.g.*, Kaplow & Shavell, *supra* note 23, at 984 (making the assumption explicit).

81. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 40 (1990) [hereinafter SUNSTEIN, RIGHTS REVOLUTION]; Paul Slovic, *Trust, Emotion, Sex, Politics, and Science: Surveying the Risk Assessment Battlefield*, *in* THE PERCEPTION OF RISK 390, 395–402 (Paul Slovic ed., 2000).

82. An extensive literature on behavioralism calls into question the rational-actor model on which neo-classical economics is built. This research suggests, *inter alia*, that people's willingness to pay for particular goods does not always accurately reflect the actual value or utility that they ultimately derive from those goods. *See, e.g.*, Robert C. Ellikson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 35–55 (1989); John D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 640–87 (1999); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–87 (1998).

83. *See* Slovic, *supra* note 81, at 395–402.

presents an intractable circularity problem and renders the enterprise indeterminate.[84]

The problem of discounting presents yet another can of worms that contributes to the indeterminacy of CBA. Economists typically apply a discount rate to monetary costs or benefits that will not be realized until some future date.[85] This reflects the time value of money, or the fact that $100 tomorrow is worth less than $100 today, both because of inflation rates and the investment value of money. With a five-percent discount rate, for example, a $100 cost to be incurred a year from now is converted into $95 "present value."

There is certainly room for considerable debate over what discount rate to apply to market goods, because reasonable people can obviously disagree about inflation and interest rates. The discount rate becomes even more controversial, however, when it is applied to non-market goods, like the value of a human life or a pristine natural area. It is hard to argue that interest and inflation rates are relevant to such valuations, but discount rates may still be justified on other grounds. For example, there is some logic to applying a discount rate to latent harms, like exposures to toxics, which will manifest themselves later in a given person's lifetime. Most people would probably prefer to die or contract a chronic disease ten years from now than today.[86] Thus, in such circumstances, a discount rate that takes account of this preference may be appropriate, though determining the exact figure is obviously controversial. On the other hand, it is not clear that any discount rate is appropriate when harm to future generations is at issue.[87] Indeed, using a discount rate in such situations can yield absurd results. Applying a discount rate of five percent to the death of a billion people 500 years from now, for example, yields the conclusion that such an event is less harmful

84. *See* SUNSTEIN, RIGHTS REVOLUTION, *supra* note 81, at 40–42; Cass R. Sunstein, *Republicanism and the Preference Problem*, 66 CHI.-KENT L. REV. 181, 184 (1990); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1135 (1986). Thus, Sunstein has argued that the legal system should do more than simply promote the satisfaction of private preferences (the goal of CBA). Rather it should also, through the deliberative process of civic republicanism, promote autonomy in the process of preference formation. *See* SUNSTEIN, RIGHTS REVOLUTION, *supra* note 81, at 40.

The problem of endogenous preferences is exacerbated by power imbalance. Corporations, for example, may wield power in part by shaping people's preferences. *See infra* notes 158–59 and accompanying text. Accordingly, this is another mechanism by which cost-benefit analysis is distorted by power imbalance. *See infra* notes 228–29 and accompanying text.

85. MISHAN, *supra* note 21.

86. *See* SUNSTEIN, COST-BENEFIT STATE, *supra* note 44, at 84; Richard Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 955 (1999).

87. Revesz, *supra* note 86, at 988–1006; *see also* Lisa Heinzerling, *Discounting Our Future*, 34 LAND & WATER L. REV. 39, 40–41 (1999) (arguing that discounting should be abandoned for measuring future lives saved). For an opposing view, see generally John J. Donohue, *Why We Should Discount the Views of Those Who Discount Discounting*, 108 YALE L.J. 1901 (1999).

(or costly) than the death of one person today.[88] Since even small differences in the rate can yield dramatically different results,[89] the problem of discount rates is a significant source of indeterminacy for CBA.[90]

Finally, the indeterminacy of CBA is further exacerbated by the fact that any hedonic or contingent-valuation study is likely to be vulnerable to challenge on a variety of methodological or theoretical grounds. Samples may be insufficiently large or insufficiently representative to produce meaningful results. In hedonic surveys, it may be difficult to control for all variables other than the presence or absence of the non-market good being valued. Willingness-to-pay surveys may be criticized for the amount or lack of objectivity of the background information provided to respondents and for the way questions are phrased.[91]

Accompanying these methodological problems is a host of theoretical problems. Respondents in willingness-to-pay studies are not subject to actual budget constraints and may therefore significantly over-estimate their willingness to pay.[92] Some have argued that these surveys do not actually measure the value respondents place on the goods at issue, but rather their "willingness to acquire a sense of moral satisfaction by a voluntary contribution to the provision of a public good."[93] Moreover, there is also no

88. DEREK PARFIT, REASONS AND PERSONS 357 (1984).

89. *See* SUNSTEIN, COST-BENEFIT STATE, *supra* note 44, at 83; SUNSTEIN, RISK & REASON, *supra* note 1, at 224–25. Sunstein's analysis of EPA's CBA regarding arsenic in drinking water reveals, for example, that application of a seven-percent discount rate over a thirty-year latency period reduces the value of a statistical life dramatically from $6.1 million to $1.1 million. *See id.* at 167.

90. *See* Robert W. Hahn, *The Economic Analysis of Regulation: A Response to the Critics*, 71 U. CHI. L. REV. 1021, 1026 (2004) ("[T]here is no general agreement on the correct choice for a discount rate.").

91. *See* Stevens et al., *supra* note 33, at 399.

92. *See* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 142 (1997).

93. Daniel Kahneman & Jack L. Knetsch, *Valuing Public Goods: The Purchase of Moral Satisfaction*, 22 J. ENVTL. ECON. & MGMT. 57, 64 (1992); *see also* SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE, *supra* note 92, at 143 ("[S]ome answers are implausibly high. Consider the fact that there is an asserted willingness to pay $32 billion per year to save the whooping crane, an amount that is over ten times what was given to all nonprofit environmental organizations in 1991."); Heyde, *supra* note 33, at 343 (stating that respondents "might tell the surveyor what they think she wants to hear or inflate their answer to effect a public policy for which they will not have to pay . . . . [A]nswers vary greatly with the wording of the survey question or with the information the surveyor provides about the resource being measured."); Jason Scott Johnston, *Million-Dollar Mountains: Princes, Sanctions, and the Legal Regulation of Collective Social and Environmental Goods*, 146 U. PA. L. REV. 1327, 1362 (1998) (questioning whether asking people to attach prices to certain collective natural resources is even "a meaningful, conceptually coherent possibility"); Stevens et al., *supra* note 33, at 399 (reporting that the majority of respondents registered protest votes, refusing to pay for the preservation of wildlife, despite stating that the species were important to them; suggesting that contingent valuation may not provide a valid measure of existence value; and arguing that CBA should not be used to make decisions about wildlife); Sunstein, *Incommensurability*, *supra* note 62, at 835 (stating that willingness-to-pay studies "frequently experience protest rates of 50 percent or more.").

obviously "right" geographic scope to apply in aggregating "society's" overall willingness to pay for a natural resource. For example, in calculating the value of the Arctic National Wildlife Refuge, should we count the willingness to pay of all households in Alaska, all households in the United States, or all households in the world? Outcomes may vary wildly depending on how these issues are resolved, and yet no consensus exists on how to handle them.[94] The result is that any particular number generated by such studies is vulnerable to reasonable arguments that it should be adjusted significantly up or down and is therefore indeterminate.

Thus, there are compelling reasons to be concerned that CBA cannot deliver meaningful answers. First, certain values are simply incommensurable with money. Second, even aside from the incommensurability problem, intractable valuation problems make the enterprise inevitably indeterminate. If CBA is flawed, however, the obvious next question is: What is the alternative? As the next Section explains, the scholarship on this question is far less developed than that critiquing CBA.

D. ALTERNATIVES

On one level, the question of alternatives is easy to answer. Because Congress has so frequently rejected CBA as a decision making standard, the pantheon of federal environmental statutes is full of alternatives. Thus, many statutes employ feasibility standards, qualitative cost-benefit balancing, or absolute standards.[95] But to the extent that these standards are viewed through the lens of welfare economics, they appear to be second-best approximations of the cost-benefit standard, made necessary by the practical difficulties that make CBA itself difficult and expensive to administer.[96] This hardly seems a ringing endorsement.

Recent developments in the literature defending CBA, however, have radically changed the nature of the conversation about alternatives. A number of CBA's most thoughtful and prominent supporters have recently begun to acknowledge that some of the critiques of CBA pose serious theoretical difficulties.[97] Indeed, several CBA proponents have gone so far as

94. *See* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 639 (1996) ("Many economists . . . implicitly accept the division of the world into a 'we' about whose utility we care and a 'they' about whom we do not care.").

95. *See supra* notes 42–44 and accompanying text.

96. *See* Latin, *supra* note 38, at 1275–84.

97. Adler & Posner, *supra* note 18, at 167; *see also* DANIEL A. FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 41 (1999) (urging a view of CBA as a mechanism for resolving disputes about resource allocation, rather than a philosophically defensible normative standard); SUNSTEIN, RISK & REASON, *supra* note 1, at 26 (urging a view of CBA as a pragmatic instrument); Kaplow & Shavell, *supra* note 23, at 997 (stating that practical difficulties make approximations necessary in applying welfare economics to the real world, e.g., wealth operates as a proxy for well-being, but economics is nonetheless "analytically useful").

to disavow welfare economics as a normative foundation for CBA.[98] Thus, rather than defending CBA as a theoretically defensible moral criterion in its own right, these authors promote it on pragmatic grounds as an imperfect approximation of such a criterion—a "rough and ready" tool[99]—that still provides a useful "decision procedure."[100]

Among the most detailed and thoughtful expositions of this position is that provided by Matthew Adler and Eric Posner in their 1999 article, *Rethinking Cost-Benefit Analysis*.[101] They offer what they describe as "a qualified defense" of CBA,[102] rejecting the traditional theoretical defenses of CBA as a moral criterion: Pareto optimality, Kaldor-Hicks optimality, and utilitarianism. They do view a certain form of utilitarianism—one that seeks to maximize overall well-being—as morally relevant, even if not morally decisive.[103] But in their view, CBA as traditionally conceived fails to accurately track this form of utilitarianism because it does not actually measure overall well-being. Here, Adler and Posner draw on and endorse some of the most prominent traditional critiques of CBA—the problems of distorted preferences and wealth effects.[104] Thus, they argue that CBA fails to measure overall well-being because: (1) it measures all preferences, including distorted ones (like the drug addict's preference for drugs);[105] and (2) by measuring preferences in terms of dollars, it inflates the preferences of the rich in relation to those of the poor (because a dollar provides less utility to a rich person than a poor person).[106]

98. *See* Adler & Posner, *supra* note 18, at 187–94; SUNSTEIN, COST-BENEFIT STATE, *supra* note 44, at 25–26.

99. Matthew D. Adler, *Against Individual Risk: A Sympathetic Critique of Risk Assessment* (U. of Pa., Inst. for Law & Econ. Research Paper 04-01; U. of Pa. Law School, Public Working Paper 49, at 63 (forthcoming 153 U. PA. L. REV. 1121 (2005)), http://ssrn.com/abstract=487123 (on file with the Iowa Law Review).

100. Adler & Posner, *supra* note 18, at 194 (calling CBA "a feeble approximation of utilitarianism"); SUNSTEIN, COST-BENEFIT STATE, *supra* note 44, at 25–26 ("The strongest arguments for CBA seem to rest not with neoclassical economics but with common sense, informed by behavioral economics and cognitive psychology.").

101. Adler & Posner, *supra* note 18.

102. *Id.* at 167.

103. *Id.* at 196.

104. *See supra* notes 78–84 and accompanying text.

105. Adler & Posner, *supra* note 18, at 196–204.

106. *Id.* at 193; *see also id.* at 238 (calling "endowment dependence"—i.e., the problem of wealth effects—"[t]he great defect of traditional CBA"). They argue that traditional CBA should be modified in order to correct these defects by replacing the concept of preferences with "welfare equivalents," *id.* at 196–97, and by weighting a person's preferences by her marginal utility of money, *id.* at 189, 220–21, but ultimately they acknowledge that no methods currently exist for putting these refinements into practice. Their notion of "welfare equivalents," besides resting on "a large and unsolved problem within the philosophical literature," *id.* at 202, is not something agencies can be trusted to apply, *id.* at 222. The idea of weighted preferences cannot be implemented because "[w]elfare economists have not yet, in fact, been successful in producing a practicable weighting factor." *Id.* at 224.

Ultimately, however, despite its failure as a moral criterion, Adler and Posner endorse CBA as a "welfarist decision procedure,"[107] concluding that even "[i]f CBA provides only a feeble approximation of utilitarianism, that is better than no guidance at all."[108] In their view, a "decision procedure" may be justified even though it does not exactly track "a criterion of moral rightness or goodness" if the actual use of that procedure by the agency would lead to "the best consequences, as measured by that criterion."[109] While direct application of the moral criterion itself might, at first blush, appear to be the best course, in practice it may not always produce the best consequences. "The agency might make mistakes in deciding what the criterion requires,"[110] direct application of the criterion may involve costs that overwhelm the welfare effects of the decision itself, or the relative opacity of the process of direct implementation may allow the agency purposely to misapply it for self-regarding reasons. Accordingly, it may be that "some other (morally irrelevant) standard is . . . reasonably well correlated to the criterion, [cheaper, and less subject to accidental or purposeful misapplication] by the agency, such that the best decision procedure for the agency is *not* direct implementation of the moral criterion, but rather the implementation of the correlated standard."[111]

This concession that CBA provides only a "feeble approximation" of what we really care about[112] has effected a radical shift in the conversation about alternatives to CBA. Now, for the first time, CBA and its alternatives begin on the same plane. None provides the "perfect" solution to market failure, even on a theoretical level. Accordingly, just as CBA may provide a better approximation of the true moral criterion than direct application of the criterion itself, it is also possible that feasibility or absolute standards may provide a better approximation of the moral criterion than CBA. Thus, the burden is now on CBA's proponents to show that it provides a better proxy—a better "rough approximation," a better rough-and-ready tool—than the alternatives that have formed the backbone of U.S. environmental law for decades.[113]

107. *Id.* at 195 (acknowledging that CBA lacks "bedrock moral status" but endorsing it nonetheless as a practical decision procedure).

108. *Id.* at 194.

109. *Id.* at 217–18.

110. Adler & Posner, *supra* note 18, at 217.

111. *Id.*

112. *Id.* at 194. In Adler and Posner's view, what we care about is something they call "overall well-being"—a utilitarian criterion which they define and elaborate on in their article. *Id.* at 217.

113. Adler and Posner make an effort to make such a showing in the final section of their article, but their dismissal of alternatives is primarily based on their unsupported assertion that they are less "accurate" than CBA. *See id.* at 231 (stating that risk-risk analysis is "less accurate" than CBA); *id.* at 232 (stating that the feasibility standard is less accurate). This contention rings a little hollow in light of their concession that CBA itself is not accurate, but nonetheless

This discovery of the impossibility of market perfection may also help to move the conversation about alternatives outside the reigning paradigm of welfare economics. Such discussions have so far been rare, though recently there have been several promising moves in this direction with respect to feasibility standards. Several authors have suggested that feasibility standards do more than simply provide a rough and easy-to-administer version of CBA, arguing instead that such standards privilege environmental protection over other values by setting pollution limits not at the economically "optimal" point where costs equal benefits, but at the lowest level we can possibly afford. As such, these authors argue, feasibility standards are firmly rooted in society's shared moral commitments. They "reflect a considered normative choice about the proper balance between lives and monetary costs,"[114] a moral imperative "that regulated entities must do their best, or nearly their best, when public health and the environment are at stake,"[115] or simply a national commitment to environmental protection.[116]

Others draw on the philosophical tradition of pragmatism to build a theoretical foundation for alternatives to cost-benefit analysis. Sidney Shapiro and Robert Glicksman defend various existing alternative standards, including feasibility and open-ended cost-benefit balancing, on the basis of "pragmatic principles that regulation should reflect important relevant social norms and be formulated in light of bounded rationality."[117] By "bounded rationality," they refer to a process of making decisions in a situation that is "'bounded' by time, resources, and cognitive constraints that

provides a better "decision procedure" than "direct implementation" of utilitarianism, which would be, they argue, "hugely expensive, highly unreliable, . . . opaque," *id.* at 226, and dependent on controversial value judgments, *id.* at 228. Is it not also possible then, that absolute standards, for example, provide a less accurate but nonetheless superior decision procedure than CBA, which is itself, "hugely expensive, highly unreliable, . . . opaque," and dependent on controversial value judgments? *Id.* at 226–28; *see id.* at 232 (admitting that some alternatives to CBA will be "cheaper, more transparent, and easier to implement correctly than CBA"). Ultimately, they also concede that this question is primarily empirical and thus beyond the scope of their inquiry. *See id.* at 239.

114. Shapiro & McGarity, *supra* note 42, at 743 (emphasis omitted). *But see* FARBER, *supra* note 97, at 72 (suggesting feasibility standards "based on the view that people have a right to be protected from environmental risk."); *see also* Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1043 (D.C. Cir. 1978) (noting that the feasibility standard under CWA embodies the view that the public has the right to a clean environment).

115. Wagner, *supra* note 42, at 92.

116. FARBER, *supra* note 97, at 107–09; *see also* SHAPIRO & GLICKSMAN, *supra* note 40, at 71 (arguing that alternatives to CBA reflect "widely shared social values besides economic efficiency," like the extraordinary value people place on human life and the natural environment). These authors seem to contrast this notion of a shared moral commitment with a cost-benefit approach. Some proponents of CBA, however, would contest the claim that CBA does not itself constitute a moral commitment, rooted as it is in utilitarian moral theory. *See* Adler & Posner, *supra* note 18, at 196.

117. SHAPIRO & GLICKSMAN, *supra* note 40, at 73.

make it virtually impossible to verify that the solution chosen is optimal."[118] Daniel Farber also draws on principles of pragmatism to propose a hybrid standard for environmental decision making that combines the feasibility principle's morally-grounded presumption in favor of environmental protection with the "reality check" of a loose cost-benefit backstop.[119]

An interesting effort to defend feasibility standards on distributional grounds also steps outside the rubric of welfare economics. David Driesen argues persuasively in a recent article that feasibility standards represent a considered judgment by Congress about the equitable distribution of the costs of both environmental degradation and prevention.[120] He begins with the observation that pollution tends to concentrate severe harms on randomly selected pollution victims, while the costs of pollution control are ordinarily widely distributed in the form of compliance costs imposed on industry that are then passed on to large groups of consumers and stockholders.[121] In such circumstances, the imposition of diffuse costs in order to prevent the concentrated harms of death, illness and ecological degradation wrought by pollution are, in Congress's view, well worth it, and feasibility standards require such a trade-off. Only where the costs of pollution control also become concentrated, as when costs are so high as to cause plant shut-downs that impose severe economic consequences on a discrete group, do feasibility standards allow the costs of compliance to trump environmental protection.[122] Thus, Driesen lays a solid theoretical foundation for feasibility standards not on the well-worn concept of economic efficiency, but on the oft-ignored principle of distributional equity.[123]

In the following pages, I offer a theoretical foundation for an alternative decision making standard that up to now has received little attention: absolute standards. At best, absolute standards have been ignored or ghettoized as a special case; at worst, they have been treated as an outmoded relic of another era: a product of the naïve and immature zeal of

118. *Id.* at 23; *see also* Jolls et al., *supra* note 82, at 1477–78.

119. Farber's exact formulation is: "To the extent feasible without incurring costs grossly disproportionate to any benefit, the government should eliminate significant environmental risks." FARBER, *supra* note 97, at 131.

120. *See* Driesen, *supra* note 42; *see also* Shapiro & McGarity, *supra* note 42, at 740 (stating that feasibility standards do a better job accounting for distributional concerns than CBA which, as an occupational health standard, would reduce costs to stockholders and consumers at the expense of workers).

121. Driesen, *supra* note 42, at 38. Driesen's observation that the *ex post* costs of pollution are concentrated on particular individuals is not inconsistent with my premise that the *ex ante* costs of environmental degradation (i.e. the *risk* of death or illness) are diffuse and widely distributed. *See infra* notes 129–38 and accompanying text.

122. Driesen, *supra* note 42, at 9, 35.

123. *See supra* notes 23–26 and accompanying text.

"1970s environmentalism."[124] As I demonstrate below, however, absolute standards provide an attractive alternative to CBA because they counteract the political failure as well as the market failure that are the root causes of environmental degradation.

III. POWER IMBALANCE

A. MARKET FAILURE AND POLITICAL FAILURE

Perhaps the fundamental question that any theory of environmental regulation must answer is: Why does environmental degradation occur in the first place? Why do we foul our own nest? Why do we act in ways that are contrary to our own collective interest? The standard story is that environmental degradation results from a malfunction of the market. According to the inexorable logic of the tragedy of the commons, each individual fails to account for the exhaustion of commonly held resources on her own cost-benefit ledger. Because of these externalities, the usual laws of the market that would ordinarily keep the production of goods and depletion of resources at socially optimal levels fail, and commonly owned resources are squandered to the detriment of all.[125]

Cost-benefit analysis provides a solution to this market malfunction.[126] Government officials attempt to fix the problem by intervening in the market with regulation. But if they do it by toting up the full costs and benefits of regulatory measures to society at large (including externalities) and issuing regulations only when the benefits exceed the costs, they can mimic the outcome that a perfectly functioning market would have produced and thereby produce socially optimal outcomes.[127] Or so the theory goes.

124. SUNSTEIN, COST-BENEFIT STATE, *supra* note 44, at 3. Indeed, absolute standards have come under considerable attack from those who contend that such standards are ineffective because agencies inevitably resist implementation. *See, e.g.*, SUNSTEIN, RIGHTS REVOLUTION, *supra* note 81, at 91 (stating that stringent standards bring about under-regulation); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 234–35 (1990) (analyzing hazardous air pollutant program under the Clean Air Act as an example of an ineffective absolute regulation). As will become clear, particularly in Part VIII, I paint a very different picture of absolute standards.

125. *See* Rober U. Ayres & Allen V. Kneese, *Production, Consumption, and Externalities*, *in* THE ECONOMICS OF THE ENVIRONMENT 3, 3–18 (Wallace E. Oates ed., 1992) (discussing the concept of "externality"); *see also* MISHAN, WELFARE ECONOMICS, *supra* note 25, at 180–83 (same).

126. For free market advocates, privatization is usually the preferred solution to the tragedy of the commons, see generally TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (rev. ed. 2001); Jason Scott Johnston, *On the Market for Ecosystem Control*, 21 VA. ENVTL. L.J. 129 (2002), but where the nature of the commonly held resource makes privatization impossible, many view government regulation tailored to meet a cost-benefit test as the best way to mimic market outcomes.

127. *See supra* notes 19–22 and accompanying text.

But the market is not the only institution that organizes collective activity in our society. Politics operates alongside markets as an additional mechanism of social organization.[128] Indeed, markets cannot exist without a political system to define rights of property and contract, and it is only through the political system that CBA can be implemented to cure market failure. But if both politics and the market structure our collective decision making, why look only to markets to solve the riddle of environmental degradation? Isn't it just as plausible that some failure of the political system also contributes to the problem?

Just as markets are only part of the decision making structure that organizes society, so is market failure only part of the story that explains the riddle of environmental degradation. While market failure is an important aspect of the problem, environmental degradation also stems in part from a kind of political failure.[129] Environmental disputes involve asymmetries of power that consistently skew government decision making in favor of less stringent environmental regulation.

The structure of this power asymmetry is straightforward. On one side, environmental disputes commonly involve an interest that is broadly shared among individuals,[130] non-economic in character, and often of relatively minor consequence to each one. This interest may involve, for example, breathing cleaner air, avoiding some statistical probability of contracting cancer, enjoying some pristine natural area, or knowing that a certain species has not been pushed to extinction.[131] On the other side, the interests

128. *See generally* CHARLES E. LINDBLOM, POLITICS AND MARKETS (1977).

129. Cass Sunstein also talks of the need to account for "government failure" alongside market failure. *See* SUNSTEIN, RIGHTS REVOLUTION, *supra* note 81, at 103; *see also* ULRICH BECK, ECOLOGICAL ENLIGHTENMENT: ESSAYS ON THE POLITICS OF THE RISK SOCIETY 39 (Mark A. Ritter trans., Humanities Press Int'l, Inc. 1995) (1991) (stating that discussions of environmental problems are "senseless" and "vacuous" unless one also considers, *inter alia*, "society's power structures").

130. While the interests favoring environmental protection tend overwhelmingly to be held by individuals rather than corporations, there are of course exceptions. Thus, there are an increasing number of small businesses, like recreational outfitters, that depend on environmental amenities. Commercial fishing interests also increasingly align with environmental groups, fighting for increased environmental protection in order to preserve the fish stocks on which they depend. *See, e.g.,* Pac. Coast Fed'n of Fisherman's Ass'ns v. Nat'l Marine Fisheries Serv., 71 F. Supp. 2d 1063, 1065 (W.D. Wa. 1999) (involving a coalition of commercial fishermen and environmental groups suing to enforce the ESA). Occasionally, even large corporations align with environmental protection interests on discrete issues. In a particularly striking reversal of the usual dynamic, for example, large insurance companies have pushed for regulatory measures to stem global warming, recognizing that the severe storms and other "natural" calamities expected to accompany global warming will impose enormous costs on their industry. *See* Jeffrey Ball, *Global Warming May Cloud Directors' Liability Coverage*, WALL. ST. J., May 7, 2003, at C1.

131. The Supreme Court's standing cases have long recognized that the interests of those benefited by environmental regulation may be diffuse, non-economic, and relatively minor for each individual. *See* Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

pitted against this set of diffuse public interests are of a very different character.[132] First, they are usually held by a much smaller set of actors.[133] Second, they tend to be economic in character and have the potential to directly impact each individual actor to a far larger degree. And third, the actors are typically businesses and corporations, rather than individuals.[134]

Accordingly, it is apparent that this profile of environmental disputants contains two axes of power imbalance, both weighted in the same direction:

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132. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1213 (1977). Professor Stewart states:

> Industrial firms, developers, unions and others with incentives to avoid environmental controls are typically well-organized economic units with a large stake in particular decisions . . . [while] [t]he countervailing interest in environmental quality is shared by individuals whose personal stake is small and who face formidable transaction costs in organizing for concerted action . . . . The technical complexity of environmental issues exacerbates this disparity by placing a premium on access to scarce and expensive scientific, economic and other technical information and analytical skill.

Id.; *see also* Esty, *supra* note 94, at 597–98; Hsu, *supra* note 59, at 356; Scott R. Saleska & Kirsten H. Engel, *"Facts are Stubborn Things": An Empirical Reality Check in the Theoretical Debate Over the Race-to-the-Bottom in State Environmental Standard-Setting*, 8 CORNELL J.L. & PUB. POL'Y 55, 64 (1998); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 1996 YALE L. & POL'Y REV. 67, 101.

133. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 143–46 (1965) (noting that in the lumber, furniture, and paper industries, thirty-seven percent of national trade associations had memberships under twenty and the median membership was between twenty and fifty). Olson also reported that collective action problems are reduced for trade associations because in almost half of trade associations "nearly 50% of the cost is borne by a handful of members." *Id.* at 145–47 (citing V.O. KEY, POLITICS, PARTIES, AND PRESSURE GROUPS 96 (4th ed. 1958)); *see also* Nathaniel O. Keohane et al., *The Choice of Regulatory Instruments in Environmental Policy,* 22 HARV. ENVTL. L. REV. 313, 332 (1998) ("Compared with citizen groups, trade associations may have significant advantages in overcoming free-riding: they are usually smaller, making the contributions of each member more significant; and even substantial annual dues may be negligible costs for member firms.").

