Health Theft

Jason R. Bent

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Three possible approaches have been advanced for setting appropriate occupational health standards: the feasibility principle currently employed by OSHA, cost-benefit analysis, and a “soft” cost-benefit analysis that allows for qualitative considerations. This Article rejects all three and advances a fourth possible approach that would focus on counteracting “health theft” by employers—employer actions that expose workers to health risks without compensation. An anti-health theft approach recognizes that Congress’s purpose in enacting the Occupational Safety and Health Act was to maximize worker welfare, not to maximize overall total social welfare. This Article makes both the positive claim that counteracting health theft was Congress’s intent when it enacted the OSH Act and the normative claim that an anti-health theft approach sets a rational regulatory standard justified on distributional grounds. The Article urges OSHA to adopt the anti-health theft principle as a reasonable interpretation of the ambiguous Section 6(b)(5) of the OSH Act.
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Health Theft

JASON R. BENT

I. INTRODUCTION

The term "wage theft" describes employer practices that deprive workers of full payment of wages or benefits to which they are entitled under federal or state law. Wage theft is a well-understood way for employers to capture some of the gains from trade in the labor market at the expense of workers, and it has been extensively chronicled in recent academic literature. But wage theft is not the only way that employers can extract some of the workers' rightful gains from trade in the labor market. Employers may also engage in "health theft" when they impose upon workers health risks for which the workers receive no compensation, either in the form of wage differentials or as compensatory payments for resulting illnesses. The prospect—and the reality—of health theft were apparent to Congress when it enacted the Occupational Safety and Health

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1 See, e.g., Kim Bobo, WAGE THEFT IN AMERICA 7 (2009) ("Wage theft is when an employer violates the law and deprives a worker of legally mandated wages."); Nantiya Ruan, What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers, 2012 MICH. ST. L. REV. 1103, 1106 ("Wage theft has become the twenty-first century moniker for a variety of wage and hour violations faced by low-wage workers in today’s workplace.").

Act (OSH Act) in 1970,\(^3\) which requires the Secretary of Labor to set national occupational health standards.\(^4\) This Article contends that the concept of health theft holds the key to understanding the goal of the OSH Act and thereby deciphering the OSH Act’s notoriously ambiguous directive for setting occupational health standards.

The OSH Act’s ambiguous Section 6(b)(5), once characterized by Justice Rehnquist as a “legislative mirage,”\(^5\) inspired an ongoing debate about how best to set occupational health standards. That debate runs as follows:

(1) Scholars resistant to formal cost-benefit analysis (CBA) defend the Occupational Safety and Health Administration’s (OSHA) current approach, known as “feasibility analysis.” These scholars emphasize key shortcomings of CBA, including the difficulty of placing a monetary value on human life and the need for dubious extrapolations when performing quantitative risk assessment.\(^6\)

(2) Law and economics scholars argue that all occupational health standards ought to pass a formal CBA, like most other regulations. CBA proponents reject OSHA’s feasibility approach as incapable of principled application.\(^7\)

(3) Others, most notably former Administrator of the Office of Information and Regulatory Affairs (OIRA) Cass Sunstein, favor a compromise approach, sometimes dubbed


\[^4\] 29 U.S.C. § 654(b) (2012) (requiring employers to comply with standards); id. § 655(b)(5) (directing the Secretary of Labor regarding the promulgation of “standards dealing with toxic materials or harmful physical agents”). The Secretary created the Occupational Safety and Health Administration (OSHA) to administer the Act, and has delegated to the Assistant Secretary for Occupational Safety and Health the authority to promulgate health standards under the Act. 29 C.F.R. § 1910.5 (1980); 36 Fed. Reg. 8754 (1971); see also Am. Textile Mfrs. Inst. v. Donovan (Cotton Dust), 452 U.S. 490, 494 n.1 (1981) (“The Secretary of Labor has delegated the authority to promulgate occupational safety and health standards to the Assistant Secretary”).


\[^7\] This view is exemplified by Jonathan S. Masur & Eric A. Posner, Against Feasibility Analysis, 77 U. CHI. L. REV. 657, 662 (2010) (asserting that feasibility analysis “lacks a normative justification and should have no place in government regulation”).
“CBA Lite” or “soft CBA.” This approach would ask whether the benefits of regulation justify the costs, even if they do not exceed the costs in absolute terms. Qualitative considerations might justify regulation even where a strict quantitative CBA calculation would not.  