134. The major permitting programs under both the Clean Water Act and the Clean Air Act apply to large industrial facilities. *See* 42 U.S.C. §§ 7475(a), 7502(c)(5) (2000) (imposing new source-review permit requirements on "[m]ajor emitting facilities" and "major stationary sources"). The regulation of vehicle emissions under the Clean Air Act is directed at the automobile industry. *See* 42 U.S.C. § 7522 (directing mobile-source prohibitions at manufacturers and importers of automobiles). Regulation under the Endangered Species Act has affected primarily the timber, mining, and housing industries. Indeed, even the publication of Rachel Carsen's *Silent Spring*, the event that is often credited with sparking the modern environmental movement, met with organized industry opposition as executives from the chemical industry attempted (unsuccessfully) to discredit Ms. Carsen's findings. *See* ROBERT J. BRULLE, AGENCY, DEMOCRACY, AND NATURE: THE U.S. ENVIRONMENTAL MOVEMENT FROM A CRITICAL THEORY PERSPECTIVE 123–24 (2000) (describing the publicity campaign to discredit *Silent Spring* led by Robert White Stevens of the American Cyanamid Corporation); *see also* Oliver A. Houck, *Of Bats, Birds and B-A-T: The Convergent Evolution of Environmental Law*, 63 MISS. L.J. 403, 462 (1994) ("Industry has challenged virtually every regulation the EPA has issued under the CAA, CWA, and RCRA.").

against the interest in environmental protection.[135] First, basic and well-accepted principles of interest-group theory predict that a group whose interests are diffuse and have less marginal impact on each individual member will have far more difficulty organizing into an effective pressure group than a smaller group in which each member suffers substantial economic harm.[136] Second, other things being equal, corporations tend to have far more political clout than individuals, both because they tend to be wealthier and because of the privileged position they occupy in politics.[137] As

135. *See* DAVID M. DRIESEN, THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW 114–20 (2003); Esty, *supra* note 94, at 649 & n.297 ("[E]nvironmental decision making is particularly susceptible to special interest distortion."); Hsu, *supra* note 59, at 323, 333 (arguing that environmental law tends to be skewed "in favor of regulated industries because the costs of pollution reduction fall on *identifiable* parties, while the benefits inure to *unidentifiable* persons—future and otherwise anonymous victims of pollution").

Proponents of cost-benefit analysis argue that government decision making about environmental issues tends to be skewed in the *other* direction, in favor of too much environmental protection, because it reflects people's irrational assessments of risks. These authors criticize, for example, the tendency of ordinary people to prefer a known probability of loss over an imprecise probability. *See* Viscusi, *supra* note 50, at 1447; *see also* SUNSTEIN, RISK & REASON, *supra* note 1, 33–34. Such arguments have a decidedly elitist cast to them and have been roundly criticized on those grounds. Ackerman and Heinzerling, for example, observe: "[O]rdinary citizens . . . have a quite predictable framework for evaluating risks; it's just different from the expert's system." ACKERMAN & HEINZERLING, *supra* note 24, at 130.

136. *See* OLSON, *supra* note 133, at 16–23; GEORGE J. STIGLER, *Can Regulatory Agencies Protect the Consumer?*, *in* THE CITIZEN AND THE STATE: ESSAYS ON REGULATION 178, 186–87 (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 11 (1971); *see also* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34–41 (1998) (summarizing the relevant literature). Russell Hardin refined Olson's theory somewhat, explaining that despite collective-action problems, large groups *do* in fact organize to some extent, in part based on moral norms. *See* RUSSELL HARDIN, COLLECTIVE ACTION 101–08 (1982); *see also* Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 12–13 (1991).

A study of IRS data on environmental organizations and business-promotion organizations shows the environmental movement having only half as many organizations with only a quarter the annual income. *See* BRULLE, *supra* note 134, at 106–07. Another study of interest groups at the federal level found a two-to-one ratio of business organizations interested in environmental issues to non-profits interested in such issues. JACK L. WALKER, JR., MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS 10–12, 59, 71 (1991).

137. *See* MARTIN JÄNICKE, STATE FAILURE: THE IMPOTENCE OF POLITICS IN INDUSTRIAL SOCIETY 14 (1990) (observing that "state failure" results, in part, from the tight relationship between government bureaucracies and industry); LINDBLOM, *supra* note 128, at 170–200; *see also* BRULLE, *supra* note 134, at 53 (noting that corporations also derive power in society from their ability to define and control scientific research and technological developments and the attendant creation of new risks); Richard W. Behan, *Degenerate Democracy: The Neoliberal and Corporate Capture of America's Agenda*, 24 PUB. LAND & RESOURCES L. REV. 9, 21 (2004). Behan states:

> Public policy is no longer fashioned by the bargaining of countervailing interest groups to advance the general welfare of the American people. Instead, it is rationalized and crafted in neoliberal think tanks, and then fashioned to serve

a result, environmental disputes almost always involve an asymmetry of power that weighs against environmental protection.[138]

> corporate clients—to create, protect, or enhance the profit opportunities of campaign contributors.

Id. One study found that "EPA employees rate industry as 20% more influential than environmental groups." BRULLE, *supra* note 134, at 112. Another study found a three-to-one ratio of environmental policy professionals working for industry rather than for environmental organizations. *Id.* at 111.

Corporate wealth and power are also backed up by government power in the form of generous government subsidies for resource extraction and development activities. "What is commonly called free enterprise is fueled by federal subsidies that encourage development of the most sensitive natural areas in America. Real estate development—even on beach dunes, floodplains, and high alpine meadows—is encouraged by $70 billion a year in federal income tax deductions." Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 880–81 (1997)*; see also id.* at 881 n.37 ("[The] primary facilitators of bottomland drainage, arid-land agriculture, and suburban development are public works projects of the U.S. Army Corps of Engineers, Bureau of Reclamation, and Federal Highway Administration."); *id.* at 900–01 (describing the government subsidy of the timber industry in the Tongass National Forest); U.S. DEP'T OF INTERIOR, THE IMPACT OF FEDERAL PROGRAMS ON WETLANDS (2004) (identifying forty-five major federal subsidy programs encouraging development of wetland ecosystems).

The privileged position of industry is, of course, particularly acute in the current Bush administration, where numerous high-level appointees come from the ranks of business. *See, e.g.*, Timothy Egan, *Shift on Salmon Reignites Fight on Species Law*, N.Y. TIMES, May 9, 2004, § 1 (detailing the influential role in the development of federal government policy on endangered Pacific salmon played by Mark Rutzick, formerly "the timber industry's top lawyer" and "[n]ow . . . a high ranking political appointee in the Bush administration").

138. Not surprisingly, those opposed to environmental regulation frequently attempt to obscure this power dynamic. Since any direct attempt to refute the point through statistics or other objective evidence would be futile, a common tactic is to contest the point indirectly, through the use of anecdotes that appear to cast the power dynamic in opposite terms. Thus, stories are told of the mom-and-pop landowners who were prevented from building their dream home on a small plot of land by powerful and malevolent federal regulators who view obscure species and ecosystems as more valuable than people. *See, e.g.*, CHARLES C. MANN & MARK L. PLUMMER, NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES (1995); Felicity Barringer, *Michigan Landowner Who Filled Wetlands Faces Prison*, N.Y. TIMES, May 18, 2004, at A20; Todd Woody, *Taking on Endangered Species: The Rat, the Farmer, and the Feds*, LEGAL TIMES, July 24, 1995, at 8. The Endangered Species Act and the section 404 wetlands permitting program under the Clean Water Act often figure prominently in such anecdotes. As two of the only federal statutes that have the effect of regulating land use, they have received the full wrath of the Wise-Use Movement. Indeed, the Wise-Use Movement itself is another example of this phenomenon. Portraying itself as a populist movement of individuals, it actually receives massive funding from large oil, chemical, logging, mining and car companies. BRULLE, *supra* note 134, at 130.

An informal survey of recent permit applications under the section 404 permit program, however, demonstrates that while the program does occasionally impact individual landowners, the vast majority of those affected are corporate interests. Out of forty-six permit applications filed in three Army Corps of Engineers districts during a four-month period in 2004, only three were filed by individuals. Five were filed by government entities, one by a religious or other non-profit organization, and one by a Native American corporation seeking to build a golf course, hotel and casino. The remaining thirty-two were filed by private corporations, the vast majority of which were seeking to build major housing or commercial development projects. (Data on file with author.) *See also* Vicki Been, Lucas v. The Green

B. DISTORTIONS OF GOVERNMENT DECISION MAKING

This power imbalance, endemic to environmental disputes, has the potential to skew government decision making in the legislative, executive, and judicial branches. Most obviously, monied corporate interests have significant advantages in lobbying legislatures and administrative agencies.[139] First, those with more wealth[140] can, of course, afford to hire more and better lobbyists and to participate in more agency proceedings.[141] Second, corporate lobbyists may also enjoy special access to government officials that those representing individual interests are denied.[142]

The superior access and influence over government decision making enjoyed by anti-environmental interests may, in addition to simply influencing outcomes, also help shape the agenda.[143] Thus, powerful

Machine*: Using the Takings Clause to Promote More Efficient Regulation?*, *in* PROPERTY STORIES 221, 221–57 (Gerald Korngold & Andrew P. Morriss eds., 2004) (describing the *Lucas* case as a calculated effort by a wealthy and politically connected developer to challenge environmental regulation rather than an unorchestrated suit by a hapless, powerless victim of majoritarian politics).

139. Sam Hays has observed that the same political struggles that play out in the legislature play out—sometimes with even more ferocity—in the administrative process. *See* SAMUEL P. HAYS, BEAUTY, HEALTH, AND PERMANENCE 6 (1987).

140. Remember that the wealth advantage of the anti-environmental interests comes from two sources: (1) the fact that corporations generally have more wealth than individuals; and (2) the organizational advantages that small, concentrated groups have over larger, diffuse groups.

141. *See* Croley, *supra* note 136, at 126–31 (describing empirical studies showing that regulated industries participate at far higher rates in agency proceedings than public interest groups, including one study of RCRA rulemakings by EPA showing industry participating ninety-six percent of the time while environmental and citizen groups participated only twelve percent of the time); Driesen, *supra* note 42, at 40 (observing that environmental regulation takes place on an uneven playing field). Driesen notes that "[r]egulated firms provide the overwhelming majority of significant written comments in rulemaking, meet with regulators incessantly, ask the elected beneficiaries of their campaign contributions to hound EPA when it seeks to regulate them, litigate often, and frequently resist enforcement." *Id.*

142. *See* sources cited *supra* note 137; *see also* STEVEN LEWIS YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT 139 (1982) (noting that interests opposing implementation of the ESA have historically had "close ties to decisionmakers"); Behan, *supra* note 137, at 20 (noting that corporations currently contribute about three-quarters of all campaign financing and thus have an enormous impact on policy making; citing as an example contributions by lumber companies Weyerhaeuser and Louisiana-Pacific to the campaign of Senator Slade Gorton and Gorton's subsequent insertion into an appropriations bill of the "Salvage Logging Rider" exempting numerous logging projects on federal lands from compliance with environmental laws); Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 326 (1993) (noting that biological opinions that determine whether projects will be stopped under the ESA are circulated in draft form to development agencies and private applicants—"subdivision developers, dam builders," etc.—but not to the general public).

143. *See* STEVEN LUKES, POWER: A RADICAL VIEW 24 (1974) (noting that under the "two-dimensional view," power may manifest itself covertly, not by influencing decision making outcomes directly, but by controlling what issues are placed on the agenda for decision); Peter Bachrach & Morton Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 948 (1962). *See generally* MATTHEW A. CRENSON, THE UN-POLITICS OF AIR POLLUTION: A STUDY OF NON-

lobbyists may exercise control over what bills are introduced in the legislature and may even write the bills. Similarly, they may have extensive input on the shape of proposed regulations or even draft them.[144] The recent furor over Vice President Cheney's Energy Task Force, which formulated the President's energy policy in close cooperation with industry executives in dozens of closed-door meetings from which environmental groups were excluded, provides a particularly vivid example of this phenomenon.[145]

Indeed, it has long been recognized that agency decision making has the capacity to be grossly distorted by the power imbalance between regulated industry and regulatory beneficiaries. The prevailing view is that "agencies unduly favor . . . the interests of regulated or client business firms and other organized groups at the expense of diffuse, comparatively unorganized interests such as consumers, environmentalists, and the poor."[146] In addition to the straightforward advantages in lobbying power that allow anti-environmental interests to exert more influence on agency decision making than their pro-environmental counterparts, many courts

DECISIONMAKING IN THE CITIES (1971) (describing an empirical study of two cities' efforts to deal with the problem of air pollution in the 1950s and 1960s, concluding that Gary, Indiana failed to take action on the issue because U.S. Steel exercised covert power to keep the issue off the agenda).

144. *See* Moss v. CAB, 430 F.2d 891, 893–94 (D.C. Cir. 1970) (describing an agency working out policy through negotiation with regulated firms); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 332 (1986) (noting that seventy-eight percent of respondents in a survey of organized lobbying groups "indicated that their organizations help draft regulations"); Eric Pianin, *Proposed Mercury Rules Bear Industry Mark*, WASH. POST, Jan. 31, 2004, at A04 (reporting that "at least a dozen paragraphs [in EPA's proposed mercury emissions rule] were lifted, sometimes verbatim," from a memo prepared by a law firm representing the utility industry); Tom Hamburger & Alan C. Miller, *Mercury Emissions Rule Geared to Benefit Industry, Staffers Say*, L.A. TIMES, Mar. 16, 2004 (same).

145. *See Bush Energy Task Force Consulted Environmentalists*, REUTERS NEWS WIRE, Apr. 12, 2002 (noting that environmental groups were briefly consulted during a two-day period, while executives from oil, coal, and utility industries were consulted repeatedly during dozens of meetings over a several-month period); Press Release, Natural Resources Defense Council, Data Show Industry had Extensive Access to Cheney's Energy Task Force (May 21, 2002) (on file with the Iowa Law Review) ("[D]ocuments provided by the Energy Department confirm that energy industry lobbyists enjoyed extraordinary access to Vice President Cheney's energy task force.").

146. Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1667, 1684–85 (1975); *see also id.* at 1687 (observing that this critique "has sufficient power and verisimilitude to have achieved widespread contemporary acceptance"). Stewart notes:

> It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative over-representation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests. Such overrepresentation stems from both the structure of agency decision making and from the difficulties inherent in organizing often diffuse classes of persons with opposing interests.

Id. at 1713.

and commentators point to a phenomenon peculiar to the administrative process widely referred to as "agency capture."[147]

Administrative law scholars point to a number of factors to explain the tendency of agencies to become "captured" or controlled by the business firms they are charged with regulating. Long-term repeat contacts with the businesses create a psychological and organizational disincentive for agency bureaucrats to adopt an adversarial posture toward the regulated firms. Bureaucracies naturally seek a kind of "routinization of administration" that requires the maintenance of an amicable relationship with the regulated firms over the long term.[148] The incentive to compromise with and placate industry is further fueled by the disparity of resources between the agency and the firms it regulates. Agency officials are aware that an adversarial relationship with industry can quickly deplete agency resources and that they can accomplish more through conflict avoidance and compromise. In particular, since the resources available to industry for filing court challenges to regulations far outstrip those of their public interest counterparts, industry can use the explicit or implicit threat of litigation to pressure agency decision makers.[149]

Agencies' reliance on regulated firms for information also biases them toward industry's point of view. Because agencies and the constituencies opposing industry interests frequently lack sufficient resources to gather information, agencies often find themselves largely dependent on the regulated industries themselves for information crucial to their regulatory duties.[150] This both exacerbates the agencies' relationship of dependency with industry, creating further incentives for conciliation and compromise, and provides the agency with a one-sided point of view.[151]

147. For specific historical examples of agency capture, see JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 22 (1997). *See also* Sierra Club v. Morton, 405 U.S. 727, 748 (1972) (Douglas J., dissenting) (noting the U.S. Forest Service's "notorious . . . alignment with lumber companies"); ROBERT A. DAHL, DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE 454 (3d ed. 1976) (describing the capture of the Maritime Administration by the shipping industry). Sociologists have observed the same phenomenon, though they describe it in slightly different terms. *See, e.g.*, JÄNICKE, *supra* note 137, at 14 (observing the "close coalitions between civil servants and industrialists" and the extent to which such coalitions "limit the independence of political decision-makers").

148. Stewart, *supra* note 146, at 1714.

149. Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1315–17 (1999).

150. *See* SCHLOZMAN & TIERNEY, *supra* note 144, at 330. This arises in part from the fact that industry's capacity to hire lawyers and experts to draft voluminous comments to proposed regulations far outstrips that of public interest groups. *See* sources cited *supra* note 141.

151. Stewart, *supra* note 146, at 1684–87, 1713–15; *see also* JÄNICKE, *supra* note 137, at 14–30; James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 357 (James Q. Wilson ed., 1980).

Clearly, "agency capture" is probably never complete. That is, agencies are rarely if ever wholly subservient to the industries they regulate. *See* DRIESEN, *supra* note 135, at 119.

Judicial review is often seen as a corrective for distortions in agency decision making caused by the undue influence of powerful private groups,[152] and it can sometimes play such a role. Indeed, I argue in the final Part of this Article that judicial review plays an important role in counteracting the disparities of power that would otherwise distort decision making under the Endangered Species Act. Nonetheless, while lobbying and other attempts to influence judicial decisions directly are prohibited by ethical rules and thus undoubtedly play far less of a role than do similar efforts in the political branches,[153] judicial decision making is by no means immune from the distorting effects of power.[154]

First, because industry has more money to file court challenges than do public interest groups, the number of industry challenges seeking to block regulation in the courts far outstrips the number of public interest lawsuits seeking to spur regulation.[155] Once in court, wealthy litigants are significantly advantaged by their ability to hire expensive expert witnesses and employ resource-intensive litigation tactics. These problems are compounded by the fact that administrative law contains built-in biases that tend to favor regulatory objects over regulatory beneficiaries.[156] These include the presumption against review of agency inaction, the doctrine of standing, and the law's general preference for negative injunctions prohibiting regulatory action over affirmative injunctions spurring

Other forces also have influence. Environmental groups, for example, are sometimes successful at counteracting industry pressure with respect to particularly high-profile issues. But it is nonetheless fair to say that industry has a disproportionate impact on agency decision making. *See supra* notes 139–45 and accompanying text.

152. Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 487–88 (1997); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 63 (1985) [hereinafter Sunstein, *Interest Groups*].

153. The suggestion that Vice President Dick Cheney might have had an opportunity to directly lobby Supreme Court Justice Antonin Scalia on a duck hunting trip when a lawsuit challenging the energy task force chaired by Cheney was pending before the Supreme Court raised a public furor, though Justice Scalia declined to recuse himself. *See generally* Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229 (2004). There have also been concerns raised in recent years about corporate lobbying of the federal judiciary through expense-paid trips to private seminars. *See generally* Douglas T. Kendall & Jason C. Rylander, *Tainted Justice: How Private Judicial Trips Undermine Public Confidence in the Judiciary*, 18 GEO. J. LEGAL ETHICS 65 (2004).

154. Indeed, Frank Cross has actually argued that the courts in reviewing agency action are even more subject to manipulation by powerful private groups than is the executive branch. *See* Cross, *supra* note 149, at 1314–26.

155. Cary Coglianese, *Litigating within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC'Y REV. 735, 742–43 (1996) (noting that ninety-one percent of challenges to EPA hazardous waste regulations are filed by corporations or trade associations). Even when such challenges are ultimately unsuccessful, they usually benefit industry nonetheless by delaying regulatory action.

156. Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 666–67 (1985).

regulatory action. Finally, industry-filed litigation can become a mechanism for excluding citizen groups from important regulatory decisions when consent decrees are hammered out behind closed doors in bilateral negotiations between industry plaintiffs and agency defendants.[157]

In addition to these kinds of relatively direct impacts on government decision making, power disparities may manifest themselves in more subtle ways as well. Power and wealth may sometimes create the capacity to shape individual preferences, when, for example, corporations promote a "taste" for certain products through advertising.[158] Such preferences may in turn

157. Cross, *supra* note 149, at 1316–17. The usual APA rules that require public notice and comment for agency rule making do not apply to consent-decree negotiations. *See* New York State Dep't of Law v. FCC, 984 F.2d 1209, 1218–20 (D.C. Cir. 1993).

There is also reason to believe that as the federal courts become more and more dominated by republican appointees, an increasingly pro-business tilt is emerging on the federal bench. A number of studies have demonstrated that republican-appointed judges are significantly more likely to side with corporate interests in environmental cases than their democratic counterparts. *See* JAY E. AUSTIN ET AL., ENVTL. LAW INST., JUDGING NEPA: A "HARD LOOK" AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 7–9 (2004), www.endangeredlaws.org/downloads/Judging NEPA.pdf (reporting results of a study of NEPA cases in federal courts between 2001 and 2004 showing that democrat-appointed federal district court judges ruled in favor of environmental plaintiffs 60% of the time and in favor of pro-development plaintiffs only 14% of the time, while republican-appointed district judges ruled in favor of environmental plaintiffs 28% of the time and in favor of pro-development plaintiffs 60% of the time. District judges appointed by George W. Bush ruled in favor of environmental plaintiffs just 17% of the time. Circuit court panels with a majority of democrat-appointed judges ruled in favor of environmental plaintiffs 58% of the time while republican-majority panels ruled in favor of environmental plaintiffs 10% of the time.) (on file with the Iowa Law Review); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1104 (2001) (reporting results of study finding that "challengers seeking more stringent health-and-safety regulations prevailed in 50.3% of the cases before panels in which at least two of the judges were appointed by Democratic presidents, but in only 27.8% of the cases before panels in which at least two of the judges were appointed by Republican presidents."); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1728 (1997) (reporting results of a study that republican-appointed judges on the D.C. Circuit are significantly more likely than democratic-appointed judges to vote to reverse the EPA when the challenger is an industry group); CASS R. SUNSTEIN ET AL., IDEOLOGICAL VOTING ON FEDERAL COURTS OF APPEALS: A PRELIMINARY INVESTIGATION 19–20 (AEI-Brookings Joint Ctr. for Regulatory Stud., Working Paper No. 03-9, 2003) (discussing similar findings); *see also* LINDBLOM, *supra* note 128, at 174 (observing that courts show special solicitude to business interests out of a recognition of their extensive control over employment and production).

158. *See generally* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1422 (1999) (describing evidence of industry manipulation of consumer preferences through marketing and advertising). Sociologist Steven Lukes argues that power, in what he calls the "three-dimensional view," operates in subtle, subterranean ways to actually

> prevent people . . . from having grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural and unchangeable, or because they value it as divinely ordained and beneficial.

shape government decision making, either through democratic processes that may register such preferences or through agency decision making methods, like CBA, that attempt to empirically measure them.[159]

While an imbalance of power undoubtedly manifests itself in the context of environmental decision making by all three branches of government, my primary concern here is with the distorting effects of power on administrative decision making. This is because my purpose is to propose a new theoretical justification for the use of absolute standards in the crafting of environmental-protection statutes, which are of course administered by agencies.[160] Rather than exploring the process by which such standards are initially set by legislatures, my argument accepts certain types of legislatively enacted standards as given—i.e., cost-benefit and absolute standards—and then explores the extent to which these standards do or do not help to counteract the distorting effect of power imbalance on administrative decision making.

An examination of the implementation of standards by agencies necessarily entails some attention to judicial decision making as well, since agency decision making is profoundly shaped by judicial review. Even if political forces distort agency decision making in the first instance, for example, certain standards might facilitate the correction of such distortions through judicial review, while other standards might provide little or no traction to courts' efforts to correct such distortions. Indeed, I argue in Part VIII that citizen-suit initiated judicial review of agency decision making

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LUKES, *supra* note 143, at 24. Thus, Madison Avenue links images of SUVs with pristine natural landscapes, thereby suppressing the conflict that might otherwise arise if citizens watching their sons and daughters die in Iraq and hearing increasingly gloomy portents of global-warming doom were to recognize their "real interests" and challenge the patterns of corporate and government decision making that produce needlessly inefficient and polluting vehicles and exempt them from existing fuel-economy and emissions standards. For a further elaboration and empirical investigation of Lukes's theory, see generally JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AD REBELLION IN AN APPALACHIAN VALLEY (1980). For a critique of Lukes, see generally Steven L. Winter, *The "Power" Thing*, 82 VA. L. REV. 721 (1996). *Cf.* MICHEL FOUCAULT, POWER/KNOWLEDGE 109–33 (1980) (expounding on the relationship between power and the production of knowledge).

159. This is another way in which preferences are endogenous and therefore do not provide a stable measure of value for purposes of CBA. *See supra* notes 80–84 and accompanying text.

160. Thus, for example, the EPA applies the feasibility or "technology based" standards set forth in the Clean Air Act and the Clean Water Act to set emissions and effluent standards for particular industrial sources of air and water pollution. *See, e.g.*, 33 U.S.C. §§ 1311(b), 1314 (2000) (EPA to set technology based effluent limitations for categories of point sources); 42 U.S.C. § 7411 (EPA to set technology-based emissions standards for categories of new stationary sources). The EPA applies the cost-benefit standard contained in the Safe Drinking Water Act to set specific standards for particular pollutants in drinking water. 42 U.S.C. § 300g-1(b)(3). The U.S. Fish and Wildlife Service applies the absolute standards in the ESA to make decisions as to which species should be listed as threatened or endangered, 16 U.S.C. § 1533(a)–(b), and what government and private development activities should be prohibited on the basis of their impacts on such species, 16 U.S.C. §§ 1536(a)(2), 1539(a).

under the ESA's absolute standards is crucial to the effectiveness of those standards in combating the distorting effects of power imbalance. Judicial review under a cost-benefit standard, on the other hand, would be ineffective on this score. As set forth above, judicial decision making is not immune from the distorting effects of power. Accordingly, many of the same factors that cause a cost-benefit standard to exacerbate the distortions in agency decision making caused by power imbalance[161] will also cause such a standard to exacerbate such distortions in the judicial process.

The above discussion raises a nagging question: If industry enjoys a power advantage over environmental-protection interests in all three branches of government, why is it that legislatures ever enact statutes containing absolute standards? If, as I argue in Part VIII, absolute standards actually serve to strip corporate interests of some of the power advantage they would otherwise enjoy in the administrative process, why do such powerful interests ever let such standards get through the legislative process in the first place? One perhaps facile response is simply to point out that a number of such standards have in fact been enacted. The Endangered Species Act[162] and the National Ambient Air Quality Standards of the Clean Air Act[163] are prominent examples. Taking the undeniable existence of such absolute standards as a given, my task here is to attempt to build a theoretical defense for them. The question of why such standards were passed, while important, is also exceedingly complex, and since it is not necessary to my argument, it is beyond the scope of this Article. Nonetheless, I explore it briefly in the next Section.

C. SOME (TANGENTIAL) THOUGHTS ON PLURALISM AND CIVIC REPUBLICANISM

Having made those disclaimers, I offer here a few preliminary thoughts on the question of how, in light of the power disparities discussed above, legislatures have been able to pass environmental-protection laws containing absolute standards. To begin with, if my claim about the existence of an endemic environmental power imbalance is accurate, then under a pluralist understanding of politics as a struggle among self-interested groups for scarce public resources,[164] one would certainly predict that the enactment of environmental statutes imposing absolute standards would be unlikely at best.[165] But I am inclined to look instead to civic republicanism for an explanation for the undeniably real—if rare—phenomenon of absolute standards in environmental legislation.

161. *See infra* notes 201–30 and accompanying text.

162. 16 U.S.C. §§ 1531–1544; *see infra* Part VIII.

163. 42 U.S.C. § 7409. For additional examples, see *supra* note 8.

164. *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 137–51 (1956); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 875–76 (1987).

165. *See generally* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

Civic republicanism takes the view that legislative outcomes can reflect some conception of the "public good" rather than a simple aggregation of private preferences resulting from "deals" among self-interested groups.[166] To be sure, this ideal is often not achieved in the real world because the "problem of faction"—that is, the capture of the political process by powerful private groups promoting their self-interest at the expense of the public good—threatens to undermine the deliberative process.[167] But civic republicanism at least holds out the possibility that every now and then, the stars align, the interest groups drown each other out or are otherwise momentarily quieted, and the elusive voice of the public good, momentarily audible above the din of power politics, carries the day. Indeed, there are occasionally legislative enactments that seem to defy a simple pluralist explanation, where the interests of the most powerful private groups are overridden in favor of some notion of the "public good." The environmental statutes of the 1970s are often cited as examples of that phenomenon.[168]

While this republican nirvana may be reached by legislatures only rarely, it is far more likely to occur in the legislative than the administrative arena. This is so for two reasons. First, legislatures deal primarily in broad generalizations of policy and principle, while administrative agencies confront the far messier task of applying these principles to particular situations involving particular people. Arguments based on economic hardship to specific private interests at the agency-implementation level are far more likely to gain traction. Visions of the "public good," on the other hand, are far easier to maintain in broad legislative debates about basic principles. Thus, in the Halls of Congress, it is difficult to argue with the broad proposition that we should preserve the rich heritage of the earth's biodiversity by making every effort to protect species that are threatened

166. *See* Frank I. Michelman, *Supreme Court, 1985 Term–Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 18–19 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547–58 (1988) [hereinafter Sunstein, *Republican Revival*].

167. *See* Sunstein, *Interest Groups*, *supra* note 152, at 32.

168. *See* MASHAW, *supra* note 147, at 33 (citing environmental legislation of 1970s as counterexample to pluralist view of legislative process); Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 65–67 (1992) (explaining environmental legislation of 1970s as arising from republican movements); Steven Kelman, *"Public Choice" and Public Spirit*, 87 PUB. INT. 80, 91 (1987). *But see* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 117–18 (1981) (describing how environmentalists allied themselves with eastern dirty coal producers to lobby for standards favoring scrubbing over clean coal in the 1977 Clean Air Amendments); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 508 (1988) (suggesting that environmental statutes actually benefit particular segments of industry and result from lobbying by those firms); William H. Rodgers, Jr., *The Lesson of the Owl and the Crows: The Role of Deception in the Evolution of the Environmental Statutes*, 4 J. LAND USE & ENVTL. L. 377, 378 (1989) (similar argument); Christopher H. Schroeder, *Rational Choice Versus Republican Moment—Explanations for Environmental Laws, 1969–73*, 9 DUKE ENVTL. L. & POL'Y FORUM 29, 31 (1998) (offering rational choice explanations for the organization of environmentalist groups and the passage of environmental laws in the early 1970s).

with extinction. On the other hand, when it comes to implementation in specific instances, the argument that efforts to preserve the northern spotted owl are costing tens of thousands of jobs may be quite compelling. Second, particular applications of a statutory standard by an agency are far less likely to be subject to widespread public scrutiny than are legislative enactments. Thus, political arm twisting and back-room deals, which clearly play a role in the legislative process, can potentially play an even more prominent role in agency implementation.[169]

Indeed, many of the ideas associated with civic republicanism are particularly compatible with my argument. First, at least one strand of civic republicanism embraces a particular concern with problems of power imbalance and its distorting effect on the deliberative process.[170] Cass Sunstein has identified this concern as one of the "four central commitments" of modern republican thought:[171]

> Many republican writers have placed a high premium on political equality. Political equality, in republican terms, is understood as a requirement that all individuals and groups have access to the political process; large disparities in political influence are disfavored . . . . Dramatic differences in wealth and power are, in this view, inconsistent with the underlying premises of a republican polity.[172]

Thus, the premise of this Article, that environmental standards should operate to counteract disparities in political power that distort government decision making, is consistent with the fundamental tenets of civic republicanism.

Second, civic republicanism explicitly rejects the pluralists' utilitarian view of the legislative process as aggregating pre-existing private preferences.[173] This rejection has important parallels to my criticisms of the cost-benefit standard, not the least of which is a pronounced skepticism about the assumption that preferences are exogenous. Because preferences are more accurately viewed as products of the existing legal system and existing relations of power, to the extent that pluralism—like CBA—purports to shape legal standards by reference to preferences, it cannot avoid a measure of circularity.[174]

169. Robert V. Percival, *Environmental Legislation and the Problem of Collective Action*, 9 DUKE ENVTL. L. & POL'Y FORUM 9, 26 (1998) (noting that, because agency rulemaking is far less visible than the legislative process, it is far easier for special interests to wield influence).

170. *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1500–02 (1988); Sunstein, *Republican Revival*, *supra* note 166, at 1548; *see also infra* notes 293–305 and accompanying text.

171. Sunstein, *Republican Revival*, *supra* note 166, at 1548.

172. *Id.* at 1552.

173. *Id.* at 1548–49; *see also* Michelman, *supra* note 166, at 21.

174. *See* Sunstein, *Republican Revival*, *supra* note 166, at 1549; *see also supra* notes 80–84 and accompanying text.

To be fair, the above characterization of pluralism may be unduly simplistic. Certainly, it is not impossible for a pluralist to also be concerned with the distorting effects of power on the political process. Indeed, to the extent that pluralists view politics as appropriately aggregating private preferences and thus reproducing a kind of utilitarian calculus of social welfare, they might well view as highly problematic large disparities of power that cause the preferences of one group to be over-counted in relation to those of another.[175] Thus, John Hart Ely, whose ideas I discuss in more detail in Parts V and VI, takes an essentially pluralist view of the legislative process, but considers restraints on the exercise of undue influence by particularly powerful groups to be essential to the proper functioning of that process.[176]

Accordingly, I do not view my argument as relying necessarily on a civic republican view of the political process. A pluralist view of politics can also be compatible with the claim that the law should be structured so as to counteract the distorting effect of power imbalance on government decision making. Additionally, a less cynical pluralist could explain the enactment of seemingly public-regarding legislation as the outcome of an undistorted, utilitarian legislative process. The Endangered Species Act, for example, could be viewed as an accurate aggregation of citizen preferences with respect to endangered species. Ultimately, however, I view the civic republican vision of politics as more compatible with my argument, both because of its clearer antagonism to a political process that is captured by powerful groups and its discomfort with the concept of private preferences as the building blocks of public policy.[177]

D. ADMINISTRATIVE LAW: THE PROCEDURAL SOLUTION

As noted above, in the context of administrative law there has been a longstanding recognition of how the power imbalance between concentrated corporate interests and diffuse public interests plays out in the agency decision making process.[178] Accordingly, both Congress and the courts have made a variety of efforts over the years to reform the institutions and structures of administrative law in order to level the playing field

175. *See* Sunstein, *Interest Groups, supra* note 152, at 33; *see also* Mashaw, *supra* note 147, at 16 (acknowledging the existence of a "benign or even positive" form of pluralism—less cynical than public choice theory—that envisions "multiple clusters of citizens pursuing their various group interests through an open and competitive process . . . . [through which] most people's interests can be served at least some of the time").

176. For Ely, those "restraints" take the form of judicial review. *See infra* notes 257–59 and accompanying text.

177. Indeed, Ely's views, on which I rely heavily, *see infra* notes 257–81 and accompanying text, can also be re-cast in a republican mold, as Frank Michelman has ably demonstrated. *See* Michelman, *supra* note 170, at 1525–26.

178. *See supra* notes 146–51 and accompanying text.

between regulated industries and regulatory beneficiaries.[179] In the 1960s and 1970s, Congress began in many instances to impose more specific statutory mandates on agencies.[180] Some, for example, provided specific time-tables and deadlines for agency action.[181] Congress also increasingly made use of the "private attorney general" concept by including citizen suit provisions in many environmental statutes.[182] By providing private causes of action for regulatory beneficiaries and by allowing them to collect attorney's fees when successful, these citizen-suit provisions aimed to counteract some of the resource and power disparities between industry and citizen groups.[183]

Congress has used other procedural tools as well to broaden public access to information and participation in government decision making.[184] Thus, the National Environmental Policy Act, by requiring public disclosure of environmental impacts and alternatives, seeks to give a boost to the influence of diffuse public interests on government decision making.[185] The Emergency Planning and Community Right-to-Know Act ("EPCRA") similarly tries to level the playing field between corporate and citizen interests by requiring companies to disclose to the public annual data on the quantities of certain toxic chemicals they have stored or released into the air, water, or land. [186] And the Superfund Statute's Community Relations Program provides for public notice and input on hazardous waste site clean-ups.[187]

179. Some have also argued for addressing the problem by reviving the non-delegation doctrine and thereby attacking what they view as the root of the problem—the delegation of unbounded discretion to agencies by Congress. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131–34 (1980).

180. *See* Mashaw, *supra* note 147, at 22; SUNSTEIN, RIGHTS REVOLUTION, *supra* note 81, at 29–30.

181. *See, e.g.*, 16 U.S.C. § 1533(b)(3)–(6) (2000) (detailing the ESA's deadlines for listings and designations of critical habitat). Time-tables and deadlines tend to favor regulatory beneficiaries, who usually have an interest in seeing regulation implemented as quickly as possible.

182. *See, e.g.*, 33 U.S.C. § 1365 (Clean Water Act); 42 U.S.C. § 7604 (Clean Air Act); 16 U.S.C. § 1540(g) (Endangered Species Act).

183. *See* Farber, *supra* note 168, at 72–73 (describing the important role played by citizen suits by environmental organizations in ensuring adequate implementation of environmental laws); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 192–93 (1992).

184. *See* Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 83 (1996) ("[V]irtually every environmental statute passed during [the 1970s] contained citizen participation programs.").

185. 42 U.S.C. § 4332.

186. 42 U.S.C. §§ 11,001–11,050. The data is submitted to EPA, which then publishes the data—called the Toxics Release Inventory ("TRI")—on the Internet. The TRI covers the releases of 650 different chemicals from over 20,000 facilities throughout the country.

187. *See* 42 U.S.C. § 9617; 40 C.F.R. § 300.700(c)(6) (2004). *See generally* Ellison Folk, *Public Participation in the Superfund Cleanup Process*, 18 ECOLOGY L.Q. 173 (1991).

At the same time that Congress was taking these measures, judicial doctrines governing review of agency action also began to evolve both to more aggressively scrutinize the merits of agency decision making and to ensure participation by a broad spectrum of interests. In the 1960s and 1970s, the courts began to apply an increasingly strong presumption in favor of judicial review of agency action.[188] Then, in the 1970s and 1980s, the "hard look" doctrine evolved, requiring agencies to provide rational explanations for their decisions, justify departures from past practices, allow participation by a wide range of interested constituencies, and consider reasonable alternatives.[189] This increased scrutiny by the courts can be viewed in part as a mechanism for ensuring that agency decisions are based on some rational view of the public interest, rather than simply on undue influence by powerful regulated industries.[190]

Along with this increased willingness to scrutinize the substance of agency action came an expansion of the courts' view of the range of interests and constituencies entitled to participate in the administrative process and complain of agency malfeasance. While traditionally the courts had accorded due process protections only to regulated entities whose liberty or property interests were invaded by agency action, in the 1960s, the courts began to accord due process rights to regulatory beneficiaries as well.[191] Under this new regime, welfare recipients, public housing tenants, and government employees could all demand procedural protections before government benefits were terminated. Additionally, the courts enlarged the class of people entitled to seek judicial review of agency action by liberalizing the standing doctrine to accommodate more readily the claims of regulatory beneficiaries.[192] A parallel loosening of the requirements for intervention expanded the class of people entitled to participate in agency proceedings.[193]

These primarily procedural reforms are no doubt helpful, but they have been less than fully effective. The "hard look" doctrine, for example, has been significantly curtailed by other countervailing developments, like *Chevron* deference[194] and *Heckler v. Chaney*'s[195] wholesale removal of a broad

188. *See* Stewart, *supra* note 147, at 1716; *see also* Abbott Labs. v. Gardner, 387 U.S. 136, 140–41 (1967).

189. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983); Ethyl Corp. v. EPA, 541 F.2d 1, 21 (D.C. Cir. 1976) (en banc) (Leventhal, J. concurring); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

190. *See* Sunstein, *Interest Groups*, *supra* note 152, at 63.

191. Stewart, *supra* note 146, at 1717–22.

192. *Id.* at 1743–47; Sunstein, *What's Standing After* Lujan?, *supra* note 183, at 183–93. On the subsequent constriction of the standing doctrine in the 1990s, see *infra* note 197.

193. Stewart, *supra* note 146, at 1750–51.

194. *See* Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (stating that where a statute is ambiguous, the court must defer to the agency's reasonable interpretation).

195. 470 U.S. 821 (1985).

range of "discretionary" agency decisions from judicial review.[196] The Supreme Court's significant constriction of the standing doctrine in the 1990s also dampened the effectiveness of reforms aimed at increasing the influence of diffuse public interests on agency decision making.[197] Some have responded to these developments by calling for further strengthening of these procedural mechanisms.[198] But it is a mistake to view procedure in isolation from the substantive standards that underlie it. Procedural reform will be ineffective if, for example, the underlying substantive standard operates to exacerbate the same power imbalances that the procedural mechanism seeks to correct.[199] Thus, procedural reforms alone will never be up to the task of compensating for the enormous disparity in power and resources that characterizes environmental disputes. They need to be complemented by substantive standards that tend to correct for rather than exacerbate the distorting effects of power imbalance on agency decision making. As the next Section explains, cost-benefit analysis is *not* a substantive standard that fits this bill.

IV. CBA IGNORES AND EXACERBATES THE PROBLEM OF POWER IMBALANCE

Some proponents of CBA actually argue that CBA helps to *counteract* the defects in the political process brought about by the relatively diffuse nature of environmental interests because it actively takes those interests into account, regardless of their ability to mobilize politically.[200] But this argument proceeds from an idealized view of CBA that fails to acknowledge the problems of wealth effects, indeterminacy, pro-cost bias, and its mistaken assumption that preferences are exogenous. As demonstrated below, these

196. *Id.* at 831–33.

197. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 894 (1990). While the dampening effect of these narrow interpretations of the standing doctrine was certainly ameliorated somewhat by the broader view taken by the Supreme Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 181–85 (2000), standing remains a significant barrier to citizen enforcement of environmental laws.

198. Cass Sunstein has urged the courts to continue to expand the scope of judicial review of agency action by treating regulatory beneficiaries the same as regulatory targets, by relaxing the doctrines of standing, reviewability, and scope of review, and by reviewing agency inaction to the same extent as agency action. *See* Sunstein, *Interest Groups*, *supra* note 152, at 74–75.

199. *See supra* note 162 and accompanying text and *infra* notes 200–31 and accompanying text.

200. BOARDMAN ET AL., *supra* note 19, at 46 ("CBA takes account of the individually small, but in aggregate large, costs borne by consumers because of government price-support programs that raise prices to the benefit of a small number of well-organized agricultural producers."); ROSE-ACKERMAN, *supra* note 36, at 36–37 (arguing for a judicial presumption in favor of agency use of CBA on the grounds that such a presumption will provide a needed thumb on the scale in favor of diffuse, broad-based interests that face collective action barriers to political organization); *see also* Hsu, *supra* note 159, at 356 ("Taking efficiency into account would tend to highlight policies that have gains (economic or environmental) that inure to a large number of people . . . .").

problems cause CBA to actually exacerbate, rather than counteract, the political distortions caused by power imbalance.

A. WEALTH EFFECTS

CBA, like welfare economics in general, self-consciously declines to address inequities in the distribution of wealth.[201] Moreover, because of the well-known problem of wealth effects, there is little question that where a regulation tends to benefit the rich and impose costs on the poor, CBA will exacerbate existing disparities of wealth (and therefore power).[202] Because it uses dollars as the common metric and because a dollar is worth more to a poor person than to a rich person, CBA gives disproportionate weight to the preferences of the rich in comparison to those of the poor. Thus, CBA might well find the imposition of regulatory controls on a polluting facility in a poor neighborhood "inefficient" if it would decrease the company's profits by more than the dollar amount that members of the surrounding community would be willing (or able) to pay to avoid the adverse health effects of the pollution.[203] While the most thoughtful proponents of CBA acknowledge this problem in theory, they insist that in practice rich and poor will usually be represented on both sides of the cost-benefit ledger such that wealth effects will tend to "wash out."[204] But this response is too facile. Countless studies have found a correlation between low-income communities and the siting of polluting facilities.[205] Moreover, even more broadly distributed environmental harms are likely to have a disproportionate impact on the poor to the extent that those who are most vulnerable to the adverse effects of environmental degradation (and thus stand to benefit the most from environmental protection) are often those with less wealth: the aged, the sick, the disabled, and children.[206] Accordingly, CBA exacerbates the problem of power imbalance because its results are systematically skewed in favor of the rich and against the poor.

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201. *See supra* notes 23–26 and accompanying text.

202. *See supra* notes 78–79 and accompanying text.

203. *See* MCGARITY ET AL., *supra* note 56, at 152–56.

204. *See* Adler & Posner, *supra* note 18, at 175. In those instances in which the benefits of a regulation fall disproportionately on the rich and the costs disproportionately on the poor, Adler and Posner and Sunstein agree that wealth effects constitute a valid reason to set aside the results of the CBA, but they insist that such instances are rare. SUNSTEIN, COST-BENEFIT STATE, *supra* note 44, at 22; Adler & Posner, *supra* note 18, at 40.

205. *See* Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1392–97 (1994) (collecting studies); Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, *in* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 15, 15–39 (Robert D. Bullard ed., 1993).

206. *See* Henry M. Peskin, *Environmental Policy and the Distribution of Benefits and Costs*, *in* CURRENT ISSUES IN U.S. ENVIRONMENTAL POLICY 144, 162–63 (Paul R. Portney ed., 1978) (concluding that "those who gain [from the Clean Air Act] are more likely to be non-white, low income, inner-city residents").

B. INDETERMINACY, FALSE OBJECTIVITY, AND MANIPULABILITY

Recall from Part II.C that CBA's critics have identified a host of measurement problems that render the enterprise hopelessly indeterminate. These include theoretical difficulties, like wealth effects, the offer/asking problem, and the problem of discount rates, as well as purely practical problems, like scientific uncertainty and lack of data.[207] Because it is indeterminate, CBA exacerbates the problem of power imbalance. First, it hides the fact of its indeterminacy behind a false veil of seemingly accurate, scientific and objective numbers, thus masking the value judgments that must inevitably go into choosing such numbers. Second, because it is indeterminate, CBA is also endlessly manipulable by those with the power and wealth to hire experts versed in the art of CBA .

By "indeterminate," I do not simply mean that a CBA fails to pinpoint costs or benefits with a single number. Certainly, some level of uncertainty or margin of error in the analysis is to be expected and does not render the entire enterprise useless. Nor do I refer to a situation in which costs are determined to be roughly equal to benefits so that the analysis yields no clear answer as to whether or not to proceed with the proposed regulation.[208] Even without delivering a clear answer, such an analysis would arguably provide meaningful information that could usefully inform and illuminate the decision making process. Rather, I use the term "indeterminate" to refer specifically to the situation in which the ambiguities and uncertainties in measurement are of such a magnitude that it is impossible to calculate the costs and/or benefits of a proposed regulation with sufficient specificity to allow any meaningful comparison. Thus, a CBA that estimates costs around $19 million and benefits between $18 million and $20 million might yield a "close call," but would not be "indeterminate" in this sense. On the other hand, a CBA for which reasonable people might peg the costs anywhere between $50 million and $100 million and the benefits anywhere between $10 million and $10 billion would be "indeterminate."

And indeed, the various problems catalogued in Part II can quickly lead to this kind of indeterminacy. The problem of discount rates alone, for example, produces enormous ranges of uncertainty. The judgment as to whether or not to apply a seven-percent discount rate over a thirty-year latency period to the value of a human life, for example, means the

207. *See supra* notes 69–94 and accompanying text.

208. Actually, an economist would in theoretical terms identify as optimal a regulation that sets a pollution limit at the point at which the *marginal* costs of pollution control are equal to its *marginal* benefits. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2–8 (1960). At that optimal point, the total benefits of pollution control are likely to be far larger than the total costs. In practice, however, CBA usually compares total costs to total benefits and requires simply that the total benefits outweigh the total costs. *See, e.g.*, Exec. Order No. 12,291, 3 C.F.R. § 128 (1982), *reprinted in* 5 U.S.C. § 601 (Supp. V 1981) (Reagan's executive order).

difference between valuing life at $6.1 million or just $1.1 million.[209] This level of gross indeterminacy was vividly illustrated in a recent article in which Cass Sunstein conducted his own analysis of EPA's CBA on its proposed standard for arsenic in drinking water. Although his purpose was to use the analysis to illustrate the value and usefulness of CBA, he came to the inescapable conclusion that EPA's CBA was indeterminate—and wildly so. According to Sunstein, by making reasonable assumptions at various steps of the analysis, one might peg the benefits of EPA's arsenic rule as low as $13 million or as high as $3.4 billion.[210] In light of the fact that the costs of the rule were estimated at $210 million, this CBA was so indeterminate as to preclude any meaningful comparison of costs and benefits. As Sunstein acknowledged, this was an example of a situation in which CBA simply "cannot resolve the ultimate judgment."[211]

Admittedly, indeterminacy itself may not be a fatal indictment. One is hard-pressed to find a decision making standard anywhere in law that cannot be accused of some degree of indeterminacy.[212] In the case of CBA, however, the indeterminacy is particularly extreme. Even a legal standard based just on health or biological effects has some indeterminacy inherent in it.[213] But CBA exacerbates that indeterminacy by orders of magnitude, by requiring monetization and thereby adding another whole layer of uncertainty and contestability to the analysis.[214]

The indeterminacy of CBA is also particularly troubling because it comes packaged in a veneer of seemingly hard data. Thus, one of the most troubling aspect of CBA lies in its false promise of determinacy—its pretense of objectivity and scientific accuracy. When a number gets attached to

209. SUNSTEIN, RISK & REASON, *supra* note 1, at 167; JASON K. BURNETT & ROBERT W. HAHN, AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, REGULATORY ANALYSIS 01-02, EPA'S ARSENIC RULE: THE BENEFITS OF THE STANDARD DO NOT JUSTIFY THE COSTS 6 (Jan. 2001), http://www.aei.brook.edu/admin/authorpdfs/page.php?id=122 (on file with the Iowa Law Review).

210. SUNSTEIN, RISK & REASON, *supra* note 1, at 175, 177.

211. *Id.* at 178. Daniel Farber reached a similar conclusion from a "back of the envelope" calculation of the costs and benefits associated with the controversy surrounding the Reserve Mining Company's discharge of mining tailings into Lake Superior in the 1970s. Farber concluded that a CBA on this issue could probably come out either way depending on the "discretionary policy decisions made in implementing the analysis." FARBER, *supra* note 97, at 89–90.

212. Ironically, rights themselves, which I turn to for guidance, have been accused of indeterminacy. *See generally* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

213. My discussion of the ESA in Part VIII reveals that even the absolute, biologically based standards of the ESA are not entirely determinate, and thus provide a substantial zone of discretion to agency decision makers. The scope of this discretion is not entirely unbounded, however. Unlike CBA, the ESA's biologically based standards place meaningful outer limits on agency discretion and thus have the capacity to counteract the inevitable pull of political power. *See infra* notes 383–463 and accompanying text.

214. *See supra* notes 61–68, 73–94 and accompanying text.

something that is actually based on a host of controversial assumptions and approximations,[215] value judgments become hidden behind a false veneer of scientific objectivity.[216] In CBA, instead of being made in an open democratic process accessible to individual citizens, these value judgments are made behind the scenes by an elite corps of experts.[217] This, then, is one way in which CBA exacerbates the problem of power imbalance. By couching the debate in a specialized technocratic discourse that requires a degree in economics to decipher and hiding policy judgments behind a false veil of scientific accuracy, CBA reduces the transparency of government decision making and excludes ordinary citizens from the debate.[218]

More importantly, however, the indeterminacy of CBA further exacerbates the extent to which power imbalance distorts agency decision making by rendering cost-benefit analysis endlessly manipulable and contestable. That is to say, for any claim as to the proper valuation of the costs and benefits of a particular project, another economist can make a credible argument to support the opposite result.[219] Indeed, Sunstein candidly acknowledges this point in his discussion of the arsenic CBA:

215. Even John Graham, a staunch advocate of CBA, has recognized the extent to which any attempt to quantify risks must be based on a set of discretionary assumptions and policy judgments. *See* JOHN D. GRAHAM ET AL., IN SEARCH OF SAFETY: CHEMICALS AND CANCER RISK 189 (1988) ("[The] frontiers of science are often ambiguous, and disagreements are not readily resolved by objective or even consensual means. Instead, intuition, craftsmanship, and judgment are critical.").

216. *See* Heinzerling, *supra* note 69, at 2064–65 (discussing "the power of numbers" and the fact that quantification of costs and benefits obscures underlying value choices, producing a "more dishonest debate about regulation"); Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1348–49, 1404–06 (2003) (observing the increasingly prevalent phenomenon of "regulatory score cards," which "reduce . . . hundreds of pages [in a CBA] to a few summary statistics," ignoring qualitative descriptions and qualifiers).

217. This is an example of a larger problem that Jürgen Habermas has identified as the "scientization of politics." Use of scientific, technocratic discourse in the development of government policy excludes the public from debate, excludes moral considerations, and limits the process of democratic decision making to a corps of elites. *See* JÜRGEN HABERMAS, TOWARD A RATIONAL SOCIETY: STUDENT PROTEST, SCIENCE, AND POLITICS 68 (Jeremy J. Shapiro trans., Beacon Press 1970) (1968).

218. *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1579–80 (2002) (noting that unquantifiable benefits are often given lip service in CBA but are ultimately ignored, and citing EPA's arsenic CBA as an example where "[s]ubsequent public discussion [of the CBA] inevitably referred only to the EPA's numerical analysis and forgot about the cases of avoided illness that could not be quantified"); FARBER, *supra* note 97, at 122 (stating that CBA obscures value choices behind technical jargon inaccessible to ordinary citizens). Although some proponents of CBA have actually tried to argue that it increases the transparency of government decision making, see, e.g., SUNSTEIN, RISK & REASON, *supra* note 1, 107–08; Adler & Posner, *supra* note 18, at 175; Kaplow & Shavell, *supra* note 23, at 1320, their arguments are ultimately unconvincing. *See* Sinden, *supra* note 53, at 218–20.

219. *See* Driesen, *supra* note 42, at 83 ("CBA . . . offers a wealth of opportunities for regulated industry to manipulate and debate benefits estimates."); Robert H. Frank, *Why is Cost Benefit Analysis so Controversial?*, 29 J. LEGAL STUD. 913, 929–30 (2000) (acknowledging that CBA

> We are now in a position to see the multiple possible challenges to any agency decision that involves cost-benefit balancing . . . . [W]e can see how creative citizens and lawyers, representing water systems or environmentalists, might be able to mount reasonable challenges to EPA's decisions, regardless (almost) of the content of those decisions.[220]

He even provides a kind of how-to manual for lawyers wishing to challenge CBAs.[221]

Thus, because it is indeterminate and manipulable, CBA does not provide a legal standard for decision at all, but rather punts the decision to the political process where raw power and wealth dominate.[222] Furthermore, by couching the issues in the technical and inaccessible language of welfare economics, CBA makes a degree in economics a prerequisite to meaningful participation in the debate. In this way, it sets the stage for a contest over which side can hire the best-credentialed experts and lawyers, rather than which side has the better argument.

C. INEVITABLE PRO-COST BIASES

Another way in which CBA exacerbates the problem of power imbalance stems from the fact that efforts at quantification are inevitably

may be susceptible to manipulation for people's self-serving ends); Johnston, *supra* note 39, at 1401 ("Under a cost-benefit statute . . . regulatory targets . . . can cause virtually interminable regulatory delay merely by contesting the agency's own cost-benefit calculation."). Indeed, the indeterminacy and manipulability of CBA has long been recognized. *See* Stewart, *supra* note 146, at 1703 ("Because applied economics is an art that requires discretionary judgments . . . no single policy solution will generally be indicated to be clearly correct. More frequently, there will be respectable economic arguments for a number of quite different alternatives.").

220. SUNSTEIN, RISK & REASON, *supra* note 1, at 179.

221. *Id.* at 179–81.

222. *See* SAGOFF, *supra* note 61, at 39 ("When cost-benefit analysis attempts to do the work of ethical and political judgment, it loses whatever objectivity it might have had and becomes a tool for partisan politics."); Driesen, *supra* note 42, at 84 ("CBA reduces the influence of advocates of the public interest in environmental protection, but enhances the influence of regulated companies."); Thompson, *supra* note 9, at 1164 (noting that property owners would have an incentive to "pervert cost-benefit analysis" under the ESA to their "private benefit").