This debate is unnecessarily circumscribed. A fourth approach would satisfy CBA proponents’ insistence on a principled decision rule, yet also accomplish the purposes of the OSH Act more effectively than CBA, CBA Lite, or even the feasibility test currently used by OSHA. This fourth approach is to set occupational health standards at the level that best counteracts health theft by employers. Health theft, as that term is used in this Article, refers to the direct economic benefit that employers receive, at the expense of a group of workers, as a result of exposing those workers to health risks for which the workers receive no compensation in exchange. To be clear, health theft is a distributional concern, not strictly an efficiency concern. Nonetheless, the primary claim of this Article is that health theft was a chief focus of the legislative body that passed the OSH Act in 1970, and that an anti-health theft decision rule can provide a normatively sound guiding principle for prioritizing and administering occupational health standards.

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8 See Amy Sinden, Cass Sunstein’s Cost-Benefit Lite: Economics for Liberals, 29 COLUM. J. ENVTL. L. 191, 200 (2004) (“Professor Sunstein has designed the brand of cost-benefit analysis he is selling to be as palatable as possible to liberals. It’s Cost-Benefit Lite, Compassionate Cost-Benefit Analysis, and Professor Sunstein cheerfully assures us it is ‘for everyone.’”).


10 See, e.g., Cass R. Sunstein, The Cost-Benefit State: The Future of Regulatory Protection (2002); Cass R. Sunstein, Risk and Reason: Safety, Law, and the Environment 112 (2002) [hereinafter Sunstein, Risk and Reason] (stating that if the benefits of a regulatory decision do not justify the regulation’s costs, the agency should be given the chance to explain itself and why the regulation is reasonable); Cass R. Sunstein, The Limits of Quantification, 102 CALIF. L. REV. 1369, 1404 (2014) (advocating for the use of a “breakeven analysis” of the costs and benefits of regulations when unquantifiable values are present); Cass R. Sunstein, The Arithmetic of Arsenic, 90 GEO. L.J. 2255, 2257 (2002) (proposing a “benefits range” approach to EPA regulations that would show who shoulders the benefits and burdens of a given regulation); Cass R. Sunstein, Cost-Benefit Default Principles, 99 MICH. L. REV. 1651, 1710 (2001) (stating that agencies should look into who wins and who loses because of a regulation when costs exceed benefits); see also Graham, supra note 9, at 433–34 (comparing the “hard test” and the “soft test” for CBA).

11 The term “health theft” is meant to capture a fundamental problem recognized by Congress when it enacted the OSH Act: that employers often directly benefit economically, at the expense of their employees, by providing lower levels of health protection to employees, and that this is especially true “where there is a long period between exposure to a hazard and manifestation of an illness.” S. REP. NO. 91-1282, at 4 (1970).

12 Such compensation could take the form of increased wages, increased employment hours, better benefits, additional job security, or other improved conditions of employment.
occupational health standards.\(^{13}\)

In more formal economic terms, the anti-health theft principle would require that OSHA standards be set at levels that maximize worker welfare (alternatively called worker surplus), regardless of whether the overall social costs of a standard exceed its overall social benefits. A regulatory standard focused exclusively on worker welfare would ensure that an OSHA health standard maximizes the net benefits to workers as a group—taking into account the risk of injuries or illnesses as well as the standard’s anticipated effects on employee wages, benefits, and employment levels—regardless of a standard’s overall efficiency from a CBA perspective.