Oliver Houck has made a parallel argument with respect to standard setting for biodiversity and ecosystem preservation. He argues that standards based on vague and contestable notions of "ecosystem management" are doomed to relegate decision making to the political realm, while standards, like those in the ESA, based on the needs of specific species provide a "bottom line" and "law to apply," and thus are ultimately more effective at protecting ecosystems as a whole. Houck, *supra* note 137, at 882–83, 959–60.

Jason Johnston's game-theoretic analysis of agency and firm behavior under statutes that require CBA (as compared with absolute statutes) reaches similar conclusions. He concludes that "contrary to the intuition of many commentators, explicit statutory cost-benefit requirements may enhance rather than reduce the incentive to politicize regulatory costs." *See* Johnston, *supra* note 39, at 1354. In particular, his model predicts that firms will spend more on lobbying under a CBA statute than under an absolute statute. *Id.* at 1374.

systematically skewed in favor of the costs and against the benefits of environmental protection. First, because the benefits of regulation are generally harder to quantify than the costs, the benefits tend to be undercounted.[223] Indeed, a recent study of fifty-five CBAs of federal regulations found that while all CBAs monetized at least some costs, half failed to monetize any benefits.[224] In a particularly stark example, the U.S. Fish & Wildlife Service recently removed all discussion of benefits from the public version of a CBA evaluating the impacts of designating 18,000 miles of streams as critical habitat for a threatened fish species. The portion of the analysis that estimated the costs at $230 million to $300 million was released to the public and widely reported in the media. But the agency omitted from the published version an additional fifty-five pages prepared by a consultant that detailed benefits of $215 million, claiming that these findings were unreliable.[225]

Second, because estimates of the costs of regulations are often provided by the industry facing regulation, they are often artificially, self-servingly high.[226] Moreover, because CBA typically demands a showing that benefits exceed costs before regulation can go forward, it effectively puts the burden of the considerable scientific uncertainty frequently associated with estimating regulatory benefits on those seeking to promote regulation.[227]

D. PREFERENCES SHAPED BY POWER

Finally, CBA's mistaken assumption that preferences are exogenous further slants CBA in favor of the powerful and against the powerless. As

223. *See* Ackerman & Heinzerling, *supra* note 218, at 1579; *see also* Frank, *supra* note 219, at 928 (calling this effect "status quo bias"); *cf.* Catherine A. O'Neill, *Restoration Affecting Native Resources: The Place of Native Ecological Science*, 42 ARIZ. L. REV. 343, 362–64 (2000) (stating that CBA tends to undercount Native Americans' knowledge and cultural valuation of natural resources).

224. *See* ROBERT W. HAHN & PATRICK DUDLEY, HOW WELL DOES THE GOVERNMENT DO COST-BENEFIT ANALYSIS? 10 (AEI-Brookings Joint Ctr. for Regulatory Studies, Working Paper 04-01, Jan. 2004), http://www.aei.brookings.org/admin/authorpdfs/page.php?id=317 (on file with the Iowa Law Review).

225. Blaine Harden, *Trout-Protection Data Questioned: Costs but No Benefits Published*, WASH. POST, Apr. 17, 2004, at A3.

226. *See* SUNSTEIN, RISK & REASON, *supra* note 1, at 130, 253; Ackerman & Heinzerling, *supra* note 218, at 1580; Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243, 1285 (1987); *see also* MCGARITY, *supra* note 70, at 137 ("[A] retrospective look at the costs of complying with OSHA's vinyl chloride standard found the actual costs were only about 7 percent of predicted costs.").

227. *See* Exec. Order No. 12,291, 3 C.F.R. § 128 (1982), *reprinted in* 5 U.S.C. § 601 (Supp. V 1981) ("Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."); *see also* DAVID M. DRIESEN, IS COST-BENEFIT ANALYSIS NEUTRAL? 57 (Feb. 2, 2005), http://ssrn.com/abstract=663602 (on file with the Iowa Law Review) (stating that, because CBA requires simply that benefits exceed costs, it acts as a "one-way ratchet," rejecting regulation as too stringent, but never rejecting regulation as too lenient).

many CBA critics have pointed out, preferences—the foundation on which CBA is built—are not exogenous.[228] Rather, they are determined by a whole host of social factors, which CBA—if used as a method for government decision making—may in turn influence. These include the distribution of wealth, existing legal rules, consumption patterns, social pressures, and so on. Many critics have pointed out that this endogeny of preferences renders CBA hopelessly circular and indeterminate. But if we consider the problem of preference formation in the context of the corporate/citizen power imbalance that is endemic to environmental issues, it becomes apparent that the problem is far more insidious. If power structures themselves actually shape preferences, as I suggest in Part III.B,[229] then we can expect a CBA based on such preferences to be not just indeterminate, but consistently skewed in favor of corporate interests and against environmental protection.

Thus, CBA not only ignores the problem of power imbalance, it exacerbates it. Because it is endlessly manipulable, it does not provide a standard for decision but rather abandons decision making to the untempered political process. It renders government decision making opaque by couching it in the inaccessible jargon of welfare economics. Moreover, the difficulties inherent in quantifying benefits systematically bias CBA in favor of the costs and against the benefits of environmental protection, and wealth effects bias CBA in favor of the rich. Finally, CBA privileges individual preferences that are themselves a product of corporate power. Perhaps it is no surprise, then, that some of the strongest advocates of CBA have been "corporations, trade associations, and associated think tanks."[230]

This failing of CBA reveals the need for a decision making standard that accounts for and counteracts the power disparities that prevent the political process from adequately addressing environmental degradation. I suggest we look for guidance in other areas of law concerned with combating disparities of power. Accordingly, the next Part looks at theories of constitutional rights.

228. *See supra* notes 80–84 and accompanying text.

229. *See supra* notes 158–59 and accompanying text.

230. *See* McGarity, *A Cost-Benefit State*, *supra* note 60, at 34; Pildes & Sunstein, *supra* note 51, at 45 (noting that CBA has at times been used as a "political tool for pursuit of an antiregulatory agenda"); *see also* Driesen, *supra* note 227, at 1 (regulated industry generally supports CBA). Because CBA systematically skews results in favor of monied corporate interests, *see supra* notes 223–27, it is not a suitable answer to the inaccuracies and uncertainties of CBA to assume that they will "wash out." Adler & Posner, *supra* note 18, at 175.

V. ANALOGY TO RIGHTS: CORRECTING FOR POWER IMBALANCE

Perhaps the area of our law most fundamentally concerned with power imbalance is the jurisprudence of constitutional rights.[231] The framers aimed the original Bill of Rights at what was then viewed as the most dangerous disparity of power threatening the new republic—the power imbalance between government and the individual.[232] And the Civil War amendments

231. Some in the Critical Legal Studies Movement, of course, disputed this vision of rights, arguing instead that rights actually legitimate existing power structures. *See, e.g.*, Allan C. Hutchinson & Patrick J. Monohan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477, 1482 (1984); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 39 (1986). In Unger's utopian vision of "the empowered democracy," however, rights would ultimately resist and counteract social hierarchy. *Id.* The CLS critique of rights was, of course, itself subject to vigorous critiques. *See generally* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

232. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 770 (2d ed. 1988) (describing rights protected by the Bill of Rights as "aim[ing] . . . to *exclude* governmental power from certain specific substantive spheres"); *see also* Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."); Stanley v. Illinois, 405 U.S. 645, 656 (1972) (stating that the Bill of Rights was "designed to protect the fragile values of a vulnerable citizenry" from overbearing government officials). Indeed, counteracting the imbalance of power between the individual and the state has long been viewed as perhaps the central function of rights. *See* Kenneth Minogue, *The History of the Idea of Human Rights*, *in* HUMAN RIGHTS READER 3, 3 (Walter Laqueur & Barry Rubin eds., 1979). Minogue explains:

> [F]rom early modern times the idea began to develop that, in addition to eyes and ears and all the other normal equipment, human beings also possess invisible things called "rights" that morally protect them from the aggression of their fellow men, and especially from the power of the governments under which they live.

Id. In crafting the Constitution, the framers sought first and foremost to design a structure for our government that would avoid the concentration of power and tyranny. The tripartite system of government and the doctrine of separation of powers were designed primarily with that end in mind. But it is to some extent misleading to talk of individual rights against government power as having been established in the original Constitution and Bill of Rights. Our modern concept of judicially enforced individual rights did not really begin to emerge until several decades after the passage of the Civil War Amendments. *See* TRIBE, *supra* note 232, at 4–6; David Kairys, *Freedom of Speech*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 190, 191 (David Kairys ed., 3d ed. 1998) ("[N]o right to free speech as we know it existed, either in law or practice, until a basic transformation of the law governing speech during the period from about 1919 to 1940."). And, the original Bill of Rights, of course, was limited to protecting individuals against abuses of federal, not state, power. TRIBE, *supra*, at 3–4.

Arguably in the present day, the primary locus of power has begun to shift from the government to the corporation. *See* BRULLE, *supra* note 134, at 53. Many multi-national corporations now have annual sales larger than the gross domestic products of most countries, and play an increasingly large role in shaping government policy. *See* CHARLES DERBER, CORPORATION NATION 3 (1998) ("General Motors has annual sales larger than Israel's [GDP]; Exxon's annual sales [are] larger than Poland's GDP, [and 161] countries have smaller annual revenues than Wal-Mart."). Though this is very different from the world the framers of the Constitution faced at the end of the eighteenth century, there is some evidence that

were passed in order to address what is perhaps the paradigmatic example of power imbalance between private groups in our society—the institution of slavery. Since then, the Fourteenth Amendment's Equal Protection Clause has been interpreted to address the subordination of other disempowered groups as well. Thus, a look at constitutional rights and how they operate to counteract power disparity may well be instructive in thinking about how to craft statutory standards for agency decision making that account for and combat the power imbalance that inevitably infects environmental law.

A. SPECIFIC CONSTITUTIONAL RIGHTS

The values and concerns that underlie and justify constitutional rights are, of course, varied and complex, and I will not attempt to fully describe the extensive literature on the subject here. For the present purposes, it suffices to observe that two dominant strands of thought consistently emerge in efforts to identify those concerns and values.

The first strand, which I will refer to as the "individual autonomy strand," "reasons out" from a philosophical conception of the person.[233] This strand views the integrity, dignity and autonomy of the individual as fundamental and as requiring the delineation of a sphere of immunity around each person within which outside forces (including the state and/or the interests of the majority) cannot intrude. While this strand takes the individual as its starting point, the problem of power imbalance looms large in the background. It is, after all, the existence of some more powerful entity (usually the state or the majority), that renders the individual vulnerable and in need of the protection that rights provide against inevitable abuses of power.[234]

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unrestrained corporate power was viewed by some as a significant threat to individual liberty even at the time of the American Revolution. *See* THOM HARTMANN, UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS 45–63 (2002) (explaining the Boston Tea Party as a rebellion against the power of the East India Company); *see also* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 19 (1993) [hereinafter SUNSTEIN, THE PARTIAL CONSTITUTION] (noting that the framers of the Constitution sought to limit the power of self-interested private groups).

233. Richard H. Pildes, *Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 729 (1998). Pildes argues that instead of reasoning out from a conception of personhood, we should "reason in" from an experience of actual government practices and from the risk that government will abuse power. Indeed, he argues that the framers actually took the latter approach. *Id.* at 730.

234. *See* T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 535 (1978). Scanlon explains that:

> To claim that something is a right, then, is to claim that some limit or requirement on policy decisions is *necessary* if unacceptable results are to be avoided, and that this particular limit or requirement is a *feasible* one, that is, that its acceptance provides adequate protection against such results and does so at tolerable cost to other interests . . . . What rights there are in a given social setting at a given time depends on which judgments of necessity and feasibility are true at that place and

The second strand, which I will call the "process strand," is centrally concerned with the effects of power imbalance on government decision making. This strand views rights as protecting the integrity and evenhandedness of government decision making from the distorting effects of power—the power of government vis-à-vis the individual or the power of one private individual or group over another.[235] Thus, while both strands are ultimately grounded in concerns about power imbalance, the second strand is most instructive here due to the ready analogy to the problem of the distorting effect of the corporate/citizen power imbalance on agency decision making in environmental law.

Both strands emerge clearly from the vast literature on the First Amendment, for example. Thus, one prominent view follows the individual autonomy strand, seeing freedom of expression as primarily aimed at protecting values of individual autonomy, self-realization and self-fulfillment.[236] Another robust line of First Amendment theory, however, follows the process strand, viewing freedom of expression as essential to the proper functioning of democratic government.[237] This includes the idea that

> time. This will depend on the nature of the main threats to the interests in question, on the presence or absence of factors tending to promote unequal distribution of the means to their satisfaction, and particularly on the characteristics of the agents (private individuals or governments) who make the relevant policy decisions: what power do they have, and how are they likely to use this power in the absence of constraints?

Id. at 535–36. The Framers also viewed property rights as a mechanism for protecting individuals against abuses of government power. *See* SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 232, at 23.

235. *See* Pildes, *supra* note 233, at 730.

236. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis and Holmes, J.J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness . . . ."); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 47–72 (1982) (discussing arguments for free speech that are grounded in notions of individual self-realization, the "good life," and individual autonomy); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990–1009 (1978) (grounding the First Amendment in self-expression and self-fulfillment); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215–22 (1972) (arguing for a theory of freedom of expression from individual autonomy).

237. *See* Alexander Meiklejohn, *Free Speech and Its Relation to Self Government*, *reprinted in* POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 3, 3–89 (1960) [hereinafter Meiklejohn, *Self-government*]; SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 232, at 232–56 (stating that free speech is grounded in promotion of deliberative democracy). This includes the idea—closely linked to the notion of the "marketplace of ideas"—that free speech ensures that the "the people" have the information they need to engage in the deliberative process necessary to self-government. *See* Meiklejohn, *supra,* at 19–20. The two strands are clearly linked in the context of the First Amendment. Thus, the freedom of self-government that the First Amendment protects via the second strand, requires for its protection "'the dignity of the individual.' Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a

by allowing criticism of government officials, the First Amendment provides an essential check on the abuse of government power.[238] In this view, the free speech, free assembly and free press clauses ensure that the power of the state is not implemented to suppress information and ideas critical of government. These rights thereby counteract the power imbalance between the government and the citizenry that might otherwise skew the democratic decision making process.[239]

The power imbalance between the individual and the state is perhaps nowhere more vividly and palpably on display than in a criminal proceeding, where "the awesome power" and "virtually limitless resources" of the state are pitted against the individual criminal defendant.[240] Thus, four of the ten amendments of the Bill of Rights address the rights of the criminally accused.[241] Both strands of rights jurisprudence can probably be identified in each of these rights, though one or the other may be more prominent in each right. The Fourth and Eighth Amendments, for example, aim primarily

ballot is assumed to express." Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 [hereinafter Meiklejohn, *Absolute*].

238. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) ("The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people."); Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring); Palko v. Connecticut, 302 U.S. 319, 326–27 (1937); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 521; ELY, *supra* note 179, at 93–94, 105 (stating that the First Amendment is centrally intended to "make our governmental processes work, to ensure open and informed discussion of political issues, and to check our government when it gets out of bounds"); Meiklejohn, *supra* note 237, at 20.

239. This is, of course, an idealized vision of the First Amendment. Its actual implementation may well fall far short of these ideals. *See* Kairys, *supra* note 232, at 212 (arguing that the Supreme Court's interpretation of free speech principles in recent decades has strayed far from the liberal paradigm that prevailed in the early twentieth century and 1960s and 1970s, and now serves "to validate and legitimize existing social and power relations and to mask the lack of real participation and democracy").

240. Wardius v. Oregon, 412 U.S. 470, 480 (1972) (Douglas, J., concurring); *see also* Susan Bandes, *"We the People" and Our Enduring Values*, 96 MICH. L. REV. 1376, 1389, 1391 (1998) (arguing that the criminal procedure amendments "serve to address the inequality of power between the government and the individual and the need to curtail abuse of that power"); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U. L.Q. 279, 280 (arguing that the constitutional criminal procedural "safeguards are checks upon government—to guarantee that government shall remain the servant and not the master of us all"); Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right of an Accused,"* 30 U. CHI. L. REV. 1, 7 (1962) ("It is helpful to view criminal procedural due process as containing two great values or objectives: 'the attainment of justice and the containment of power.'" (quoting BARTH, THE PRICE OF LIBERTY 26 (1961))).

241. This reflects the framers' particular concern with abuse of government power in the context of criminal prosecutions. *See* THE FEDERALIST NO. 83, at 407 (Alexander Hamilton) (Terence Ball ed., 2003) ("Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings.").

at protecting the dignity, integrity and autonomy of the individual against the power of the state and are thus largely grounded in the first strand.[242] Many of the other criminal procedure rights, however, serve in particular to counteract distortions in the decision making process of the criminal trial that are caused by the vast disparity in power and resources between the individual and the state.[243] Thus, the right against self-incrimination, [244] the right to counsel,[245] the right to trial by jury,[246] and the double jeopardy guarantee,[247] to name a few, are all justified in these terms.[248] The

242. The Fourth Amendment also contains elements of the second strand—concern about the abuse of government power in decision making. Thus, the requirement of a warrant from a neutral magistrate serves to constrain the discretionary decision making power of public officials in part to avoid "indefensible inequities in treatment." *See* ELY, *supra* note 179, at 97. Ely also views the Eighth Amendment as concerned with avoiding discriminatory treatment in the infliction of punishment. *Id.*

243. *Wardius*, 412 U.S. at 480 (Douglas, J., concurring). Douglas wrote:

> The Bill of Rights does not envision an adversary proceeding between two equal parties . . . . But, the Constitution recognized the awesome power of indictment and the virtually limitless resources of government investigators. Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution. It is not for the Court to change that balance.

Id. See generally Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193 (1998) (arguing that modern criminal procedure rights are animated by concerns about totalitarianism parallel to the framers' concerns about tyranny underlying the original Bill of Rights).

244. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (noting that the right against self incrimination is aimed at ensuring "the proper scope of governmental power over the citizen . . . . and maintaining a 'fair state-individual balance'" (quoting 8 WIGMORE, EVIDENCE 317 (McNaughten rev., 1961))); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (stating that the privilege against self-incrimination is based in part on "our sense of fair play which dictates 'a fair state-individual balance . . . by requiring the government in its contest with the individual to shoulder the entire load'" (quoting 8 WIGMORE, *supra*, at 317)).

245. United States v. Gouveia, 467 U.S. 180, 189 (1984) (stating that the right to counsel is based on a recognition of an imbalance of power between the government and the accused).

246. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) (arguing that the framers believed it was the role of the jury "to protect individuals from government overreaching").

247. Green v. United States, 355 U.S. 184, 187–88 (1957). The Court ruled:

> The underlying idea [behind the double jeopardy clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id.; *see also* Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 895–97, 940–42, 944 & n.276 (1998).

248. William C. Waller, *The Beginning of the End of Preemptory Challenges*, 16 HARV. J.L. & PUB. POL'Y 287, 292 (1993). Waller states:

requirement that a prosecutor must prove a defendant's guilt "beyond a reasonable doubt"[249] and the prosecution's obligation to turn over evidence favorable to the accused[250] have been derived from the Due Process Clause of the Fourteenth Amendment, and are similarly justified in terms of the need to level the uneven playing field between the individual and the state.[251]

The equal protection guarantee traces its roots to the post-Civil War dismantling of slavery—perhaps the most extreme example of private power imbalance our society has ever known. Despite these origins, the courts have frequently interpreted the equal protection clause in a-contextual, a-historical terms, as forbidding any differentiation based on suspect classes like race—an approach that tends to de-emphasize its roots in concerns about existing power relations among groups in society.[252] But a competing view grounds the equal protection guarantee squarely in the problem of power imbalance. The "anti-subordination" model views the Equal Protection Clause as aimed at correcting the conditions that result from the historically subordinated status of certain groups in society, seeking to "eliminate the power disparities between[, for example,] men and women, and between whites and non-whites."[253] Under this model, differential

> The model envisioned by the Constitution is not a model of symmetry between two equal parties. Instead, constitutional safeguards exist to protect defendants against the imbalance of power created by the unlimited resources available to the state in its prosecution. The Fifth Amendment right to remain silent; the Sixth Amendment rights to an impartial jury and to confront adverse witnesses; the Fourteenth Amendment due process burden placed upon the State to prove its case beyond a reasonable doubt; and the due process right articulated in *Brady v. Maryland*, requiring the prosecution to disclose evidence favorable to the defense, are just a few examples of the Constitution's attempts to even the scales.

Id.

249. *In re* Winship, 397 U.S. 358, 364 (1970); *see* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 74 (1991) (tying the presumption of innocence to the power imbalance between state and defendant).

250. Brady v. Maryland, 373 U.S. 83, 87 (1963).

251. *See* Waller, *supra* note 248, at 292. The Fifth Amendment's Takings Clause can also be viewed as a corrective against power imbalance between the majority and the minority—"[a] protection of the few against the many, 'a limit on government's power to isolate particular individuals for sacrifice to the general good.'" ELY, *supra* note 179, at 97 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 463 (1978)).

252. TRIBE, *supra* note 232, §§ 16–21, at 1514, §§ 16–22, at 1521 (2d ed. 1988) (distinguishing the "anti-discrimination" principle, which focuses on acts of prejudice, from anti-subjugation, which focuses on legally reinforced systems that treat some people as second-class citizens).

253. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986); *see also* MARTHA MINNOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 112 (1990) ("[A]ttributions of difference should be sustained only if they do not express or confirm the distribution of power in ways that harm the less powerful and benefit the more powerful."); Kimberlé Williams Crenshaw, *Race, Reform and*

treatment per se is not necessarily invalid. But government action is "constitutionally acceptable only to the extent that it [does] not create, reinforce, or perpetuate" the subordinated status of such groups.[254] As Laurence Tribe has put it, "federal policies [in the Constitution] designed to realize the promise of equality under law are nothing less than government efforts to redress the imbalance of power between institutions that practice discrimination and individuals who suffer from it."[255]

This model of equal protection draws on both the individual autonomy and process strands of constitutional-rights jurisprudence. Thus, it aims to end the subordination of powerless groups, both in order to protect and foster the dignity, autonomy, and self-realization of members of those groups, and also in order to ensure that such subordination does not lead to distortions in legislative and administrative decision making.[256]

In sum, with regard to many of our most prominent constitutional rights, concerns about power imbalance and, in particular, "second strand" concerns about the distorting effects of power imbalance on government decision making are clearly evident. Indeed, as I demonstrate below, a number of general theories of rights echo this same theme.

B. GENERAL THEORIES OF RIGHTS

Several of the most prominent and influential general theories of rights put forward in the past few decades have cast constitutional rights as correctives for distortions in government decision making processes caused by power imbalance. These include the ideas of John Hart Ely, Ronald Dworkin, and the authors associated with the recent revival of civic republicanism.

i. John Hart Ely

John Hart Ely's "process view" of the Constitution is certainly the most prominent example. Ely views constitutional rights as devices for correcting

Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1336 (1988) (asserting that existing anti-discrimination law has allowed black material subordination to be perpetuated, and arguing for a "societal commitment to the eradication of the substantive conditions of Black subordination"); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 154–55 (1976) (arguing that the Equal Protection Clause should be interpreted to protect social groups that have suffered perpetual subordination and severely circumscribed political power rather than under an individual anti-discrimination model).

254. Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 960 (1994).

255. Tribe, *supra* note 23, at 604.

256. As discussed in more detail below, there is a reasonable argument that both rationality review and strict scrutiny under the Equal Protection Clause are aimed at ferreting out legislation that is the product of a political process distorted by power imbalance. *See infra* notes 299–303, 339–41 and accompanying text.

malfunctions of the representative political process.[257] He begins with the fundamental dilemma of judicial review: Given that the text of the Constitution itself provides insufficient guidance for its application to specific situations, where are unelected judges to look for principles of interpretation to "fill in the Constitution's open texture"[258] without violating the basic democratic tenet of majority rule? His answer is that all judicially enforceable constitutional rights serve not to measure democratically produced legislation according to any substantive values but rather to simply ensure that the process of representative democracy is functioning such that no group or individual has been denied the ability to participate in the political process.[259]

Thus, First Amendment freedoms are protected "because they are critical to the functioning of an open and effective democratic process."[260] The voting-rights cases seek to "unblock[] stoppages in the democratic process,"[261] recognizing that the legislature cannot be trusted to police such stoppages because "those in power have a vested interest in keeping things the way they are."[262] Article IV's Privileges and Immunities Clause and the Commerce Clause both seek to protect out-of-state residents who are unrepresented in state legislatures and are thus "a paradigmatically

257. ELY, *supra* note 179, at 87 (arguing for a "participation oriented, representation reinforcing approach to judicial review"); *see also id.* at 102–03 (asserting that rights serve to correct systematic malfunctions of the "political market").

258. *Id.* at 73; *see also id.* at 13.

259. *Id.* at 117, 120.

260. *Id.* at 105.

261. *Id.* at 117. Ely's concern with the proper functioning of the political process rests at bottom on a concern that power imbalance will distort government decision making. This comes through particularly clearly in his discussion of the voting-rights cases, where he suggests that the underlying principle of "at least rough equality in terms of one's influence on governmental choices" could conceivably be promoted by some allocation of voting power that attempted to compensate for existing inequalities in influence:

> Some groups have unusual access to, say, the state executive, or the city governments, or the media, and it is therefore not unreasonable—indeed it may ultimately serve the cause of real equality—to compensate for such comparative advantages by granting others advantages when it comes to the weighting of votes for, say, legislative officials. Urban working people, the idea might run in a given state, do not need the same clout in the legislature the farmers have, since they historically have had an effective pipeline to the governor.

Id. at 123–24. Ultimately Ely concludes that such a scheme, while perhaps theoretically defensible or even desirable, would be unadministrable in practical terms. Such a standard "would have involved the Court in difficult and unseemly inquiries into the power alignments prevalent in the various states whose plans came before it . . . 'in short, the details of the petty corruption and networks of personal influence that all too often constitute critical sources of power in municipal politics.'" *Id.* at 124 (quoting Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections between Law and Political Science*, 20 STAN. L. REV. 169, 247 (1968)).

262. ELY, *supra* note 179, at 120 ("We cannot trust the ins to decide who stays out . . . .").

powerless class politically."[263] And the Equal Protection Clause seeks to correct the distortions in democratic decision making that occur when prejudice operates to "bar[] [some minority group] from the pluralist's bazaar"[264]—the bargaining process by which minorities join forces with others in the political process to protect themselves from the tyranny of the majority.[265]

Ely cites footnote four of the Supreme Court's 1938 opinion in *United States v. Carolene Products* as a "foreshadow[ing]" of his analysis.[266] In the famous footnote, Justice Stone suggested two instances in which the Constitution might demand heightened judicial scrutiny of legislative enactments even if they do not on their face appear to fall within one of the specific prohibitions of the Constitution. First, "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation [might] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment."[267] Second, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[268] Ely reformulates the *Carolene Products* criteria, identifying two permissible functions for judicial review:[269] first, to clear the channels of political participation and representation from obstacles erected by those in power,[270] and, second, to correct for distortions in the political process caused by prejudice.[271]

Ely is cognizant that the *Carolene Products* focus on "discrete and insular minorities" is too restrictive—a point made convincingly and elegantly a few years later in an article by Bruce Ackerman.[272] Although understandable in light of the history and context of the time—when the plight of Blacks in U.S. society overshadowed other instances of oppression—the discrete-and-insular-minorities formulation, taken literally, leaves out many of the groups that are in fact most powerless in the political process. The poor, for

263. *Id.* at 83.

264. *Id.* at 152.

265. *Id.* at 135 (noting that this pluralist political theory "has come under powerful attack, as more stress has been placed on the undeniable concentrations of power, and inequalities among the various competing groups, in American politics").

266. *Id.* at 75.

267. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 & n.4 (1938).

268. *Id.* at 153 n.4.

269. ELY, *supra*, note 179, at 103 (identifying the two functions for judicial review).

270. *Id.* at 104–34; *see also id.* at 106 ("[T]he ins have a way of wanting to make sure the outs stay out.").

271. *Id.* at 135–79; *see also id.* at 164 (protecting those who have "operat[ed] at an unfair disadvantage in the political process").

272. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 740–41 (1985).

example, are diffuse rather than insular, and gays and lesbians—another historically powerless group—are often anonymous rather than discrete.[273] Consistent with this insight, Ely's focus on "prejudice" broadens somewhat the *Carolene Products* formulation that it is only "discrete and insular minorities" that require specific protection. As "a lens that distorts reality,"[274] prejudice will prevent other groups from joining forces with certain disadvantaged groups even where their interests coincide, and will thus shut the disadvantaged groups out of the pluralist bazaar that otherwise prevents more powerful groups from ignoring entirely the interests of the less powerful. Thus, Ely argues for heightened scrutiny of gender-based classifications despite the fact that women are neither discrete and insular, nor a minority.[275]

But arguably even Ely's formulation is too narrow. Ackerman argues that *Carolene Products* should be read even more broadly as standing for a general principle "that some groups suffer from systematic disadvantages in pursuing their interests in the pluralist bargaining process normally central to American politics."[276] In his view, by enforcing rights, the courts act as "perfecter[s] of pluralist democracy . . . correct[ing] the political results generated by unfair bargaining advantages."[277] Thus, for Ackerman, footnote number four is concerned fundamentally with malfunctions in the political process, and prejudice against discrete and insular minorities is simply one example. The principle is broad enough, however, to encompass other malfunctions as well, including those of the type that infect environmental disputes, like the political ineffectiveness of diffuse majorities and the distorting effects of wealth on democratic processes.[278]

Another scholar, Richard Parker, also argues for an expanded view of the kinds of malfunctions in the political process that warrant judicial review. He criticizes Ely for assuming that the political process works most of the time. That assumption legitimizes the status quo and fails to take sufficient account of the ability of politically powerful minorities, like industry, to routinely control diffuse and non-mobilized majorities.[279] Thus,

273. *Id.* at 741–42.

274. ELY, *supra* note 179, at 153.

275. *Id.* at 164. Although the Supreme Court has never explicitly adopted his approach to constitutional rights, at least one observer has concluded that Ely's process perspective "has shaped the universe of constitutional discourse" and "become the background against which constitutional questions themselves are framed." Flagg, *supra* note 254, at 949–50.

276. Ackerman, *supra* note 272, at 740.

277. *Id.* at 740–41.

278. *See id.* at 722–23.

279. *See* Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 241–46 (1981). Frank Michelman also argues for an expanded view of Ely's theory that takes a republican rather than pluralist view of the political process. *See generally* Michelman, *supra* note 170.

he argues for a process view of rights that accounts for malfunctions in the political process caused by these kinds of power discrepancies.

But the point here is not to parse the niceties of Ely's definition of politically powerless groups.[280] The point is rather to note that all these theorists share a vision of constitutional rights as functioning to correct malfunctions in the democratic process that occur when politically powerless groups suffer from a "systematic bargaining disadvantage"[281] that effectively shuts them out of the democratic process.

ii. Ronald Dworkin

A similar concern for correcting distortions in government decision making appears in the writings of Ronald Dworkin, perhaps the most influential rights theorist of the last several decades. In Dworkin's view, rights are necessary to correct inevitable defects in the utilitarianism that normally provides the basis for democratic lawmaking.[282] Dworkin grounds his theory in the principle of equality. Thus, the defects in utilitarianism, for which rights are a corrective, occur when it violates the cardinal principle that government must treat people with equal concern and respect.[283]

Dworkin acknowledges that, in general terms, utilitarianism embraces the equality principle. Indeed, he argues that utilitarianism gains much of its appeal from its promise of egalitarianism. It weighs the preferences of each individual on the same scales and thus "treat[s] the wishes of each member of the community on a par with the wishes of any other."[284]

However, Dworkin argues, utilitarianism frequently violates the principle of equality. Dworkin's primary examples of when this occurs involve situations of prejudice. When certain members of the community

280. Barbara Flagg has actually argued that Ely's process theory has contributed to the Supreme Court's adoption of a "colorblindness" approach to equal protection and thereby inhibited the Court's ability to address the broader problems of power imbalance that underlie racial inequality. *See* Flagg, *supra* note 254, at 963.

281. Ackerman, *supra* note 272, at 741.

282. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 277 (1977). Dworkin articulates the two strands of rights jurisprudence I describe above. In Dworkin's terms,

> [t]he first is the vague but powerful idea of human dignity . . . . [which is] associated with Kant . . . . The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves.

Id. at 198–99. He argues that the idea of rights can be grounded in one or both strands. Both strands appear at various points in Dworkin's writing. *Compare id.* at 201 (characterizing a certain right as an "invasion of personality" and free speech as protecting "the dignity of dissenters"), *with id.* at 277 (arguing that rights are necessary to correct for the philosophical defects of the utilitarianism that drives democratic decision making).

283. *See id.* at 272–73; Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 165–66 (Jeremy Waldron ed., 1984).

284. *See* DWORKIN, *supra* note 282, at 234, 275.

hold racist or Nazi views, for example, their preferences include not only those that are "personal" to them (i.e., those that concern the availability of goods or opportunities to themselves) but also those that Dworkin calls "external" (i.e., those that concern the availability of goods and opportunities to others.)[285] Their external preferences take the form of preferring that members of the disfavored group (Blacks or Jews) have fewer of their preferences fulfilled.

Utilitarianism, Dworkin argues, has no principled or practical basis on which to exclude such preferences. Accordingly, they must be counted, the result of which is to "corrupt" the "egalitarian character of [the] argument."[286] The problem is, according to Dworkin, that in such a utilitarian calculus "corrupted" by external preferences, "the chance that anyone's preferences have to succeed will . . . depend, not only on the demands that the personal preferences of others make on scarce resources, but on the respect or affection [or lack thereof] they have for him or for his way of life."[287] When external preferences based on prejudice cancel out the personal preferences of the disfavored group in this way, members of that group have less influence on the decision making process, and this violates the principle of equality.

Dworkin's external-preference argument has come under considerable attack, particularly to the extent that he extends the concept to cover altruistic preferences for the assignment of goods and opportunities to others, as well as prejudicial preferences.[288] But putting that debate aside, it is apparent that Dworkin's theory focuses, as does Ely's, on prejudice and its distorting effect on democratic decision making. While Dworkin talks in terms of utilitarianism rather than the democratic process, his concern with utilitarianism arises ultimately from the fact that he views it as constituting the basis, at least in rough form, of democratic decision making.[289] Rights provide a corrective for defects in the utilitarian calculus (as expressed through the democratic process) that occur when prejudice causes some people to have less influence because their preferences are counted for less. In this sense, Dworkin's theory parallels rather closely Ely's theory that rights

285. *Id.*

286. *Id.* at 235.

287. *Id.*

288. *Id.*; *see* H.L.A. Hart, *Between Utility and Rights*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 198, 208–21 (1983). *See generally* C. Edwin Baker, *Counting Preferences in Collective Choice Situations*, 25 UCLA L. REV. 381 (1978); John Hart Ely, *Professor Dworkin's External/Personal Preference Distinction*, 1983 DUKE L.J. 959.

289. DWORKIN, *supra* note 282, at 277 (arguing that democratic decision making "enforc[es] [an] unrefined or overall utilitarianism"). Ely agrees that "there exists a rough congruence between utilitarianism and democratic models of public choice." Ely, *supra* note 288, at 979.

provide a corrective for the distorting effect of power imbalance on democratic decision making.[290]

The concept of political power is not evident on the surface of Dworkin's writings, but this may be a product of the level of abstraction on which he operates. While Ely describes and considers the actual workings of the legislative process—the pluralist tug of war among contending political interests—Dworkin's analysis avoids the realities of political struggle and considers instead the utilitarian theory that he views democratic legislatures as roughly approximating. Thus, Ely envisions the rough and tumble of the legislative process, while Dworkin's vision is instead the sanitized image of preferences being delivered to the "utilitarian computer."[291] Nonetheless, when translated into the realities of the political world, Dworkin's theory, grounded in the principle that each citizen must have an equal opportunity to influence government decision making, is ultimately about power as well.[292]

iii. Civic Republicanism

Like Ely and Dworkin, the civic republicans view rights as essential to the maintenance of a properly functioning democratic process.[293] That process is central to civic republicans, who view politics as a process by which citizens come together (either directly or through their representatives) to engage in reasoned dialogue and deliberation in order to discern the "public good." This vision depends on a measure of political equality. All individuals and groups must have equal access to the political process. Otherwise, large disparities in wealth or power may allow some voices to drown out others, or worse, allow some powerful groups to subvert the process to their own private ends and thus destroy the integrity of the deliberative ideal.[294]

Thus, Cass Sunstein has said that constitutional rights are fundamentally concerned with "the problem of faction"[295]—that is, the concern that "groups seeking to use government power to promote their own private ends might come to dominate the political process."[296] Indeed,

290. Or perhaps it is more accurate to say that Ely's theory parallels Dworkin's. *See* Ely, *supra* note 288, at 979 (noting the parallels between his theory and Dworkin's).

291. Dworkin, *supra* note 283, at 160.

292. *See* DWORKIN, *supra* note 282, at 204 ("If we want our laws and our legal institutions to provide the ground rules within which [controversial issues of social and foreign policy] will be contested then these ground rules must not be the conqueror's law that the dominant class imposes on the weaker.").

293. *See* Michelman, *supra* note 170, at 1505.

294. *See* Sunstein, *Republican Revival, supra* note 166, at 1552; Sunstein, *Interest Groups, supra* note 152, at 32.

295. *Id.* at 29 ("The problem of faction has been a central concern of constitutional law and theory since the time of the American Revolution.").

296. *Id.* at 32.

in his view, "much of modern constitutional doctrine reflects a single perception of the underlying evil: the distribution of resources or opportunities to one group rather than another solely because those benefited have exercised the raw power to obtain government assistance."[297] Thus, many of the individual rights in the Constitution can be understood as aiming to correct that underlying evil.[298]

According to Sunstein, both rationality review and strict scrutiny demonstrate an embrace of republicanism and a rejection of the politics of raw power.[299] By demanding some rational basis for legislation, rationality review assumes the existence of some independent "public interest," and requires government to show that something other than private power justified its decision.[300] Strict scrutiny under either the First Amendment or the Equal Protection Clause does not necessarily turn on the raw power question per se. Thus, statutes discriminating against a suspect class or abridging freedom of speech will be struck down even without a demonstration that they actually resulted from exercises of raw power. But, argues Sunstein, "[u]nderlying the Court's approach is a perception that classifications in this context are likely to reflect private power."[301] Thus, for example,

> [w]hen a statute discriminates against women, there is a special likelihood that it is not an effort to promote the public good, but is instead an unthinking reflection of existing relations of power. Discrimination against women may result from the disproportionate authority of men over lawmaking processes or, more precisely, from an understanding about the proper roles of men and women that itself operates to promote the power of men and to undermine the power of women.[302]

297. *Id.* at 50–51.

298. SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 232, at 25.

299. Sunstein concedes that his view is not universally held, acknowledging the possibility that there may be some "judicial ambivalence about the notion that pluralist compromise is impermissible," as well as "skepticism toward the view that the Constitution forbids legislation that is based on the power of self-interested private groups." Sunstein, *Interest Groups*, *supra* note 152, at 66.

300. Sunstein acknowledges that, in practice, rationality review rarely results in the invalidation of a statute, and that accordingly, rationality review's "prohibition of decisions based on raw power may be regarded as a member of the class of 'under-enforced' constitutional norms." *Id.* at 55. It nonetheless serves his purpose to show that (even if just rhetorically) the "normative understanding of politics" underlying modern constitutional doctrine is republican. *Id.* at 59. Similarly, his showing supports my argument that constitutional rights are generally grounded in concerns about power imbalance. Sunstein also argues that the courts should strengthen rationality review in order to more effectively serve republican ideals. *See id.* at 69–72.

301. *Id.* at 57; *see also* SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 232, at 31.

302. Sunstein, *Interest Groups*, *supra* note 152, at 57.

It is this distorting effect of power imbalance on government decision making processes that constitutional rights seek to redress.[303]

It is interesting to note in this regard that Sunstein recognizes a parallel between the protection of disadvantaged groups against social subordination and the protection of "non-commodity values," like the protection of future generations from irreversible environmental losses. Both, in his view, involve politically weak groups, and efforts to protect each of these values tend to produce similar kinds of political failure.[304] Sunstein argues that in both instances "the very problems that make [protecting such values necessary] in the first instance tend to undermine enforcement."[305]

In sum, there is a prominent strand of thought in the jurisprudence of constitutional rights that views them as responding fundamentally to problems of power imbalance and its distorting impact on government decision making. If that is so, then what can these theories teach us that will be helpful in crafting standards for environmental decision making? In order to answer this question, we must delve deeper into the concept of rights. How do rights operate? By what mechanism do they address the problem of power imbalance? The next Part addresses these questions.

VI. THE OPERATION OF RIGHTS

There is plenty of disagreement about exactly what rights are and how they operate. Many court opinions in recent decades have adopted a balancing approach that seems to apply a utilitarian calculus to rights, purporting to identify all relevant interests and then weigh them against each other. But this approach has come under consistent and sustained attack.[306] The dominant view of rights in the academic literature of law and political theory sees rights in quite different terms, as the antidote to utilitarianism. Thus, many otherwise disparate thinkers view rights as in one way or another rejecting the standard utilitarian balancing of interests in which democratic legislatures are thought to engage.[307] Instead, these

303. Like Ely, Sunstein also points out that the Privileges and Immunities Clause and Negative Commerce Clause also both address distortions in the political process caused by disparities in power—in these instances, disparities in power between in-staters (who can vote in the state) and out-of-staters (who cannot vote in the state). SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 232, at 30.

304. SUNSTEIN, RIGHTS REVOLUTION, *supra* note 81, at 171.

305. *Id.* at 103; *see also id.* at 171 ("[C]ourts should generously construe statutes designed to protect traditionally disadvantaged groups and noncommodity values.").

306. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Tribe, *supra* note 23; *see also* ELY, *supra* note 179, at 113–14; Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 653 (1983) ("The purpose of the Bill of Rights . . . was to place certain subjects beyond the reach of cost-benefit analysis.").

307. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 319–20 (1980) (positing rights as guarantees of the integrity of the liberal conversation against threats posed

theorists understand rights to replace the utilitarian balance with a blunt prophylactic rule[308] that essentially puts a thumb on the scale in favor of the right holder. Certainly, any conception of rights that follows the "process strand" and thus takes seriously their function as a corrective for the distorting effects of power imbalance on government decision making is particularly compatible with this view.[309]

Perhaps the most influential view of rights during the last three decades has been Ronald Dworkin's conception of rights as "trumps."[310] The image of "trumps" seems to imply a kind of absolutism—that rights must prevail regardless of the nature or weight of the countervailing interests. Indeed, some have read Dworkin's theory that way.[311] But Dworkin's view is actually somewhat more nuanced. Once invoked, rights do not necessarily win. There is an escape valve. Where there are sufficiently compelling reasons on the other side, rights may be overridden.[312] To be sure, only a very limited set of reasons can qualify as compelling: There must be a competing right that is being abridged or some extremely weighty social-welfare concern, such that the cost to society of extending the right "would be of a degree far beyond the cost paid to grant the original right."[313] Ordinary utilitarian interests will not do. Thus, whether the idea of "rights as trumps" conceptualizes rights as absolute bars to countervailing considerations or as simply placing a very heavy thumb on the scales in favor of the interests protected by the right, the important point for Dworkin is that the standard

by utilitarian claims); DWORKIN, *supra* note 282, at 277 (stating that rights are a "response to the philosophical defects of utilitarianism"); ROBERT NOZIK, ANARCHY, STATE, AND UTOPIA 28–29 (1974) (discussing rights as "side constraints" on utilitarianism); JOHN RAWLS, A THEORY OF JUSTICE 243–50, 541–44 (1971); E. Fleming, *Securing Deliberative Democracy*, 72 FORDHAM L. REV. 1435, 1457–58 (2004) (suggesting that, under John Rawls' framework, rights (or what Rawls calls "basic liberties") also trump utilitarianism; thus "'[t]hey have an absolute weight with respect to reasons of [utilitarian] public good'" such that "'a basic liberty can never [be limited or denied] for reasons of [utilitarian] public good . . . .'" (quoting JOHN RAWLS, POLITICAL LIBERALISM 294–95 (1996))). Rights can also be defended on utilitarian grounds, *see* ACKERMAN, *supra*, at 316, although such an approach is far less prominent.

308. Ely, *supra* note 288, at 965 (describing Dworkin's theory of rights as "prophylactic").

309. A conception of rights rooted in the first strand may also reject utilitarianism. Thus, the rights theorist who reasons out from a concept of personhood and thus views rights as primarily rooted in concerns about individual integrity and autonomy will argue that rights must trump utilitarianism in order to protect those individual interests against the interests of the collective, as expressed in the utilitarian calculus. *See, e.g.*, NOZIK, *supra* note 307.

310. *See* DWORKIN, *supra* note 282, at 184–205.

311. *See* Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 306 n.22 (2000) (providing examples of this view).

312. DWORKIN, *supra* note 282, at 191; *see also* Waldron, *supra* note 311, at 303.

313. DWORKIN, *supra* note 282, at 200. Dworkin actually includes, along with these two, a third ground on which rights can be limited: "The government might show that the values protected by the original right are not really at stake in the marginal case." *Id.* I chose not to include this ground above because it is really an argument that the right claimed is not actually implicated after all, rather than a countervailing "compelling reason" that overrides the right.

utilitarian balancing of interests is clearly "ruled out."[314] Utilitarian arguments "cannot count as grounds for limiting a right."[315]

Dworkin's rejection of utilitarianism follows naturally from his ideas about why we need rights in the first place. As discussed in Part V, Dworkin views rights as "a response to the philosophical defects of utilitarianism" and the "practical impossibility" of correcting them.[316] Thus, where it seems likely that the utilitarian calculus of the legislature will be distorted by external preferences such that each citizen will not enjoy an equal opportunity to influence the decision making process, rights must step in and trump utilitarianism.[317] Put more crudely, the concern is that in certain circumstances the utilitarian calculus is too easily corruptible by power relations in society and the only solution is to protect the weaker interest through invocation of a trumping right.[318] The following Sections explain the manner in which rights operate to place a thumb on the scale in favor of the rights bearer.

A. FREE SPEECH

The trumping approach is particularly compatible with the concerns that animate the "process strand" of rights jurisprudence. Where the free speech right, for example, is grounded in the need to protect the democratic process and check abuses of government power, a utilitarian balancing of interests will be too easily manipulable in favor of entrenched

314. *Id.* at 203.

315. *Id.* at 201.

316. *Id.* at 277.

317. Jeremy Waldron explains the operation of "rights as trumps" as follows:

> Trumping contrasts with balancing: we choose trumping where a balancing analysis would for some reason be inappropriate. . . . [T]he way to establish that a right exists is to show (i) that utilitarian or majoritarian arguments in a given area are likely to have been corrupted by the wrong sort of reasons and (ii) that it is impossible to disentangle those reasons from whatever respectable reasons a utilitarian or majoritarian argument may also comprise. Once we have shown i and ii, then we may not appeal back to the utilitarian or majoritarian case to counterbalance the right: to allow such an appeal would be to give force to a corrupt argument against the very consideration that was introduced to offset the corruption.

Waldron, *supra* note 311, at 303.

318. The analogy I draw to statutory standards in environmental law is a loose one. *See infra* notes 352–53 and accompanying text. Thus, I do not argue that the power imbalance that distorts agency decision making in environmental law stems from any "external preferences" of industry. Industry's preferences for profits are no doubt internal. The point is simply that a different kind of power imbalance distorts the utilitarian calculus in the environmental arena in a way that is different from but roughly analogous to the problem of external preferences that Dworkin describes.

interests and against the weak or unpopular cause.[319] In such circumstances, the clear backstop created by rights as trumps may often be viewed as the only reliable method for guarding the right against the inevitably corrosive effect of government power.[320] At least "where political issues are involved governments are notoriously partisan and unreliable. Therefore giving government the authority to make policy by balancing interests in such cases presents a serious threat to particularly important [First Amendment interests]."[321]

Thus, Ely, the great process theorist, emphatically rejects a balancing approach to free speech. Recall that for Ely, all constitutional rights can be explained in terms of the need to correct malfunctions in the political process that occur when certain disparities of power—between the "ins" and the "outs" or between the majority and some subjugated minority—distort the political process. When legislatures impose content-based restrictions on speech, in Ely's view, we can assume that such distortions are at work. "Where the evil the state is seeking to avert is one that is thought to arise from the particular dangers of the message being conveyed . . . the hazards of political distortion . . . are at their peak."[322]

One solution to the problem of power relations distorting legislative decision making might be simply to rely on judicial review to correct the distortion. That is, courts could, from their privileged position above the political fray, simply re-weigh the utilitarian interests to make sure the legislature got the balance right.[323] Ely emphatically rejects that approach,

319. *See* Aleinikoff, *supra* note 306, at 982 (criticizing a balancing approach to constitutional law as being too "manipulative").

320. Thus, Alexander Meiklejohn, perhaps the most famous absolutist, was also a prominent proponent of the second strand, viewing First Amendment rights as essential to the maintenance of a healthy democratic process. *See generally* Meiklejohn, *Absolute*, *supra* note 237; Meiklejohn, *Self-government*, *supra* note 237. Justice Hugo Black, the most vocal proponent of First Amendment absolutism on the Supreme Court, *see infra* notes 329–30 and accompanying text, also saw a clear link between absolutism and the need to check abuses of government power. *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 878 (1960). Justice Black stated:

> The great danger of the judiciary balancing process is that in times of emergency and stress it gives Government the power to do what it thinks necessary to protect itself, regardless of the rights of individuals. If the need is great, the right of the Government can always be said to outweigh the rights of the individual.

Id. But see C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47–193 (1989) (arguing for absolutism based on an individual-autonomy view of the First Amendment).

321. Scanlon, *supra* note 234, at 534.

322. ELY, *supra* note 179, at 111.

323. A parallel argument might be made in support of cost-benefit analysis as the standard for agency decision making in environmental law. That is, one might argue that any distortions in the agency decision making process caused by power imbalance could be cured by judicial review of agency CBAs. In my view this argument fails for reasons that parallel Ely's rejection of judicial balancing in the First Amendment context. If CBA is indeterminate and manipulable at

however. The ways in which power manifests itself in the political process, he argues, are often subtle and covert—taking the form of the prejudice or the "paranoia of the age"—and power disparities therefore have the capacity to infect judicial decision making as well.[324] Accordingly, in those situations where "the hazards of political . . . distortion are at their peak," Ely does not even trust judges to balance the interests. While he grants that "unelected judges are likely to be somewhat more objective than elected officials about the dangers posed by an alien view," ultimately he concludes that the same forces that threaten to distort legislative decision making threaten judicial decision making as well.[325]

> [J]udges by and large are drawn from the same political and social ranks as elected officials, and are subject to many of the same anxieties. If the history we briefly reviewed teaches us anything, it is that attempts to evaluate the threat posed by the communication of an alien view inevitably become involved with the ideological predispositions of those doing the evaluating, and certainly with the relative confidence or paranoia of the age. If the First Amendment is even to begin to serve its central function of assuring an open political dialogue and process, we must seek to minimize assessment of the dangerousness of the various messages people want to communicate.[326]

Accordingly, where content-based regulation is at issue, Ely worries that the dangers of both "political distortion *and judicial acquiescence* are at their peak."[327] Thus, a re-weighing of the utilitarian calculus cannot be trusted, even if performed by unelected judges. The only solution is the blunt prophylactic of an "absolute" free speech right. In Ely's view, then, unless the speech regulated falls within one of the few narrow categories of excluded speech that are clearly unrelated to the democratic process, the free speech right must prevail and the restriction must be struck down.[328]

Ely, of course, is not alone in taking an "absolutist" view of the First Amendment. Ever since the 1940s and 1950s when Justice Hugo Black first staked out the absolutist position against the balancing approach advocated

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the agency level, it will also be indeterminate and manipulable in court. *See supra* notes 152–57, 161 and accompanying text. An absolute standard, on the other hand, is more amenable to effective judicial enforcement. *See infra* note 459–60 and accompanying text.

324. ELY, *supra* note 179, at 112; *see also* LUKES, *supra* note 143, at 21–24.

325. ELY, *supra* note 179, at 112. The efficacy of a constitutional principle, of course, depends on its application and enforcement by the judiciary. The same is true of the statutory standards for agency decision making that are my ultimate concern here.

326. *Id.*

327. *Id.* at 111 (emphasis added).

328. *Id.* at 111–12.

by Justice Felix Frankfurter,[329] many commentators have taken up Black's banner, arguing that, at least within certain categories of speech, content-based regulation should be absolutely prohibited.[330] But as Professor Charles Black pointed out in a famous 1961 article defending Justice Black's "absolutism," there is not really any such thing as "absolutism" in a logically pure sense.[331] "[E]ven 'absolute' rights have the limits that inhere in their own definitions."[332] In deciding any case, a court must decide whether the facts complained of fall inside or outside the definition of "free speech," and in close cases that process will inevitably involve the "weighing of competing public and private interests."[333] Additionally, no right is really absolute. One

329. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 517–61 (1951) (Frankfurter, J., concurring); *id.* at 579–81 (Black, J., dissenting). Justice Black elaborated his position further in a famous 1960 lecture at N.Y.U. Law School:

> It is my belief that there *are* "absolutes" in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be "absolutes."
>
> . . . .
>
> [T]here is . . . no justification whatever for "balancing" a particular right against some expressly granted power of Congress . . . .
>
> . . . .
>
> Nothing that I have read in the Congressional debates on the Bill of Rights indicates that there was any belief that the First Amendment contained any qualifications.

Hugo L. Black, *supra* note 320, at 867, 875, 880.

330. *See, e.g.*, BAKER, *supra* note 320, at 163–69. *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17 (1970); RAWLS, POLITICAL LIBERALISM, *supra* note 307, at 344, 352–56; Meiklejohn, *Absolute*, *supra* note 237, at 257–59; Scanlon, *supra* note 234, at 530–31. *See also* BAKER, *supra* note 320, at 125–93 (defending an absolutist approach to time, place, and manner regulations).

331. Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S MAG., Feb. 1961, *reprinted in* CHARLES L. BLACK, THE OCCASIONS OF JUSTICE: ESSAYS MOSTLY ON LAW 89, 93–94 (1963); *see also* Melville Nimmer, *The Right to Speak from* Time *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 936–37 (1968) (arguing that Justice Black's absolutism is untenable if taken literally).

332. Charles Black, *supra* note 331, at 93.

333. *Id.*; *see also* SCHAUER, *supra* note 236, at 89–92 (elaborating on the distinction between "coverage of a right" and level of "protection of a right": "Were we omniscient we could . . . define a right limited in scope but absolute in strength, building into the defined boundary all of the exceptions and qualifications to be applied. The difficulty of this is that we simply do not know what all of the exceptions and qualifications might be."). *But see* Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 914–15 (1963) (distinguishing between "defining" and "balancing," and arguing that a "defining" approach "narrows and structures the issue for the courts" and "emphasiz[es] that the entire question of reconciling social values and objectives is not reopened"). Indeed, some have noted how Justice Black used the definitional step to limit his "absolutist" approach by defining "expression" very narrowly. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 719 (1971). Alexander Bickel argued that Justice Black's "absolutist" approach "chooses to obscure the actual process of decision." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 112 (1962).

can always conjure some extreme set of circumstances in which all would agree that even the most seemingly "absolute" right should be abridged.[334]

Accordingly, Professor Black concluded, what is really at stake between the "absolutists" and the "balancers" is "attitude."[335] "[T]he man who prefers to look on the Bill of Rights' guarantees, once they are defined, as 'absolutes' will see them as more broadly defined and enforce them with more resolution than will the man who prefers to stress their character as invitations to start 'balancing.'"[336] Ultimately, what is important is (1) that the balancing is performed at the definitional stage, which will make it very difficult to balance away at least those kinds of speech that fall within the core of the right, and (2) that only extremely compelling countervailing reasons—"of an altogether different order of magnitude from [ordinary] prudential considerations"—be counted as sufficiently weighty to overcome the right.[337] Thus, on close inspection, even Justice Black's absolutism ends up looking a lot like Dworkin's view of "rights as trumps": rights can be overcome for very, very good reasons, but ordinary utilitarian arguments do not qualify.