This Article rejects all three of the proposed approaches to OSHA health standards advanced in the literature to date, in favor of an anti-health theft approach. The Article contends, as a descriptive matter, that the maximization of worker welfare to counteract health theft was precisely what Congress intended when enacting the OSH Act, and that it is the most sensible interpretation of the ambiguous language found in the OSH Act. The Article further contends, as a normative matter, that the anti-health theft principle is justified and should guide the promulgation of occupational health standards. As a policy prescription, this Article urges OSHA to expressly abandon its vague and inconsistent interpretation of feasibility analysis, and to adopt instead an understanding of feasibility that focuses on the maximization of worker welfare. This new approach to feasibility would offer a reasonable agency interpretation of the OSH Act’s directive, to which reviewing courts would be required to give deference under *Chevron v. NRDC.*\(^{14}\)

The Article proceeds as follows. Part II lays out the relevant statutory text and judicial attempts to interpret it, as well as a description of OSHA’s current understanding of the feasibility test. Part II also substantially expands on the current literature by providing the first comprehensive review of OSHA’s use of feasibility analysis in major health standards since the Supreme Court’s *Cotton Dust* case. Part III then frames the running academic challenge to OSHA’s feasibility standard advanced by proponents of CBA and CBA Lite. Part IV sets out the details of the

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13 This Article is addressed exclusively to the regulation of occupational health. Much of the literature debating the relative virtues of CBA considers environmental regulation as well as occupational safety and health. *See supra* notes 6–10 and text accompanying. Several factors relevant to the analysis in this Article, however, counsel in favor of a narrower claim regarding only occupational health regulations. First, in the occupational setting there exists a privity of contract between employees and employers that is absent in the context of environmental health risks. Second, differences between the statutory text and legislative history of the OSH Act and various federal environmental statutes suggest at least the possibility that potentially differing Congressional purposes underlie the respective federal statutes. For these reasons, the positive and normative claims set forth below are limited to occupational health regulation.

14 467 U.S. 837, 842–45 (1984) (holding that if Congress is silent on a precise regulatory question, courts must look at whether an agency’s interpretation of the statute at issue is permissible).
overlooked fourth approach to health standards: the anti-health theft principle. In doing so, Part IV draws upon the literature from a seemingly unrelated field of law—antitrust law, where a similar distributional principle has been widely influential. Part V makes the positive claim that the anti-health theft principle is consistent with the statutory text and well-supported by the legislative history of the OSH Act. Finally, Part VI makes the normative claim that OSHA ought to replace its current feasibility test, which has suffered from inconsistent application across specific occupational standards (as will be shown herein), with an interpretation of feasibility founded upon the anti-health theft principle. Part VI further demonstrates that an anti-health theft interpretation of feasibility analysis would satisfy CBA proponents’ insistence upon a clear, principled decision rule and would command the deference of reviewing courts.

II. FEASIBILITY ANALYSIS: A LEGISLATIVE MIRAGE?

"[The majority's] view is that Congress required the Secretary to engage in something called 'feasibility analysis.' . . . But those words mean nothing at all. They are a 'legislative mirage, appearing to some Members [of Congress] but not to others, and assuming any form desired by the beholder.'"15

A. The Statutory Text

Justice Rehnquist’s view that “feasibility analysis” under the OSH Act is a meaningless legislative mirage did not command a majority of the Court.16 Nonetheless, his underlying concern about the vagueness of the OSH Act’s statutory directive to the Secretary of Labor is well-taken. To understand his concern, and to understand the development of OSHA’s current feasibility test, a brief review of the OSH Act’s text and the key precedent interpreting that text is required.

The OSH Act, enacted in 1970, permits the Secretary of Labor to establish permanent health and safety standards for the protection of