B. EQUAL PROTECTION

The equal protection right also rejects a utilitarian balancing of interests. Indeed, it has to. A racist law, for example, might well produce an increase in overall social utility if the preferences of racists weighed more (in the aggregate) than the preferences of those harmed by the discrimination.[338] This is, in fact, the prototypical example of the type of "defect in utilitarianism" at which Dworkin's theory of "rights as trumps" aims. And the doctrinal structure of the equal protection guarantee—the

334. Charles Black, *supra* note 331, at 99. Professor Black posed the following hypothetical:

> [W]hat if an atom bomb were ticking somewhere in the city, and the roads were closed and the trains were not running, and the man who knew where the bomb was hidden sat grinning and silent in a chair at the country police station twenty miles away? Could the "absolute right" not to be tortured prevail?

Id.

335. *Id.* at 96; *see* BICKEL, *supra* note 333, at 112 ("[T]here is a great deal about [Black's absolutist position] that is merely tactical; Justice Black knows as well as anyone else that free speech cannot really be an absolute and that the First Amendment does not literally say any such certain thing.").

336. Charles Black, *supra* note 331, at 96.

337. *Id.* at 101–02; *see also* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2156–57 (1990) (viewing Black's absolutism as articulating the expressive value of rights: "To balance an ideal on the same scale with lower values is to lose the resources of language and meaning by which ideals are constituted.").

338. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 65 (1985); RAWLS, A THEORY OF JUSTICE, *supra* note 307, at 29–30. *See generally* Kenneth Arrow, *The Theory of Discrimination*, *in* DISCRIMINATION IN LABOR MARKETS 3–33 (O. Ashenfelter & A. Rees eds., 1973).

strict scrutiny test—fits Dworkin's theory nicely. Thus, the right provides a trump to the weaker party—the member of the subjugated group—that can only be overcome if there is a compelling interest on the other side and the discriminatory provision is narrowly tailored to serve that interest.

Again, this trumping view of the equal protection right is particularly compatible with the concerns that underlie the "process strand" of rights jurisprudence. Thus, Ely and Sunstein both view strict scrutiny as a mechanism for "flushing out" those legislative decisions likely to have been the product of a distorted political process.[339] Ely points out that "[t]he goal the classification in issue is likely to fit most closely . . . is the goal the legislators actually had in mind."[340] If the actual goal is the product of a legislative process distorted by prejudice and the government tries to put forward some alternative goal in defense of the statute, it is unlikely that the alternative goal will fit as well as the prejudicial goal. An ill-fitting goal, then, raises the inference that the classification was actually the result of a distorted political process. The other prong of strict scrutiny—that the goal serve a compelling interest—serves a similar function. Thus, if the alternative goal put forward is unimportant, this raises an inference that it is simply a pretext for the real prejudicial goal, and again, the hazard that the statute resulted from a distorted political process is at its peak. [341] Where such hazards are present, as in the First Amendment context, balancing cannot be trusted and the only dependable antidote to political distortion is the blunt prophylactic of a trumping right.

C. CRIMINAL PROCEDURE

Although the Supreme Court has increasingly begun to apply a utilitarian balancing approach to certain criminal procedure rights,[342] many can still be conceptualized as trumps that alter the existing balance of power by putting a thumb on the scale in favor of the weaker party. The right to counsel and the *Brady* rule, for example, serve as counterweights to level the

339. ELY, *supra* note 179, at 146; SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 232, at 30–31; Sunstein, *Interest Groups*, *supra* note 152, at 56–57.

340. ELY, *supra* note 179, at 145.

341. *Id.* at 147–48; *see also supra* notes 301–02 and accompanying text (describing Sunstein's similar view of how strict scrutiny serves to flush out legislative decisions distorted by power imbalance).

342. *See, e.g.*, United States v. Leon, 468 U.S. 897, 906–07 (1984) (arguing that an application of the Fourth Amendment exclusionary rule "must be resolved by weighing the costs and benefits"); Kamisar, *supra* note 306, at 645–67 (criticizing the Supreme Court for adopting a utilitarian cost-benefit approach to the Fourth Amendment exclusionary rule); *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 77, 194–95 (1991) (criticizing the Court for adopting for the Fourth Amendment's probable-cause requirement the same utilitarian balancing approach "that has already made significant inroads in other areas of criminal procedure").

playing field between the prosecution and the defense.[343] And, at least in their core areas of coverage, these rights operate as trumps. An indigent defendant's right to have a lawyer stand next to her at trial and to have clearly exculpatory evidence turned over by the prosecution cannot be abridged on the basis of ordinary utilitarian concerns, like the not insignificant costs to taxpayers of paying for public defenders.[344]

The rights against self-incrimination and double jeopardy, as well as the beyond-a-reasonable-doubt standard, are often justified not just in terms of the power relationship between prosecution and defense in an individual trial, but in terms of the power imbalance between citizens and government more generally.[345] Indeed, these rights may do more than simply restore a level playing field in the courtroom. Here the "thumb" may tip the scales so far in the defendant's favor that the truth-seeking function of the individual trial is actually impaired.[346] Nonetheless, these rights are justified on a broader level as mediating the relationship between citizens and government more generally—as necessary to check abuses of government power and provide a bulwark against tyranny. Additionally, the justifications for these rights sometimes take on a decidedly anti-utilitarian cast, as in the

343. *See* United States v. Gouveia, 467 U.S. 180, 189 (1984) (arguing that the function of the Sixth Amendment right to counsel is to diminish the imbalance of power between citizens and the government); Waller, *supra* note 248, at 292 (citing the *Brady* rule as an example of the "Constitution's attempts to even the sales" between the prosecution and defense); *see also* Michael J. Howe, *Tomorrow's Massiah: Toward a "Prosecution Specific" Understanding of the Sixth Amendment Right to Counsel*, 104 COLO. L. REV. 134, 152 (2004). Professor Howe argues that

> [t]he Sixth Amendment right to counsel has always been understood as a trial-based right and as the central feature of the American adversarial system, without which the system would be unacceptably skewed in favor of the state. The guarantee of counsel to the inherently inferior defendant is the primary equalizing force in the system, allowing for a more balanced adversarial contest.

Id. Other scholars have also justified the beyond-a-reasonable-doubt standard in these terms. *See* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1306–07 (1977) (noting that the reasonable-doubt standard is sometimes justified as enhancing the truth-seeking function of trial by ensuring that the opponents are evenly matched and that the adversarial process therefore functions smoothly).

344. This does not mean that there may not be cases on the margins in which balancing occurs in the definitional context, see, e.g., Commonwealth v. DeHart, 516 A.2d 656, 665 (Pa. 1986) (declining to extend the Sixth Amendment right to counsel to photographic identification proceedings because of the "unreasonable burden" such a ruling would impose on law enforcement officials and taxpayers), as it does under an absolutist view of the First Amendment; *see supra* notes 331–37 and accompanying text.

345. *See* Underwood, *supra* note 343, at 1307 (observing that reasonable doubt standard is justified as a protection against abuse of government power).

346. *See, e.g.*, George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1840 (1997) ("[V]irtually all [scholars] agree that the Fifth Amendment privilege [against self-incrimination] is, on balance, truth impairing."). This thumb on the scale in favor of the accused is sometimes apparent in the Fourth Amendment context as well. *See* Henry v. United States, 361 U.S. 98, 104 (1959) ("It is better, so the 4th Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest.").

well-worn adage that "it is better that ten guilty persons escape, than that one innocent suffer."[347]

These justifications lead naturally to a trumping approach and a rejection of balancing. As the *Miranda* court recognized, where constraining the power of government is the issue, balancing is not up to the task; it is too easily corrupted.[348] Or as Yale Kamisar put it,

> Here, perhaps even more so than in the first amendment area, when the government seeks power in the name of the "public interest" or the "general welfare" or "the good of society," balancing tests "inevitably become intertwined with the ideological predispositions of those doing the balancing—or if not that, at least with the relative confidence or paranoia of the age."[349]

Accordingly, there is a prominent and respected view that criminal procedure rights should operate as trumps, and indeed, at least in their core

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347. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358*; see also In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (citing as justification for the reasonable-doubt standard the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"); Conner v. Commonwealth, 3 Binn. 38, 41 (Pa. 1810). The court explained:

> The suggestion that the party might escape is not of the least importance; it might be made in any case, and thus turned into an instrument of the grossest oppression. The Constitution prefers the escape of ten culprits, to the adoption of a practice which might lead to the imprisonment of one innocent man.

Id.; George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 881–82 (1968) (citing various historical statements of the general principle, some putting the ratio as high as twenty to one); *see also* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 217 (1990) (opposing this principle on efficiency grounds). For a thorough and satirical examination of this adage through history, see Alexander Volokh, *N Guilty Men*, 146 U. PENN. L. REV. 173, 174–80 (1997). For an argument that this principle *can* be justified on utilitarian grounds (and an argument that it cannot), see Jeffrey Reiman & Ernest van den Haag, *On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer*, *in* CRIME, CULPABILITY, AND REMEDY 226 (Ellen Frankel Paul et al. eds., 1990).

348. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966). The Court rejected a cost-benefit test on the ground that:

> [t]he whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.

Id. But see New York v. Quarles, 467 U.S. 649, 681 (1984) (Marshall, J., dissenting) (complaining that the majority had "return[ed] to the scales of social utility to calculate whether *Miranda*'s prophylactic rule remains cost-effective when threats to the public safety are added to the balance").

349. Kamisar, *supra* note 306, at 649–50 (quoting John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975)).

areas of coverage, many of these rights effectively do, with balancing occurring primarily at the margins, where coverage of the right is less clear.

In sum, while courts have often taken a balancing approach to rights, the theoretical literature on rights largely rejects this approach. Particularly where rights are justified under the second or "process strand" identified above—as providing a corrective for the distorting effects of power imbalance on government decision making—many theorists distrust a utilitarian balancing approach on the grounds that it is too easily manipulable and corruptible by the same forces that distorted the legislative process to begin with. From such a perspective, a conception of "rights as trumps" is appealing. The next Section explores whether these ideas may offer a useful new perspective from which to view statutory standards for agency decision making in environmental law.

VII. ENVIRONMENTAL TRUMPS

To recap: the last two Parts have revealed that in many instances in which power disparities in society threaten to grossly distort government decision making, constitutional rights operate to compensate for those distortions by replacing the usual utilitarian balancing of interests with a trumping approach. Under this approach, a right operates as a blunt prophylactic rule that puts a heavy thumb on the scale in favor of the weaker interest, trumping all countervailing interests except in certain extraordinary circumstances. By analogy then, in crafting statutory standards for agency decision making in environmental law, where the "hazards of political distortion are [similarly] at their peak"[350] as a result of the endemic power imbalance between diffuse citizen interests and monied corporate interests, a rejection of utilitarianism and cost-benefit analysis in favor of a trumping approach may also be warranted.[351] Under such an environmental

350. ELY, *supra* note 179, at 111.

351. Cass Sunstein has made a somewhat similar argument, though limited to the question of relief. He argues that in cases involving environmental harm, courts should reject the usual common law balancing-of-equities approach to injunctive relief and the presumption in favor of damages and instead adopt a presumption favoring injunctive relief. This is because "[i]n the environmental arena . . . there is a severe collective action problem, and environmental harms that are trivial in the individual case might be collectively disastrous." SUNSTEIN, RIGHTS REVOLUTION, *supra* note 81, at 221.

Leslie Bender has made a roughly parallel argument with respect to mass tort litigation. She argues that courts should impose a stringent burden of proof on corporate defendants in mass tort litigation in order to compensate for the power imbalance between plaintiffs and defendants, drawing an analogy to the use of the beyond-a-reasonable-doubt standard in criminal law to level the playing field between the defendant and the state. *See* Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 888–94.

Ironically, several authors have made a roughly parallel argument in *favor* of CBA, contending that CBA actually *counteracts* the power imbalance problem by counting the interests of diffused, broad-based interests that face collective action barriers to political

trumping approach, environmental-protection interests outweigh countervailing interests of economic cost, except in extraordinary circumstances. As Part VIII explores in more detail, this is the form that the absolute standards of the Endangered Species Act take.

A. THE RIGHTS ANALOGY: SOME CLARIFICATIONS

The analogy I wish to draw here is clearly far from perfect. To be sure, there are vast and important differences between constitutional rights and absolute standards in environmental law. Moreover, my analysis of the purposes and operation of constitutional rights has been superficial at best—barely scratching the surface of a vast and deep literature on rights. But my point is not to construct an airtight analogy, nor to argue for a constitutional right to environmental protection.[352] Instead, I wish merely to observe that certain theoretical positions that have been influential and appealing in the area of constitutional rights are suggestive of a new and possibly useful framework for thinking about environmental standard setting at the statutory level.

It is important to reiterate that, while I draw on broad principles that emerge from thinking about constitutional rights, the environmental

organization. *See supra* note 200 and accompanying text. These authors have a faith in the ability of CBA to reflect the public interest that I do not share.

352. Certainly, one might make an argument for such a constitutional right along the lines of the same kind of analogy I have attempted to sketch here. One might argue either for a constitutional amendment adding a free-standing environmental protection right, or that such a right should be read into the existing Equal Protection Clause. Indeed, some efforts in those directions have recently been made. *See generally* Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181 (1994) (arguing for a constitutional amendment); Bruce Ledewitz, *Establishing a Federal Constitutional Right to a Healthy Environment in Us and in our Posterity*, 68 MISS. L.J. 565 (1998) (arguing for a constitutional right to environmental protection on the basis of existing substantive due process and equal protection doctrine); R. George Wright, *The Interests of Posterity in the Constitutional Scheme*, 59 U. CIN. L. REV. 113 (1990) (arguing for an extension of the equal protection guarantee to the protection of future generations); *cf.* Frederick A.O. Schwartz, Jr., *The Constitution Outside the Courts*, 14 CARDOZO L. REV. 1287, 1293 (1993) (arguing that the preservation of the environment implicates constitutional values but is not suitable for constitutional adjudication).

Such arguments were far more plentiful in the 1970s. *See, e.g.*, John C. Esposito, *Air and Water Pollution: What to Do While Waiting for Washington*, 5 HARV. C.R.-C.L. L. REV. 32, 45–52 (1970); E.F. Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, *in* LAW AND THE ENVIRONMENT 134–65 (Malcolm F. Baldwin & James K. Page, Jr. eds., 1970); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 456 (1972); John Y. Pearson, Jr., Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458, 458–86 (1970). *See generally* William D. Kirchick, *The Continuing Search for a Constitutionally Protected Environment,* 4 B.C. ENVTL. AFF. L. REV. 515 (1975); David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 642–43 (1970). Such arguments were also made in the courts but were uniformly rejected. *See* Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 112–17 (1997).

standard setting I am concerned with is a matter of statutory, not constitutional, law. Thus, the environmental standards at issue here are contained in statutes and accordingly serve to constrain the decision making of administrative agencies, not legislatures. Constitutional rights, on the other hand, occupy a hierarchical position above legislative enactments and constrain the decision making of legislatures themselves. My defense, then, is not of a timeless first principle of constitutional dimensions necessary to the maintenance of a just society. Rather, it is a defense of a particular type of legislative enactment. My point is simply to argue that *when* absolute standards *are* enacted by legislatures—as they sometimes are—there exists a rational and coherent theoretical basis on which to defend them.[353]

B. WHAT ABOUT MARKET FAILURE?

There remains, however, a gap in the analysis. While I have shown how absolutes operate to counteract the problem of political failure, the problem of market failure also plays a significant role in environmental degradation. Do absolute standards help to solve that problem as well, or do they ignore or even exacerbate the problem of market failure such that any gains against the problem of political failure are offset?

I begin from the premise that a perfectly calibrated solution to the problem of market failure is impossible. Even if we assume that a perfectly functioning market or some form of utilitarianism provides the right criterion for environmental decision making,[354] there is a growing consensus that CBA fails to track such a criterion accurately and, indeed, that no practical decision making standard can.[355] And in my view, the problem is even more severe: CBA is incapable of even meaningfully approximating such a criterion. Indeed, as I argue in Part IV, because it is grossly indeterminate, CBA is in practice a non-standard—it essentially punts the decision to the untempered political process.

If perfection is out of reach, then the question can be reframed: Do absolute standards provide a reasonable approximation of the criteria we care about? Do they at least temper, rather than exacerbate, the problem of market failure?

Market failure leading to environmental degradation occurs when the existence of some externality causes individual actors to fail to account fully for environmental harms in their own decision making processes. Thus, the problem consists of a society-wide undercounting of the benefits of actions that tend to protect the environment vis-à-vis their costs. Since absolute

353. For a discussion of why such standards are enacted to begin with, see *supra* notes 164–69 and accompanying text.

354. This is a premise that a number of thoughtful scholars would take issue with. *See, e.g.*, ANDERSON, *supra* note 61, at 192–95; SAGOFF, *supra* note 61, at 92–95; Tribe, *supra* note 61, at 1325–32.

355. *See* Adler & Posner, *supra* note 18, at 187–94.

standards instruct agency decision makers to consider environmental benefits to the exclusion of costs, they clearly "push" in the right direction: They tend to counteract, rather than exacerbate, the problem of market failure.

Indeed, as Part VIII demonstrates, the operation of absolute standards is more accurately conceptualized as "pushing on," rather than dictating, the decision making process. That is to say, absolute standards do not actually produce absolute results. I argue in Part VIII that even under a regime of absolute standards, agency decision making is inevitably shaped primarily by a process of political negotiation between competing interests. Rather than dictating outcomes, absolute standards simply place a thumb on the scale in favor of environmental interests. In so doing, they tend to counteract the problems of both political failure and market failure that otherwise skew decision making against environmental interests.

Because perfect calibration is impossible, my argument does not require a commitment to any particular view of what the optimal criterion for environmental protection should be in an ideal world. Whether one believes that our goal should be the maximization of overall well-being,[356] the results a perfectly functioning market would achieve,[357] the results a perfectly functioning deliberative democratic process would achieve,[358] or the minimization of human impact on the earth,[359] absolute standards bring us closer to where we want to be than do the alternatives currently available to us.[360]

C. PUTTING ABSOLUTES BACK ON THE TABLE

My purpose here is not to provide a definitive answer for the problem of standard setting across the vast and varied field of environmental law.

356. *See* Adler & Posner, *supra* note 18, at 195–96.

357. *See, e.g.*, Coase, *supra* note 208, at 16.

358. *See, e.g.*, ANDERSON, *supra* note 61, at 215.

359. *See, e.g.*, Arne Naess, *The Deep Ecological Movement: Some Philosophical Aspects*, *in* ENVIRONMENTAL PHILOSOPHY: FROM ANIMAL RIGHTS TO RADICAL ECOLOGY 193, 197 (Michael E. Zimmerman ed., 1993).

360. David Driesen suggests that the optimal criterion for environmental standard setting should be absolute protection of the overridingly important values of health and the environment absent a showing of concentrated economic harm, such as plant shutdowns causing mass unemployment. *See* Driesen, *supra* note 42, at 34–41. He argues that feasibility standards best approximate that criterion. *See id.* Absolute standards arguably approximate the same criterion, particularly because the degree of political pressure pushing against environmental protection is calibrated at least roughly to the degree of economic dislocation caused by a particular regulatory measure. *See generally infra* Part VIII. Driesen also suggests an additional reason we may wish to push regulation toward stronger environmental protection: Because not all sources of environmental harm are amenable to regulation, even a regime that perfectly calibrated each regulated source to the optimal level of pollution might result in higher-than-optimal pollution levels across society as a whole. *See* Driesen, *supra* note 20, at 585–87.

Rather, I aim simply to reinvigorate the debate by putting absolute standards back on the table as a realistic and attractive option. Some will argue that absolute standards in some areas of environmental law have been an abject failure,[361] and that may be true. I will leave for another day the task of critically examining such claims and determining which types of environmental problems and regulatory structures may be more or less amenable to absolute standards. The point here is simply to demonstrate that, at least under certain conditions, absolute standards can effectively counteract the power imbalance endemic to environmental issues and thereby lead to results that are closer to where we want to be.

In order to accomplish that task, the next Part considers the Endangered Species Act as a particular example of a statute in which Congress did, in fact, adopt a trumping approach to standard setting in environmental law, and in which that approach has been arguably quite successful. This case study shows how the ESA's absolute standards actually operate in practice as "trumps" to counteract the power imbalance that would otherwise distort agency decision making.

While the ESA's simple structure, unambiguously absolute standards, and long track record make it an ideal "case study," using the ESA to illustrate my point poses certain dangers as well. There is a tendency in environmental law to ghettoize the ESA as a special case—to view it as a particularized response to the narrow and unusual problem of irreversible ecological harm, with little or no relevance to "mainstream" environmental issues like air and water pollution.[362]

361. For example, John Dwyer has argued that the absolute health-based standards for hazardous air pollutants under the Clean Air Act are an example of failed "symbolic" legislation that led to regulatory paralysis. *See* Dwyer, *supra* note 124, at 250–82. Some might also point to the Delaney Clause, 21 U.S.C. § 348(c)(3)(A) (2000), as an example of a failed absolute standard. The Delaney Clause originally imposed a zero-risk standard for pesticide residues in processed foods, but Congress repealed that standard when it enacted the Food Quality Protection Act in 1996, Pub. L. No. 104-170, 110 Stat. 1489 (codified in scattered sections of 7 and 21 U.S.C.). The Delaney Clause is not a representative case, however. It was a particular brand of absolute, actually gauged to a zero level of risk rather than to a more loosely qualitative description of a level of human or ecological health to be maintained. *See supra* note 8. Furthermore, the new standard that the FQPA enacted in place of the Delaney Clause is also an absolute, cost-blind standard. It is just an absolute standard of the "loosely qualitative" type (like the ESA or the NAAQS) rather than a zero-risk standard. *Compare* 21 U.S.C. § 348(c)(3)(A) (old Delaney Clause) ("[N]o additive shall be deemed to be safe if it is found to induce cancer . . . [in] man or animal . . . ."), *with* 21 U.S.C. § 346a(b)(2)(A)(ii) (new standard) (safe means "a reasonable certainty that no harm will result").

362. Indeed, even some staunch proponents of CBA, who would like to see it used in virtually all government decision making, carve out what they view as a narrow exception for the ESA. They concede that CBA is inappropriate under the ESA because "genuinely irreversible losses" are at stake. *See* SUNSTEIN, COST-BENEFIT STATE, *supra* note 44, at 68; *see also* FARBER, *supra* note 97, at 186 (suggesting that CBA may be inappropriate for decisions with irreparable consequences); Arthur P. Hurter, Jr., George S. Tolley & Rovert G. Fabian, *Benefit-Cost Analysis and the Common Sense of Environmental Policy*, *in* COST-BENEFIT ANALYSIS AND ENVIRONMENTAL

But I highlight the ESA not to showcase an anomaly, but rather in hopes of suggesting how absolute standards could prove effective in other areas of environmental law as well. This is hardly a radical idea. After all, the Clean Air Act has employed an absolute health-based standard as its central organizing principle for over three decades. And by virtually all accounts, that experiment has proven extraordinarily successful.[363] Similarly, the Clean Water Act's anti-degradation policy imposes an absolute, cost-blind standard for those waters designated as "high quality."[364] Although a comprehensive examination of how these absolutes have played out in practice is beyond the scope of this Article, these standards at least suggest that there is good reason to believe that absolute standards can be useful beyond the realm of irreversible ecological harm.

Furthermore, while it could be argued that the problem of power imbalance is particularly acute (and therefore absolute standards particularly warranted) where irreversible ecological harm is at issue,[365] it

REGULATIONS: POLITICS, ETHICS, AND METHODS 98 (D. Swartzman et al. eds., 1982) (stating that irreversible harm is "not fully captured by the usual willingness-to-pay measures"). *But see* BOARDMAN ET AL., *supra* note 19, at 169 (arguing that irreversibility is not an obstacle to CBA). But these authors appear to view irreversibility as a narrow exception to the general rule of CBA, probably not extending beyond the special case of the ESA. I suspect, on the other hand, that "genuinely irreversible" ecological loss is actually implicated by a far broader range of environmental legislation. *See infra* notes 365–67 and accompanying text.

363. A recent OMB report finding that the benefits of environmental regulation far outweigh the costs attributed the vast majority of that success to the Clean Air Act. *See* 2003 OMB REPORT, *supra* note 44. *See generally* David M. Driesen, *Should Congress Direct the EPA to Allow Serious Harms to Public Health to Continue? Cost-Benefit Tests and NAAQS under the Clean Air Act*, 11 TUL. ENVTL. L.J. 217 (1998) (defending health-based NAAQS against proposals for CBA).

364. This standard is contained in regulations promulgated by EPA pursuant to section 303(d)(4)(B) of the Clean Water Act, which requires state water quality standards to comply with an "antidegradation policy." 33 U.S.C. § 1313(d)(4)(B) (2000). The regulations mandate that the quality of waters designated by the state as "high quality" and "constitut[ing] an outstanding National resource . . . shall be maintained and protected." 40 C.F.R. § 131.12(a)(3) (2004).

365. Three factors render the usual power imbalance between diffuse citizen interests and monied corporate interests particularly extreme in such circumstances: First, when environmental harm is irreversible, it affects future generations, the interests of which are not directly represented by any current political constituency. *See* Wright, *supra* note 352, at 122 ("[F]uture generations themselves are literally silent politically. They also have little if any current bargaining power, and little with which to reward or threaten the current generation of legislators [or bureaucrats]."). In some sense, future generations are in Ely's scheme the perfect "paradigmatically powerless class," analogous to the out-of-state residents protected by the Privileges and Immunities Clause. *See* ELY, *supra* note 179, at 83*; see also* Frederick A.O. Schwarz, Jr., *The Constitution Outside the Courts*, 14 CARDOZO L. REV. 1287, 1293 (1993) (drawing a similar analogy between the interests of future generations in environmental protection and the current interests of discrete and insular minorities); SUNSTEIN, RIGHTS REVOLUTION, *supra* note 81, at 104 (arguing that statutes that protect future generations from irreversible losses are apt to suffer from inadequate implementation). Some have even used this kind of political-process theory to argue for a constitutional right for future generations, *see generally* Wright, *supra* note 352, or for environmental protection generally, *see generally* Ledewitz, *supra* note 352.

would be a mistake to view species extinction as the only example of such harm. In fact, irreversible ecological loss is implicated by a whole range of environmental issues. Discussions of air pollution, for example, increasingly focus on global warming, which threatens to irreversibly alter ecosystems across the globe within the next century.[366] Similarly, mismanagement of water resources is increasingly blamed for the irreversible destruction of a range of valuable ecosystems, including wetlands and coral reefs.[367]

Second, because ecological harm usually does not injure people directly, it is much harder to build a political constituency to prevent it than it is to build a constituency to prevent harms to human health or harms that are more readily measurable in economic terms. *See* SUNSTEIN, RIGHTS REVOLUTION, *supra* note 81, at 104 (arguing that statutes protecting non-commodity values are likely to be inadequately implemented); Schroeder, *supra* note 168, at 45–46 (suggesting that public health issues are easier for groups to organize around than ecological or aesthetic harms).

Third, because the functioning and health of ecosystems is still so poorly understood, the magnitude of scientific uncertainty surrounding issues of ecosystem harm and its potential consequences is even larger than it is for other types of environmental harm. *See* DANIEL B. BOTKIN, DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY 9 (1990); Houck, *supra* note 137, at 878 ("In decisions about air quality or water pollution, at least we have had a handle on the variables: one discharge, a few contaminants, and a targeted effect. When it comes to the diversity of an ecosystem, however, there are thousands of organisms in a spade full of soil."); A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 LOY. L.A. L. REV. 1121, 1129 (1994). This enormous scientific uncertainty even further magnifies the difficulties and obstacles to building a political constituency to monitor and lobby against ecological harm. *See generally* Houck, *supra* note 137, at 880 (detailing why the disparity of power between interests in favor of and opposed to environmental protection is particularly acute in the areas of biodiversity and ecosystem preservation).

366. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY 237–315 (2001), http://www.grida.no/climate/ipcc_tar/wg2/index.htm (on file with the Iowa Law Review). There are those who dispute that climate change is irreversible, arguing that human ingenuity will someday find a way to reverse the warming of the planet. *See, e.g.*, Jay Michaelson, *Geoengineering: A Climate Change Manhattan Project*, 17 STAN. ENVTL. L.J. 73, 105–06 (1998) (citing proposals to reverse global warming by, *inter alia*, creating vast carbon sinks by stimulating phytoplankton growth in oceans, or blocking sun's rays by releasing clouds of dust from airplanes into upper atmosphere). But most experts view climate changes as irreversible.

367. *See* NAT'L RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 1 (2001) (noting that, by the 1980s, development activities had decreased wetland area in the United States to fifty-three percent of 1780 levels), http://www.nap.edu/openbook/0309074320/html/index.html (on file with the Iowa Law Review); NAT'L OCEANIC AND ATMOSPHERIC ADMIN., THE STATE OF CORAL REEF ECOSYSTEMS OF THE UNITED STATES AND PACIFIC FREELY ASSOCIATED STATES 33–35 (2002), http://www.nccos.noaa.gov/documents/status_coralreef.pdf (describing coastal pollution as a "high threat" to coral reef ecosystems) (on file with the Iowa Law Review). Whether wetlands loss is truly irreversible might also generate some debate. The construction of artificial wetlands has been standard practice for decades now, but some studies have questioned their effectiveness. NAT'L RESEARCH COUNCIL, *supra* at 22–45 (describing how replacement wetlands often fail to replicate the natural function and structure of wetlands); *id.* at 44 (stating that a greater than one-to-one ratio of mitigation to destroyed wetlands is needed to achieve functional equivalency).

Accordingly, I hope that the Endangered Species Act example will be read expansively, as suggestive of other possibilities for the use of absolutes in environmental law, rather than narrowly as an idiosyncratic special case.

VIII. A CASE STUDY: THE ENDANGERED SPECIES ACT

The Endangered Species Act is often held up as the paradigmatic example of an absolute approach to environmental regulation. Known as the "pit bull" of environmental statutes,[368] the ESA is a remarkable piece of legislation. With only a few small exceptions,[369] its prohibitions are absolute, based entirely on biological standards, with no room for consideration of economic impacts. Indeed, it explicitly names "economic development" as the enemy. The very first words of the statute declare that: "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . . ."[370]

Thus, the decision whether to list a species as threatened or endangered is based "solely" on biological factors.[371] And once listed, no federal agency can take any action that is "likely to jeopardize the continued existence" of a threatened or endangered species or cause "adverse modification" of its critical habitat, regardless of the economic consequences.[372] The Act imposes strict restrictions on private actors as well. No person can "take" an endangered species[373]—i.e., kill or harm an individual member of the species; "take" is defined broadly to include habitat modification.[374] Thus, the Act prohibits private parties not only from

368. *See* George Cameron Coggins, *An Ivory Tower Perspective on Endangered Species Law*, 8 NAT. RESOURCES & ENV'T 3, 3 (1993); *see also* Timothy Egan, *Strongest U.S. Environment Law May Become Endangered Species*, N.Y. TIMES, May 26, 1992, at A1 (quoting World Wildlife Fund vice president Donald Barry as stating that the ESA is "'short, compact and has a hell of a set of teeth. Because of its teeth, the act can force people to make the kind of tough political decisions they wouldn't normally make.'").

369. *See infra* note 376.

370. 16 U.S.C. § 1531(a)(1) (2000); *see also id.* § 1533(f)(1)(A) (giving priority in allocation of resources for recovery plans to those species in conflict with economic activity).

371. The statute states that the listing determination is to be made "solely on the basis of the best scientific and commercial data available . . . ." 16 U.S.C. § 1533(b)(1)(A). The word "commercial" refers to trade data, not economic considerations. *See* H.R. REP. NO. 97-567, at 20 (1982) (adding the word "solely" and "specifically reject[ing]" the application of economic criteria to the listing process).

372. 16 U.S.C. § 1536(a)(2).

373. 16 U.S.C. § 1538(a)(1)(B). Though the statute only explicitly prohibits the "taking" of endangered species, FWS has also applied the "take" prohibition to threatened species through regulation. *See* 50 C.F.R. § 17.31(a) (2004); *see also* 50 C.F.R. § 17.71(a) (regarding threatened plants). NMFS applies the "take" prohibition to marine species on a case-by-case basis pursuant to its authority under section 4(d) of the ESA, 16 U.S.C. § 1533(d).

374. *See* 16 U.S.C. § 1532(19) (defining "take" to include "harm"); 50 C.F.R. § 17.3 (defining "harm" to include "significant habitat modification"). "Significant habitat modification" is in turn defined purely in biological terms as activity that "kills or injures

hunting an endangered species, but from developing their land in ways that adversely alter its habitat. The impact of these restrictions on private parties is softened somewhat by the availability of Incidental Take Permits for landowners who develop approved Habitat Conservation Plans and can show that their development projects will "minimize and mitigate" impacts on endangered species "to the maximum extent practicable." But these landowners are still ultimately bound by the biological bottom line of the jeopardy standard—that is, their actions must "not appreciably reduce the likelihood of the survival and recovery of the species," period.[375] Economic costs are irrelevant.[376]

Furthermore, the Act contains strict procedural provisions that make these substantive standards difficult to evade. For example, it imposes clear deadlines on the listing process.[377] And it does not leave the crucial determination as to whether a federal action will "jeopardize" a species to the development agency that is promoting the project. The Army Corps of Engineers, in other words, is not left to make its own decision as to whether its dam project will jeopardize an endangered species. Nor is it left to the Forest Service to decide whether a timber sale will cause jeopardy. To make that determination, the development agency must engage in a process of consultation with one of the two wildlife agencies charged with implementing the Act, the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS").[378] Since these agencies tend to

wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Id.* In 1995, the U.S. Supreme Court upheld FWS's regulatory definition of "harm" in *Babbitt v. Sweet Home Chapter of Committee for a Great Oregon*, 515 U.S. 687, 708 (1995).

375. 16 U.S.C. § 1539(a)(2)(B). The drafters of this provision did not actually use the term "jeopardy," but intentionally borrowed the wording of the then-applicable regulatory definition of jeopardy. *See* Daniel J. Rohlf, *Jeopardy Under the Endangered Species Act: Playing A Game Protected Species Can't Win*, 41 WASHBURN L.J. 114, 125 (2001).

376. Two provisions of the ESA do allow government decision makers to balance economic costs against the benefits of species preservation in limited circumstances. First, the "God Squad" provision allows an Endangered Species Committee to grant exemptions from the Act's requirements for certain large projects if the Committee determines that the benefits of the project outweigh its costs. 16 U.S.C. § 1536(e), (g)–(n); *see infra* notes 438–47 and accompanying text. Second, the agencies can alter the designation of critical habitat based on a cost-benefit test, as long as extinction will not result. 16 U.S.C. § 1533(b)(2). These provisions have had little effect on the implementation of the statute, however. *See* Sinden, *supra* note 3, at 151–60.

377. 16 U.S.C. § 1533(b)(3)–(6).

378. *See* 16 U.S.C. § 1536(a)–(d) (consultation requirement); 50 C.F.R. § 402.01–402.16 (same). The statute assigns responsibility for the administration of the ESA to the Departments of the Interior and Commerce, depending on the type of species involved. Generally, the Secretary of the Interior has jurisdiction over terrestrial species, which it exercises largely through FWS, and the Secretary of Commerce has jurisdiction over marine species, which it exercises through NMFS. *See* 16 U.S.C. § 1532(15) (referencing Reorganization Plan No. 4 of 1970, 35 Fed. Reg. 15,627, 84 Stat. 2090 (1970)); *see also* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 203 n.49 (1997).

view endangered-species preservation as part of their missions, they are more likely to make decisions favoring species protection.[379] It is the wildlife agency that makes the initial determination about whether jeopardy will result, and while the development agency is technically free to ignore that judgment, it does so at its peril. The Supreme Court has called the biological opinions of FWS and NMFS "virtually determinative," and thus a court is unlikely to uphold a development agency's decision to proceed with a project over a wildlife agency's jeopardy finding.[380]

Finally, if any of these agencies fail to act in accordance with these provisions, the statute specifically allows citizens to sue to enforce its mandates, and an attorney's-fees provision gives them the financial ability and incentive to do so.[381] Indeed, citizen enforcement of the ESA has played a major role in its implementation since its enactment.[382]

As the U.S. Supreme Court pointed out just five years after the Act was passed into law, the ESA's language could not be clearer: It commands that species be protected "whatever the cost," and "admits of no exception."[383] Since the Supreme Court immortalized those famous words, many courts have followed its lead, issuing injunctions under the ESA against politically powerful and influential industries.[384] Still, just as Professor Charles Black admitted with respect to the First Amendment,[385] no standard is entirely absolute in practice. Virtually any legal standard leaves some zone of discretion—some "wiggle room"—that interest groups naturally attempt to exploit. In fact, implementation of the ESA involves a process of negotiation in which political and economic interests play a significant role. This arises in part from the ambiguity contained in the biological standards themselves.

379. *See* YAFFEE, *supra* note 142, at 110, 113. While the endangered species mission at FWS and NMFS is by now well-established and both agencies employ a cadre of biologists committed to that mission, both agencies are situated within larger departments—Interior and Commerce—whose constituencies are largely made up of commercial interests. *See id.*

380. Bennett v. Spear, 520 U.S. 154, 169–70 (1997).

381. 16 U.S.C. § 1540(g).

382. *See* Houck, *supra* note 142, at 311.

383. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 173, 184 (1978).

384. *See, e.g.*, Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109, 1119–20, 1138 (10th Cir. 2003) (upholding the district court's preliminary injunction compelling the Bureau of Reclamation to maintain sufficient river flow to avoid jeopardizing endangered fish), *vacated by* 355 F.3d 1215 (10th Cir. 2004) (dismissing the appeal as moot and vacating the prior opinion, but leaving the preliminary injunction intact); Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1056, 1057 (9th Cir. 1994) (upholding the district court's injunction compelling the Forest Service to consult with NMFS regarding endangered salmon and enjoining any timber sales pending such consultation); Lane County Audubon Soc'y v. Jamison, 958 F.2d 290, 295 (9th Cir. 1992) (enjoining timber sales on federal lands pending BLM's consultation with FWS regarding the spotted owl); Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228, 1251 (N.D. Cal. 2001) (enjoining the Bureau of Reclamation's delivery of irrigation water pending its consultation with NMFS regarding endangered salmon).

385. *See supra* notes 331–37 and accompanying text.

Overlaid on that dynamic, which gives political and economic forces covert influence over agency decision making, are two mechanisms by which politics and economics can also *overtly* influence the decision making process. First, the statute itself contains an escape valve that in certain exceptional circumstances allows a special committee to grant exemptions from the ESA's absolute standards based on a cost-benefit test.[386] Second, Congress has itself on occasion stepped in to override the statute's requirements based on political and economic considerations.[387]

Ultimately, then, the ESA's absolute standards involve a negotiation between environmental and economic interests, but it is not the unbounded political free-for-all that the CBA standard would produce. Rather, it is a balance that is clearly weighted toward environmental protection. Thus, the ESA's absolute standards operate as a "trump" or a thumb on the scale in favor of the weaker interest. In this way, they serve to counteract the inevitable tug toward economic interests that the environmental power dynamic produces.

The following pages explain these dynamics in more detail, using the story of the northern spotted owl and the logging of federal lands in the Pacific Northwest to illustrate how they actually played out in the context of a particular controversy. Accordingly, I pause here to provide a brief background on that controversy.

A. THE SPOTTED OWL STORY

The northern spotted owl is a shy nocturnal bird that inhabits the old growth forests of the Pacific Northwest from British Columbia to northern California.[388] It is monogamous and highly territorial. This seemingly inconspicuous bird began to attract significant attention among ornithologists and forest managers in the 1970s and early 1980s.[389] Scientists studying the owl had learned that it was highly dependent on large tracts of intact old-growth forest ecosystem for its survival. Indeed, one breeding pair was estimated to use an average of 2000 acres of habitat.[390] Because of its dependence on old growth, the Forest Service had designated the spotted owl a "management indicator species," meaning that it served as a measuring rod for the overall health of the old-growth ecosystem and the other species that depended on it.[391]

386. *See infra* notes 438–47 and accompanying text.

387. *See infra* notes 448–56 and accompanying text.

388. *See generally* Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990).

389. *See generally* Brendon Swedlow, *Scientists, Judges, and Spotted Owls: Policymakers in the Pacific Northwest*, 13 DUKE ENVTL. L. & POL'Y F. 187, 191–96 (2003).

390. *See* Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. at 26,114.

391. *See* 36 C.F.R. § 219.19 (2004).

Unfortunately for the owl, however, the old-growth forests on which it depended had been steadily disappearing for decades as timber companies harvested the large and valuable trees. By the 1980s, most old-growth forest on private lands had been destroyed,[392] and as the demand for lumber grew, timber companies turned to the vast tracts of federal land in western Washington and Oregon managed by the Forest Service and the Bureau of Land Management ("BLM"). Soon the remaining habitat on federal lands was quickly disappearing as well. During the 1980s, the Forest Service sold 71,000 acres per year for timber harvest, and the BLM logged an additional 15,000 acres each year.[393]

In the early and mid-1980s, scientists and environmentalists began warning the Forest Service and BLM of the precarious state of the owl and its ecosystem and the need to take steps to limit timber harvest in old-growth forests. But any hope of saving the owl would require dramatic reductions in timber-harvest levels. Even early, relatively conservative estimates predicted that a million acres would have to be made off limits to logging, a step that would undoubtedly provoke vigorous opposition from an array of wealthy and powerful timber companies.[394]

Thus, the usual imbalanced alignment of interests began to emerge from the outset. On one side were environmental organizations representing diffuse citizen interests in the preservation of species, old-growth forests, and related values. On the other side were powerful corporate interests representing the resource-extraction industries of the West—primarily timber, but mining interests as well. The timber and mining industries had enormous economic interests at stake. Mining companies claimed that one particular pair of nesting owls threatened $400 million in mining claims,[395] and the timber industry was facing potentially drastic reductions in its annual harvest levels. These industries would ultimately spend millions of dollars in litigation and lobbying efforts to fight protections for the owl, even hiring a public-relations firm to try to win public support by portraying the controversy as a zero-sum trade-off between jobs and owls.[396] Against these powerful and well-financed interests, environmental groups had little effect—at least until the late 1980s when the ESA entered the scene.

392. *See* Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. at 26,130; *id.* at 26,118 (noting that, by 1990, nearly ninety percent of the remaining owl habitat was on federal land).

393. Victor M. Sher, *Travels with Strix: The Spotted Owl's Journey Through the Federal Courts*, 14 PUB. LAND L. REV. 41, 44 (1993).

394. SHANNON PETERSEN, ACTING FOR ENDANGERED SPECIES: THE STATUTORY ARK 82 (2002).

395. *Id.* at 90.

396. *Id.*

B. AGENCY DISCRETION: THE POLITICS OF DELAY

As noted above, the negotiation process that characterizes ESA implementation arises in large part from the fact of agency discretion.[397] One important aspect of implementation with respect to which the wildlife agencies retain some discretion is the promptness with which actions to protect particular species are taken. While the statute imposes strict deadlines for listings and critical habitat designations,[398] it is commonly understood that the agencies' budgets do not come close to providing sufficient resources to complete all of the listings and designations required by law.[399] Accordingly, the wildlife agencies inevitably perform a kind of triage, exercising discretion to give some species priority and leave others to languish.

To be sure, the procedural provisions of the Act—the strict deadlines and the citizen-suit provision—place an important brake on this discretion. Once an agency is sued for failing to meet a deadline in the Act, the court may well impose a strict timetable on the agency over its objection.[400] Indeed, agency officials frequently protest that they are sued so frequently for failing to meet deadlines that priorities for listings are set on an ad hoc basis by citizen groups and court orders, rather than in some rational way by the agency.[401]

Nonetheless, the agencies retain substantial discretion with regard to which listings and designations to move forward and which to leave on a back burner, at least initially.[402] Any decision with important consequences

397. *See* Houck, *supra* note 142, at 358 (arguing that the agencies have implemented the ESA largely as a discretionary permit system in order to avoid conflict).

398. 16 U.S.C. § 1533(b)(3)–(6) (2000).

399. *See* Houck, *supra* note 142, at 293–94.

400. *See, e.g.*, Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1178 (9th Cir. 2002) (upholding the district court's grant of injunctive relief against FWS for failure to complete listings within the deadlines set by the ESA); Forest Guardians v. Babbitt, 174 F.3d 1178, 1193 (10th Cir. 1999) (remanding to the district court with instructions to order FWS to issue a final critical-habitat designation for the silvery minnow "as soon as possible"); Save Our Springs v. Babbitt, 27 F. Supp. 2d 739, 747–49 (W.D. Tex. 1997) (ordering FWS to make a listing determination regarding the Barton Springs salamander within thirty days).

401. *See The Critical Habitat Reform Act of 2003: Hearings on H.R. 2933, Before the H.R. Resources Comm.*, 108th Cong. 81 (2003) (testimony of Craig Manson, Assistant Secretary for Fish, Wildlife and Parks, Department of Interior) ("[L]awsuits have subjected the service to an ever-increasing series of court orders compliance with which now consumes nearly the entire listing program budget. This leaves the service with little ability to prioritize its activities, to direct scarce resources to listing program actions most urgently needed to conserve species.").

402. Such decisions have significant impacts. While a species is waiting to be listed, development projects may go forward unhindered and a species' plight may worsen. Moreover, delay affects outcome: delays in the listing process increase the chances that a species ultimately will not be listed. *See* Amy Whritenour Ando, *Waiting to be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J.L. & ECON. 29, 45, 47–48 (1999) (finding that the longer a species waits to be listed, the less likely are its chances for being proposed for listing).

and with respect to which an agency exercises discretion creates an opening for interest groups to pressure the agency to exercise its discretion in one way or another, and indeed, there is substantial evidence that exactly such a dynamic has taken place in this instance. FWS has frequently delayed listing decisions in response to pressure from economic interests.[403] And for many years, FWS implemented a "de facto policy" of non-implementation of the critical-habitat provisions of the Act in response to such pressures.[404]

The spotted owl was no exception. When FWS received a petition to list the owl in 1987, the agency was under enormous pressure from industry to avoid listing the species. A large cadre of corporate interests had testified in Congress against reauthorization of the Act in 1985, and the timber industry was warning of dire economic consequences should a relatively mild Forest Service proposal to protect the owl be adopted.[405] In this climate, FWS actually chose to forego its usual strategy of delay in favor of flat-out avoidance. It made a decision on the petition within the twelve-month deadline set by the statute, but, in the face of overwhelming scientific evidence that the owl was facing extinction, it determined that listing was "not warranted."[406] Environmentalists promptly challenged this finding in a citizen suit, and a federal court overturned FWS's decision as "arbitrary and capricious."[407] FWS subsequently reversed course and, in June 1990, listed the owl as threatened.[408]

403. *See* Ando, *supra* note 402, at 30; *see also* AMY WHRITENOUR ANDO, ECONOMIES OF SCOPE IN ENDANGERED-SPECIES PROTECTION: EVIDENCE FROM INTEREST-GROUP BEHAVIOR (Resources for the Future Discussion Paper No. 97-44, 1999) (finding that the degree of opposition and delay in listing increases with the expected costs of protection); YAFFEE, *supra* note 142, at 87 (quoting an FWS staff member who claimed economic considerations, such as the loss of jobs in a dam project, always played a role in listing decisions); *id.* at 126 (quoting an FWS official telling staff to handle controversial listings "very, very slowly"); U.S. GEN. ACCOUNTING OFFICE, ENDANGERED SPECIES ACT: FACTORS ASSOCIATED WITH DELAYED LISTING DECISIONS, REPORTS AND TESTIMONY 199 (1992) (detailing how pressure from top Bush administration officials contributed to delays in listings by the FWS); Thompson, *supra* note 9, at 1149 (stating that political pressure from economic interests led to a delay in listing the lesser prairie chicken, despite a ninety-seven percent decline in its population); *id.* at 1152 ("[P]roperty owners can delay listings, and, in isolated cases, even derail them by filing opposition comments, enlisting the aid of local legislators, and suing to block the listings."). The ESA was amended in 1982 to impose deadlines on the listing process specifically in response to Congress's impatience with egregious FWS delay. PETERSEN, *supra* note 394, at 83.

404. Rohlf, *supra* note 375, at 117 n.9; Houck, *supra* note 142, at 297–315 (describing how the critical-habitat provision has been rarely used, eliminating the most powerful requirement of the ESA); YAFFEE, *supra* note 142, at 96 (describing a project where it appeared that political pressures caused a critical habitat designation to not be implemented); *see* Sinden, *supra* note 3, at 151–60 (describing how FWS's interpretation of the critical habitat provisions of the ESA essentially vitiated their effectiveness).

405. PETERSEN, *supra* note 394, at 83–84.

406. 52 Fed. Reg. 48,552 (1987).

407. N. Spotted Owl v. Hodel, 716 F. Supp. 479, 483 (W.D. Wash. 1988). A GAO report later concluded that "FWS management substantively changed the body of scientific evidence presented" in FWS's report on the owl in an attempt to support its decision not to list. It also

With respect to critical-habitat designation for the owl, FWS employed its usual strategy of non-implementation. Although the statute requires critical habitat to be designated concurrently with listing,[409] FWS declined to do so, claiming that critical habitat was "not presently determinable."[410] Environmental groups sued again and won another court order overturning the agency's decision. The court ordered FWS to designate critical habitat for the owl according to a tight series of deadlines.[411]

Thus, in the spotted owl controversy, political pressure from economic interests initially pushed the agency to an extreme posture of non-implementation. The Act's absolute substantive provisions in conjunction with its procedural provisions, however, provided sufficient leverage to environmental interests to allow them to counteract that political pressure and force implementation, albeit with some delay.[412]

C. AGENCY DISCRETION: VAGUE, CONTESTABLE STANDARDS

The agencies also retain considerable discretion in applying the ESA's substantive standards, which, on close inspection, turn out to be far more ambiguous than they may at first appear. "Jeopardy" is the primary substantive standard of the ESA. It directly limits the actions of federal agencies[413] and indirectly limits the actions of private parties through its incorporation into the standard for granting incidental take permits to private landowners.[414] The jeopardy standard is solely biological. The statute prohibits any action that is "likely to jeopardize the continued existence" of

concluded that "factors in addition to the owls' biological condition were considered in deciding to deny the listing petition" and that such factors were "inconsistent with the decision making process provided for in the [ESA]." U.S. GEN. ACCOUNTING OFFICE, ENDANGERED SPECIES: SPOTTED OWL PETITION EVALUATION BESET BY PROBLEMS 1, 2 (1989).

408. Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990). This was about seventeen months later than the final listing would have been issued had FWS simply found the listing warranted to begin with. *See* 16 U.S.C. § 1533(b)(3), (6) (2000) (requiring a decision on whether a listing is "warranted" within twelve months of receiving a petition and requiring a decision on a final listing within twelve months of a "warranted" finding).

409. 16 U.S.C. § 1533(a)(3).

410. Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. at 26,124–25.

411. N. Spotted Owl v. Lujan, 758 F. Supp. 621, 629–30 (W.D. Wash. 1991).

412. While in this high profile case citizen suits effectively imposed relatively tight bounds on the agency's discretion in this regard, delay and non-implementation went (and continue to go) unchallenged in dozens of other cases. *See* Houck, *supra* note 142, at 302–06. By August 2001, for example, FWS had only designated critical habitats for 138 of the 1244 species it had by then listed as endangered or threatened. Rohlf, *supra* note 375, at 117–18 & n.10.

413. *See* 16 U.S.C. § 1536(a)(2) (imposing a duty on all federal agencies to "insure that any action authorized, funded, or carried out by [the] agency . . . is not likely to jeopardize the continued existence" of a threatened or endangered species "or result in the destruction or adverse modification of habitat . . . which is determined by the Secretary . . . to be critical").

414. *See supra* note 375 and accompanying text.

a threatened or endangered species, which the regulation further defines as "an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of the species."[415]

While this standard does not produce the kind of gross indeterminacy that arises from a cost-benefit test, neither does it draw clear, uncontestable lines. It contains substantial ambiguity and uncertainty and therefore affords the agencies considerable discretion in applying it. For one thing, the statute leaves the agencies latitude in determining what level of risk to a species constitutes "jeopardy."[416] Deciding how much risk is acceptable—or, in the words of the regulation, how much of a reduction in the likelihood of survival constitutes an "appreciable" reduction—ultimately requires a policy judgment.[417] If the likelihood of survival drops from seventy percent to sixty-five percent, should that count as jeopardy? Should a drop from seventy to fifty percent count? The problem is that "there is no magic number above which a population is secure or below which it is headed for extinction."[418] Moreover, the scientific question of whether and how much a given action will reduce a species' chances of survival is fraught with uncertainty and provides ample grounds for experts to disagree.

Again, the spotted owl controversy provides an example. When it came to determining how much forest had to be protected from logging in order to avoid jeopardizing the spotted owl, there was much disagreement and, accordingly, considerable room for discretion on the part of agency decision makers. Scientific estimates of the amount of acreage needed for each breeding pair ranged from 1000 to 4500 acres.[419] There was a correspondingly wide range of estimates by scientists and government officials as to the total amount of old-growth forest that would need to be

415. 50 C.F.R. § 402.02 (2004).

416. Rohlf, *supra* note 375, at 159.

417. *Cf.* Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1618–27 (1995) (arguing that questions we think of as "scientific" often include questions of values or policy embedded within them).

418. Rohlf, *supra* note 375, at 158; *see also* Michael C. Blumm & Greg D. Corbin, *Salmon and the Endangered Species Act: Lessons from the Columbia Basin*, 74 WASH. L. REV. 519, 593–94 (1999) (noting NMFS's shifting standards in this regard—sometimes requiring a "high probability" of both survival and recovery to avoid a jeopardy finding, and at other times requiring only a "moderate to high probability" of recovery).

Additionally, there is the problem of scope. The standard is ambiguous as to whether the agencies should make jeopardy determinations based on how a project will affect listed species in the project area alone, over an entire region, or across the entire species. Rohlf, *supra* note 375, at 137. Also, the standard fails to address the extent to which cumulative effects should be considered. *Id.*

419. PETERSEN, *supra* note 394, at 82, 84; Swedlow, *supra* note 389, at 193, 201. Federal agencies' early estimates in the 1970s had actually put the owl's habitat needs at just 300 acres per nesting pair. *Id.* at 192.

protected in order to save the owl from extinction. Between 1986 and 1993, various government committees and independent scientific review panels made recommendations that ranged from 690,000 to 11.4 million acres.[420]

Thus, in some instances, the standard affords the agency enough wiggle room to credibly make the jeopardy call either way.[421] This zone of discretion creates an opening for interest groups to pressure the agency, and the agency's decision to call "jeopardy" or "no jeopardy" thereby becomes a product of negotiation and compromise rather than a mechanical application of uncontestable standards.[422] In such negotiations, political and economic considerations inevitably gain a foothold.[423]

420. PETERSEN, *supra* note 394, at 84 (stating that a 1986 Forest Service Plan called for protecting 690,000 acres); *id.* at 88 (showing that a revised Forest Service Plan recommended 1.6 million acres); *id.* at 91 (stating that the Interagency Spotted Owl Committee recommended 8 million acres); *id.* at 99 (explaining that the FWS proposed 11.6 million acres for critical habitat and later reduced that figure to 8.2 million acres based on economic impacts); *id.* at 102 (noting that a congressional task force recommended protecting 2.3 to 5.7 million acres); *id.* at 107 (stating that the FWS proposed preserving 5.5 million acres); *id.* at 111 (explaining that the Forest Ecosystem Management Assessment Team, formed as result of Clinton's timber summit, proposed ten management options ranging from protecting 5.4 million acres to 11.4 million acres). The 690,000-acre proposal came very early in the controversy. By 1992, a consensus had developed that 2.8 million acres or fewer would not be sufficient to meet the requirements of the ESA. *See id.* at 106–07 (describing the first Bush administration's proposal to preserve 2.8 million acres, which it acknowledged would require amending the ESA).

421. *See* Rohlf, *supra* note 375, at 160.

422. Houck, *supra* note 142, at 327 ("[C]onfronted by any fact pattern more ambiguous than Tellico Dam, in which the only known stock of the species was to be completely destroyed, the Secretary may call it as he sees fit without fear of judicial review."). Even where the jeopardy call is clear, the nature and content of the "reasonable and prudent alternatives" specified as necessary to avoid jeopardy becomes a subject of negotiation. The Act specifies that where the wildlife agency finds that an action will jeopardize a species, it must propose "reasonable and prudent alternatives" that the agency believes would not jeopardize the species. 16 U.S.C. § 1536(b)(3) (2000).

423. *See* YAFFEE, *supra* note 142, at 89 (testimony of FWS official Keith Schreiner) ("'I cannot tell you that the final determinations are based only on biological evidence, because you know as well as I do that other considerations—political, economic, and the like—enter into such matters.'" (quoting *Hearing Before U.S. S. Comm. on Appropriations, 1976 Special Hearing*, 94th Cong. 10 (1976))); YAFFEE, *supra* note 142, at 109 (quoting an FWS scientist who acknowledged that "[p]olitics enter into the decision"); Blumm & Corbin, *supra* note 418, at 599 (arguing that certain "no jeopardy" determinations by the NMFS regarding hydroelectric operations in the Columbia basin "cannot be explained on biological grounds," but rather evidence the fact that the agency also took into account the economic benefits of hydroelectric operations and timber sales); Houck, *supra* note 142, at 319 (citing "recurring evidence that—whatever the law—the alternatives found for controversial projects have been strongly influenced by local and national politics"); Hannah Gosnell, *Section 7 of the Endangered Species Act and the Art of Compromise: The Evolution of a Reasonable and Prudent Alternative for the Animas-La Plata Project*, 41 NAT. RESOURCES J. 561, 563 (2001) (describing a case study "illustrat[ing] the difficulties confronted by the FWS in implementing Section 7(a)(2) forcefully, in the face of powerful political and institutional constraints"); Rohlf, *supra* note 375, at 160 ("When the Services put themselves in a position to either approve or disapprove actions based on identical biological analyses, factors other than risks to the species—including economics, politics, public controversy and the like—are much

Indeed, the statistics on the consultation process confirm this view of the jeopardy process. If the ESA's standards are simply mechanical instruments that require whatever measures are necessary to preserve endangered species with utterly no consideration of costs, one would expect to see jeopardy findings right and left and legions of development projects stopped in their tracks. But the statistics paint a very different picture. A finding of jeopardy that actually stops a development project is extremely rare. In the vast majority of cases, a compromise is reached that allows development to go forward with, at most, a set of "reasonable and prudent alternatives"[424] that impose minor conditions on the project to limit its adverse effects on the species.[425] Two reports on the consultation process in 1992 concluded that nearly ninety percent of all consultations are resolved informally; ninety percent of the remaining consultations that are conducted formally result in a finding of "no jeopardy"; and of the few formal consultations that produce a finding of "jeopardy," ninety percent arrive at "reasonable and prudent alternatives" that allow the project to proceed with only minor modifications.[426] Thus, of 71,560 formal and informal consultations conducted over five years, only 131 resulted in findings of jeopardy, and only 18 projects were ultimately terminated, less than 0.02% of overall consultations.[427]

Nonetheless, while the jeopardy standard creates a zone of discretion, that discretion is not entirely unbounded. It does impose some limits on discretion, so that some matters are at least uncontestable. Thus, when the completion of the Tellico Dam was challenged in the famous case of *Tennessee Valley Authority v. Hill*,[428] no one argued that inundating the only stretch of river inhabited by the snail darter would not jeopardize the species

more likely to influence the Services' jeopardy assessments."); Thompson, *supra* note 9, at 1150 ("[C]osts inevitably creep into . . . [ESA] implementation.").

These observations of actual practice under the ESA are consistent with Jason Johnston's predictions under a game theory model that regulated parties subject to absolute statutes will nonetheless make cost-based arguments to the legislative and executive branches, though not to the courts. He also predicts that costs will influence agency decisions to some extent under such statutes. *See* Johnston, *supra* note 39, at 1353*; see also* SAGOFF, *supra* note 61, at 201 ("When statutes assert utopian and draconian goals, the administrative agencies nevertheless take economic and technological feasibility into account.").

424. *See supra* note 422.

425. Houck, *supra* note 142, at 317–18 (stating that the jeopardy standard seems to "permit[] all but the most threatening development to proceed without even formal review"); *id.* at 319–20 (describing author's informal study of ninety-nine jeopardy opinions finding that the few projects that were blocked involved "small-scale, private development directly in habitat essential to the species; . . . No major public activity, nor any major federally-permitted private activity was blocked."); Rohlf, *supra* note 375, at 151.

426. Houck, *supra* note 142, at 317–18.

427. *Id.*

428. 437 U.S. 153 (1978).

and adversely modify its critical habitat.[429] Similarly, while the numerous committees of experts that convened in the early 1990s to study the spotted owl crisis may have differed on the precise numbers, each one reached the same basic conclusion: that extensive reductions in timber-harvest levels were necessary to protect the owl. Indeed, several concerted efforts by the Bush I administration to hand-pick experts who would view things differently were unsuccessful.[430] And when environmental groups brought a citizen suit that succeeded in compelling BLM to consult with FWS on the impacts of logging on the spotted owl, FWS did in fact call jeopardy on fifty-two timber sales.[431]

D. ESA IMPLEMENTATION AS NEGOTIATION

Ultimately then, the ESA, perhaps like all law, is implemented through a political process of negotiation, not through the wooden application of absolute, unbending standards. Indeed, numerous commentators who have studied the actual, on-the-ground implementation of the ESA have noted this phenomenon. Steven Yaffee, for example, an early observer of the ESA, noted soon after its enactment that implementation of the Act was "heavily influenced by the political context in which [it] takes place. Balancing [of economic costs] occurs; outside interests participate; and negotiation prevails."[432]

Though these negotiations take many forms, occur in a variety of contexts, and may involve a number of different entities at the negotiating table, the real parties in interest are always the same: Diffuse citizen interests represented by environmental organizations push for species preservation and concentrated, corporate, economic interests push for unrestricted

429. *Id.* at 171 (noting that the TVA did not "seriously dispute" the fact that operation of the dam would "eradicate the known population of snail darters").

430. *See* PETERSEN, *supra* note 394, at 92, 103.

431. *See* Lane County Audubon Soc'y v. Jamison, 958 F.2d 290, 292–93 (9th Cir. 1992); Sher, *supra* note 393, at 49–52; *see also* Houck, *supra* note 137, at 953–71 (describing how the HCP process has succeeded in producing significant gains for species protection, despite opposition from entrenched and powerful economic interests, because it establishes a "bottom line," "law to apply").

432. YAFFEE, *supra* note 142, at 86*; see also* Daniel A. Farber, *A Tale of Two Cases*, 20 VA. ENVTL. L.J. 33, 38 (2001) (noting that, in the context of the HCP process, "locally negotiated solutions have substantially replaced top-down federal enforcement of the ESA"); Rohlf, *supra* note 375, at 115. Rohlf explains:

> In their day to day implementation of [the ESA, the wildlife agencies] seldom use the jeopardy standard to draw a clear biological line in the sand; rather, the concept of jeopardy often amounts to little more than a vague threat employed by FWS and NMFS to negotiate relatively minor modifications to federal and non-federal actions.

Id.

development. If these parties are not seated directly at the negotiating table, they are behind the scenes exerting pressure on those who are.[433]

Thus, in one context, FWS and the U.S. Forest Service may negotiate over whether FWS will make a jeopardy finding with respect to a timber sale and what reasonable and prudent alternatives should be required. While the agencies themselves conduct such negotiations, their environmental and industry constituencies are likely to be active in the background. Threats of adverse publicity and/or lawsuits as well as direct political pressure (applied to agency officials themselves or to their overseers in Congress) from environmental groups on one side and the timber industry on the other have a strong influence on each agency's negotiating posture. In another context, a private developer will negotiate with FWS over what species-protection measures must be included in a Habitat Conservation Plan in order to avoid jeopardy and thus warrant issuance of an Incidental Take Permit.[434] Environmental groups may participate directly in such negotiations or indirectly through pressuring the agency. In yet another context, environmental and industry groups may "negotiate" with FWS or NMFS through the regulatory notice-and-comment process or through informal means in an attempt to influence the timing and outcome of listing decisions and critical habitat designations.

Through all these negotiations, even though the applicable legal standards are explicitly blind to economic costs, economic and political considerations exert a covert influence. First, the political and economic strength of the interest groups that are either directly or indirectly involved in the negotiation obviously affects the level of pressure they can bring to bear on agency decision making.[435] Second, to the extent agency officials have a range of decisions that they can reasonably defend as adhering to the biological standard, they will be inevitably tempted to consider other factors—primarily political and economic—in deciding where within the range of reasonable choices to situate their decision. Accordingly, as numerous commentators have observed, decision making under the ESA is driven by political and economic as well as biological considerations.[436]

In addition to exerting this kind of covert influence, it is also important to keep in mind that economic and political factors can also overtly enter

433. Indeed, that behind-the-scenes political pressure can at times be quite intense—as when President Bush's top political advisor, Karl Rove, reportedly urged officials at the Department of Interior to reverse a biological judgment that caused the shut-off of irrigation water to hundreds of angry farmers in the Klamath River Basin. *See* Tom Hamburger, *Water Saga Illuminates Rove's Methods*, WALL ST. J., July 30, 2003, at A4.

434. *See* 16 U.S.C. § 1539(a) (2000) (governing Incidental Take Permits and Habitat Conservation Plans). For an in-depth analysis of the HCP negotiation process, see Shi-Ling Hsu, *A Game-Theoretic Approach to Regulatory Negotiation and a Framework for Empirical Analysis*, 26 HARV. ENVTL. L. REV. 33, 49–92 (2002).

435. *See* Johnston, *supra* note 39, at 1385.

436. *See supra* note 423.

the ESA decision making process in certain circumstances. The statute itself provides a process by which certain projects of regional or national significance may be exempted from the requirements of the Act if the Endangered Species Committee finds that they meet a cost-benefit test.[437] And Congress has on several occasions overridden the requirements of the Act for particular projects based on political and economic considerations. Although these exemptions and overrides have occurred only rarely in the history of the ESA, all negotiations under the Act take place against this backdrop. That is, the parties negotiating do so with an awareness that in extreme circumstances, even the absolute, biologically based backstops of the ESA can be overridden. Even in ordinary cases, this backdrop further increases the pressure on agency decision makers to covertly take economic and political considerations into account.

E. THE STATUTORY ESCAPE VALVE

Just five years after the ESA's enactment, Congress wrote an escape valve into the statute. Where the statute threatens to derail a major project, the project's proponents can petition an "Endangered Species Committee"—popularly dubbed the "God Squad"—for an exemption.[438] The Committee is explicitly authorized to consider the economic costs of species preservation and can grant an exemption if those costs "clearly outweigh" the benefits of protecting the species.[439] Given the seemingly absolute and unyielding standards of the ESA, one might expect this provision to be invoked all the time. In fact, however, the Endangered Species Committee has been convened on only a handful of occasions in the quarter century since its creation, and even in those rare instances, it has never granted a wholesale exemption from the ESA's protections.[440] These facts are themselves further

437. 16 U.S.C. § 1536(h)(1)(A)(ii).

438. *Id.* § 1536(e), (g).

439. *Id.* § 1536(h)(1)(A)(ii). The Committee must also find that "there are no reasonable and prudent alternatives," "the action is of regional or national significance," and there has been no "irreversible or irretrievable commitment of resources." *Id.* § 1536(h)(1)(A). The statute also allows economic considerations to be taken into account in designating critical habitat for threatened and endangered species. *See id.* § 1533(b)(2). Until recently, however, this provision was rarely implemented. *See* Sinden, *supra* note 3, at 151–60; Thompson, *supra* note 9, at 1139.

440. This provision was added to the statute in 1978 in response to the Tellico Dam controversy, in which the U.S. Supreme Court upheld an injunction against completion of the $100 million dam in Tennessee in order to preserve the critical habitat of an obscure fish called the snail darter. Ironically, when that case was submitted to the Endangered Species Committee, it ultimately refused to grant an exemption for the dam, concluding that the project could not be justified in cost-benefit terms. *See* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 683–84 (2d ed. 1998). The events surrounding the convening of the Committee in connection with the spotted owl controversy are described above. The only other project to receive an exemption from the "God Squad" was the Gray Rocks Dam in Wyoming, but that exemption was specifically conditioned on

testament to the rarity of jeopardy findings and the large extent to which jeopardy determinations are reached through a process of negotiation and compromise rather than through the wooden application of unyielding rules.

One of the few occasions on which the Endangered Species Committee has been convened was during the height of the spotted owl controversy.[441] BLM petitioned the Committee to exempt forty-four of the fifty-two timber sales on which FWS had called jeopardy for the spotted owl. The exemption process, of course, calls explicitly for economic costs to be taken into account, but on this occasion, at least, politics entered the equation as well. The Bush I administration was by this time fiercely resisting efforts to protect the owl, had publicly called for weakening the ESA,[442] and therefore viewed the Committee's decision to grant an exemption as "extremely important politically."[443] The Committee granted an exemption for thirteen of the forty-four sales,[444] but news reports shortly before the Committee issued its decision stated that at least three members of the Committee had been "summoned to White House meetings" and pressured to vote for an exemption.[445] Indeed, it appeared that at least one committee member may have changed his vote as a result, thus altering the outcome of the Committee's decision.[446]

In a pattern that is perhaps typical of ESA disputes, the ultimate resolution of this conflict involved both the courts and executive-branch politics. In a lawsuit by environmental groups charging that the White House's ex parte contacts with the Committee violated the Administrative Procedure Act, the Ninth Circuit ruled in favor of the environmental groups and remanded the decision to the Committee for further fact finding, thus casting the entire Endangered Species Committee proceeding into doubt. The Committee never got a chance to revisit the case, however. By the time the Ninth Circuit ruled, the Clinton administration had come into office, and, under new leadership, the BLM withdrew its request for the exemption.[447]

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modifications to the project that prevented it from causing jeopardy to the endangered whooping crane. *See* BEAN & ROWLAND, *supra* note 378, at 264–65 & n.337.

441. *See generally* Houck, *supra* note 142, at 329–45 (describing the exemption process with respect to the spotted owl timber sales).

442. PETERSEN, *supra* note 394, at 92, 94, 103–08.

443. Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1550 (9th Cir. 1993) (excerpting the affidavit of Victor M. Sher, counsel for plaintiffs).

444. *See* Northern Spotted Owl ESA Exemptions, 57 Fed. Reg. 23,405, 23,406 (June 3, 1992).

445. *See Portland Audubon Soc'y*, 984 F.2d at 1538 n.5 (quoting press reports).

446. *Id.* at 1538. The Committee vote was five-to-two in favor of the exemption. Since five votes in favor are required for an exemption, just one additional "no" vote would have changed the outcome. *Id.* at 1550 (excerpting the affidavit of Victor M. Sher, counsel for plaintiffs).

447. *See* Sher, *supra* note 393, at 57.

F. CONGRESSIONAL OVERRIDE

It is not just the politics of the executive branch that drives the resolution of ESA conflicts. In several instances over the course of the Act's history, particularly contentious issues have prompted Congress to jump into the fray—directly overriding agency implementation of the statute through legislation. Indeed, one of the first and most famous ESA controversies of all time was ultimately resolved in this way.

In the years just following enactment of the statute, the nearly completed $100 million Tellico dam project in Tennessee threatened to inundate the habitat of a little-known fish on the endangered species list called the snail darter. In this seemingly stark contest between economics and endangered species, the absolute language of the ESA seemed to dictate that the $100 million investment be sacrificed to save the fish. Indeed, the U.S. Supreme Court read it just that way, upholding a Sixth Circuit injunction prohibiting completion of the dam.[448] Despite this remarkable endorsement of "absolutism" by the Supreme Court, however, politics ultimately won out over biology when Congress passed an appropriations rider exempting the Tellico project from the ESA.[449]

A decade later, when enforcement of the ESA with respect to the spotted owl threatened to shut down logging in national forests across the Pacific Northwest, lawmakers in Congress immediately began proposing legislation to override the ESA's protections for the owl. One proposed law would have nullified the ESA's provisions with respect to the owl for five years.[450] Another bill would have dissolved all injunctions of timber sales on federal lands in Washington and Oregon for one year.[451] The Bush I administration responded to the owl controversy by urging Congress to pass legislation weakening the ESA and proposed a plan for managing owl habitat in the Pacific Northwest that it acknowledged would have required an amendment of the ESA.[452] Although none of this legislation actually passed, these constant calls for a congressionally imposed solution to the owl dispute certainly colored the negotiation process, reminding all sides that the ESA's absolute standards were not inviolate.

The 104th Congress that came into office in 1994 was openly hostile to the ESA, and when efforts to amend the statute failed, it again used the mechanism of the appropriations rider to directly override certain provisions of the Act. A rider attached to an emergency appropriations bill providing disaster relief to the victims of the Oklahoma City bombing exempted hundreds of timber sales on federal lands from the

448. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194–95 (1978).

449. *See generally* PETERSEN, *supra* note 394, at 60–69.

450. *Id.* at 90.

451. *Id.* at 90–91.

452. *Id.* at 92, 106.

environmental laws, including the ESA.[453] It was, in one Congressperson's words, "a timber lobbyist's dream."[454] In the same year, another rider attached to another emergency appropriations bill imposed a year-long moratorium on species listings and critical habitat designations.[455] Senator Kay Bailey Hutchinson, who introduced the bill in the Senate, opined that the country needed a "time out" from the ESA "so that silly things will not happen" like "salmon that are running the wrong way in a stream . . . tak[ing] precedence over the rights of farmers and ranchers."[456]

Thus, even though Congress only rarely steps in to directly alter the outcome of a dispute under the ESA, the knowledge of that possibility colors virtually all negotiations under the Act, providing additional leverage to economic interests.

G. THE ESA'S ENVIRONMENTAL TRUMPS

In sum, we have seen that ESA implementation occurs not through the mechanical application of rigid, unyielding standards, but through a process of negotiation in which the diffuse citizen interests favoring species preservation and the concentrated corporate interests favoring unrestricted development compete to influence agency decision making. Political and economic considerations play a role in these negotiations because (1) they affect the relative bargaining and lobbying strength of the competing interests, (2) agency officials are inevitably tempted to consider political and economic factors in deciding where within the reasonable range of discretion to situate their decisions, and (3) all parties to the negotiation act with an awareness that in an extreme case, even the seemingly absolute backstop of the ESA's biological standards can be overridden either by an Endangered Species Committee exemption or by direct congressional action.

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453. Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19, § 2001, 109 Stat. 194, 240–47 (1995). *See generally* Patti A. Goldman & Kristin L. Boyles, *Forsaking the Rule of Law: The 1995 Logging Without Laws Rider and Its Legacy*, 27 ENVTL. L. 1035 (1997); Jason M. Patlis, *Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts*, 16 TUL. ENVTL. L.J. 257, 283–84 (2003).

454. 141 CONG. REC. H3230 (daily ed. Mar. 15, 1995) (statement of Rep. Yates).

455. Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, ch. 4, 109 Stat. 73, 86; *see* Patlis, *supra* note 453, at 287–91. The moratorium was automatically renewed for the first part of fiscal year 1996 as Congress and the President haggled over the budget. Ultimately, the omnibus appropriations bill that President Clinton signed into law extended the moratorium for the following year, but it also contained a provision allowing the President to suspend the moratorium, *see* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1321-159–160, which President Clinton did. In the end, the moratorium remained in effect for 381 days. *See* Patlis, *supra* note 453, at 291.

456. 141 CONG. REC. S4009-03 (daily ed. Mar. 16, 1995) (statement of Sen. Hutchinson).

But the process of political negotiation that underlies ESA enforcement is not unbounded. It is not the standardless political free-for-all produced by cost-benefit analysis. Formally, at least, it takes place within the confines of the cost-blind, biologically based standards of the statute. And while the ambiguity embedded in those standards may offer the agencies some wiggle room, their discretion is not limitless. A whole category of argument, after all—appeals to economic costs—is declared off limits by the cost-blind standards of the ESA. As we have seen, this does not mean that such concerns do not creep in covertly, but their impact is significantly muted by their formal exclusion. Without the added uncertainty and ambiguity that monetizing benefits and balancing them against costs inevitably introduces, there are circumstances in which jeopardy is undeniably jeopardy. As Oliver Houck describes it: The ESA "convene[s] the meeting and draw[s] a bottom line."[457]

Thus, the substantive standards of the ESA tilt the playing field decidedly in favor of the diffuse citizen interests that favor environmental protection. Even these strongly tilted substantive standards would not be effective, however, without the corresponding procedural rights that allow environmental interests to go to court to ensure agency compliance with those standards. It is the absolute substantive standards in combination with the ESA's strong citizen-suit provision and other procedural requirements that give environmental groups concrete power in the negotiating arena—the threat of injunction. Ever since the Supreme Court set the stage in *Tennessee Valley Authority v. Hill*,[458] courts have repeatedly responded to citizen suits alleging violations of the ESA's procedural and substantive standards by issuing injunctions against development activity.[459] Such injunctions rarely end the controversy, but they give environmental interests leverage in the negotiating process—a seat at the table.[460]

457. Houck, *supra* note 137, at 959 ("The ESA provides the muscle for the discussions: a reason for them to take place, and a boundary below which they cannot fall.").

458. 437 U.S. 153 (1978).

459. *See* cases cited *supra* note 384.

460. *See* PETERSEN, *supra* note 394, at 87 (describing how, early in the spotted owl dispute, environmentalists forced FWS, the Forest Service, BLM, and the timber industry to the negotiating table with the threat of litigation).

Just as the substantive standards of the ESA would be of little effect without the statute's procedural rights, nor would the procedural rights—the citizen-suit provision, the deadlines, and the availability of injunctive relief—be effective without the underlying substantive standards. Without its absolute substantive standards, the ESA would not shift nearly as much bargaining power to environmental interests, as thirty years of experience with NEPA's purely procedural dictates makes clear. *See generally* Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245 (2000); Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207 (1992). While these substantive standards do create a zone of agency discretion, they are not entirely indeterminate (like CBA). Therefore, they can provide effective grounds for courts

This is precisely what happened in the spotted owl controversy. During the height of the dispute, environmental groups succeeded in enjoining literally hundreds of timber sales in the Pacific Northwest. But eventually these injunctions were lifted, and ultimately, the controversy was resolved not according to the federal court's interpretation of the language of the ESA, but through a politically negotiated compromise. In April 1993, President Clinton convened a "Timber Summit" in Portland, Oregon.[461] Stakeholders on all sides of the controversy expressed their positions and the Clinton administration subsequently hammered out a compromise, which came to be known as the Northwest Forest Plan. While the plan did not protect as much of the forest as environmentalists would have liked, its protections were far more extensive than would have occurred in the absence of the ESA.[462] By giving environmentalists the "bottom line" of the jeopardy standard and the threat of injunction, the ESA's absolute standards gave them leverage at the bargaining table, and thus to some degree compensated for the vast mismatch of power and resources between them and the wealthy corporate interests that opposed them.

It is apparent, then, that the absolute, cost-blind standards of the ESA do not translate literally into absolute results. But they do impact natural-resources decision making in a tangible and meaningful way by fundamentally altering the political power dynamic that governs the process. Rather than literally defining substantive outcomes, the ESA's absolute standards perform a crucial power-shifting function. By giving the diffuse citizen interests that favor environmental protection a credible threat of an injunction forcing agency adherence to a cost-blind standard, they counteract the endemic power disparity between diffuse citizen interests and concentrated corporate interests that would otherwise skew agency decision making against environmental protection. This power shift ultimately leads to politically negotiated outcomes that—while perhaps less protective of species than a literal reading of the ESA might dictate—are nonetheless

to overturn substantive agency decisions. Further, even when a court-issued injunction is based purely on procedural grounds, requiring the agency to apply substantive standards through the enforcement of procedural requirements can have meaningful effect. When, for example, a federal district court enjoined the Bureau of Reclamation from delivering water from the Klamath Irrigation Project to farmers before completing formal consultation with NMFS under the ESA, *see* Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228, 1251 (N.D. Cal. 2001), NMFS subsequently issued a biological opinion calling jeopardy in response to which the Bureau of Reclamation drastically reduced water deliveries for the remainder of the season in order to preserve stream flows for fish, *see* NMFS, BIOLOGICAL OPINION: ONGOING KLAMATH PROJECT OPERATIONS (April 6, 2001), http://swr.ucsd.edu/psd/kbo.pdf (on file with the Iowa Law Review). Deborah Schoch, *Dreams Dry Up in Klamath Basin*, L.A. TIMES, July 23, 2001, at A1.

461. PETERSEN, *supra* note 394, at 110.

462. Before the spotted owl was listed under the ESA, the Forest Service had proposed preserving 690,000 acres of owl habitat. *See id.* at 84. Ultimately, the Northwest Forest Plan protected approximately 10 million acres. *See id.* at 111.

substantially closer to the results we would hope to achieve under virtually any set of ideal criteria for environmental standard setting[463] than are the outcomes that would result from the political free-for-all that CBA inevitably produces.

IX. CONCLUSION

The debate about how best to craft environmental standards has raged for decades. Cost-benefit analysis—perhaps because of its well-established theoretical pedigree in welfare economics—is increasingly becoming the preeminent contender in that debate: the one to beat. Alternative principles for environmental standard setting have seemed like second-best approximations and have suffered from a lack of theoretical grounding. While some promising efforts to remedy these deficiencies have recently been made with respect to the feasibility principle, absolute standards have been largely ignored, or perhaps viewed as an embarrassment, an outmoded relic of the idealism of the 1970s.

But even as CBA is increasingly used by government agencies, some cracks are beginning to appear in its theoretical foundations. Even some of CBA's most ardent supporters now admit that its claim to mimic perfect market outcomes is theoretically incoherent. They now defend CBA as a pragmatic decision procedure—a second-best approximation—rather than a perfectly calibrated solution to the problem of market failure.[464]

As the capacity of welfare economics to provide a solid theoretical foundation for CBA thus comes into doubt, it is an opportune moment to begin to change the terms of the debate, to shift perspective by stepping outside the economic paradigm. Once we break free from the seductive pull of the tragedy of the commons and recognize that environmental degradation results not only from market failure but from a kind of political failure as well, things begin to look very different. We can see that the despoliation of our planet is driven not only by externalities and prisoners' dilemmas but by the pervasive imbalance of power between diffuse citizen interests and monied corporate interests that characterize virtually all environmental disputes. From this perspective, absolute standards no longer seem so anachronistic. If the problem is power imbalance, then maybe an absolute standard that privileges environmental protection over all else—that deems economic costs irrelevant and requires environmental interests to prevail except in extraordinary circumstances—is just the kind of thumb on the scale that is needed. Just as constitutional rights operate as trumps to counteract intractable power imbalances that threaten to distort government decision making—the power of the state over the individual, the power of privileged over subjugated groups—perhaps environmental standards ought

463. *See supra* notes 356–60 and accompanying text.

464. *See supra* notes 97–113 and accompanying text.

also to act as trumps in order to counteract the corporate/citizen power imbalance that plagues environmental decision making. If that is the case, then absolute standards may fit the bill nicely. That is to say, in a world where teenagers sport bell-bottoms with their iPods, absolutes can provide a realistic and coherent approach to twenty-first century environmental problems.