16 In the 1980 Benzene case, Justice Rehnquist wrote only for himself. Benzene, 448 U.S. at 671 (Rehnquist, J., concurring). In the 1981 Cotton Dust case, Justice Rehnquist had convinced Chief Justice Burger to join his view that the OSH Act’s “legislative mirage” rendered it an unconstitutional delegation of legislative authority. Cotton Dust, 452 U.S. at 543 (Rehnquist, J., dissenting). Questions about the constitutionality of the OSH Act under the non-delegation doctrine have also been raised more recently by Cass Sunstein. See Cass R. Sunstein, Is OSHA Unconstitutional?, 94 VA. L. REV. 1407, 1447–48 (2008) (raising invalidation of the OSH Act on constitutional grounds as an aggressive, but plausible, course for courts to take following the Supreme Court’s decision in Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001)).
workers, and requires that covered employers comply with such standards. But the Act is remarkably vague about the type of analysis that is required (or permitted) of the Secretary in setting such permanent standards. There are only two textual provisions of the Act that can be viewed as constraining or guiding the Secretary’s promulgation of permanent standards. The primary one, Section 3(8) of the Act, is actually not a substantive directive to the Secretary, but is rather the Act’s definition of “occupational safety and health standard”:

The term “occupational safety and health standard” means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

Although no doubt open to widely varying interpretations, the italicized language in the definition above has been viewed as potentially constraining the Secretary’s authority to promulgate permanent standards.

The second textual provision of the Act that constrains the Secretary, Section 6(b)(5) of the Act, applies only to that subset of permanent standards “dealing with toxic materials or harmful physical agents” and provides, in relevant part:

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the

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17 29 U.S.C. § 655(b) (2012) (setting out the procedure by which the Secretary “may by rule promulgate, modify, or revoke any occupational safety or health standard”).
18 Id. § 654(a)(2).
19 See Sunstein, supra note 16, at 1407–08 (noting the breadth of the statutory directive to the Secretary in the OSH Act, analogizing it to a hypothetical directive to “do what you believe is best. Act reasonably and appropriately. Adopt the legal standard that your prefer, all things considered”).
20 See id. at 1408 (“Notably, this language appears in a mere definitional clause, not in a separate substantive provision instructing the Secretary what, exactly, he is supposed to consider in deciding what to do.”).
22 E.g., Am. Textile Mfrs. Inst. v. Donovan (Cotton Dust), 452 U.S. 490, 512–13 n.32 (1981) (noting that the language “reasonably necessary or appropriate” in Section 3(8) of the Act might require some balancing of costs and benefits in cases not involving toxic substances); Sunstein, supra note 16, at 1417 (raising the question how the Secretary should be constrained in cases not involving toxic substances).
period of his working life. . . . In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws.  

Section 6(b)(5) of the Act, with its multiple layers of qualifications and its use of the phrases “to the extent feasible” and “feasibility of the standards,” provides the textual footing for the type of feasibility analysis that Justice Rehnquist would later deride as a mere legislative mirage.

B. Benzene and Cotton Dust

The question whether Section 3(8) and/or Section 6(b)(5) of the OSH Act require the Secretary to weigh the expected costs imposed by a standard against its expected benefits was first presented to the Supreme Court ten years after passage of the Act, in the 1980 Benzene case. OSHA had promulgated a new, more restrictive standard for employee exposures to the substance benzene. The Court, however, avoided the difficult question about cost-benefit analysis by rejecting OSHA’s new benzene exposure standard on other grounds. A plurality of the justices found that OSHA had not met its initial burden of showing that the new benzene standard would reduce or eliminate a significant risk of harm to workers. Writing separately in Benzene, Justice Rehnquist first articulated his view that Congress had unconstitutionally delegated legislative authority to OSHA by not resolving the question whether or how costs were to be taken into account in setting standards.

25 Id. at 613. OSHA had promulgated a standard reducing the airborne permissible exposure limit (PEL) for benzene from 10 parts per million (ppm) to 1 ppm. See id. at 614 n.5.
26 See id. at 639–40 (“In our view, it is not necessary to decide whether either the Government or industry is entirely correct [about whether cost-benefit analysis is required]. . . . Because the Secretary did not make the required threshold finding [of a significant risk of harm under the existing PEL] in these cases, we have no occasion to determine whether costs must be weighed against benefits in an appropriate case.”). Only Justice Powell would have reached the cost-benefit question and required some form of cost-benefit analysis, concluding “that the statute also requires the agency to determine that the economic effects of its standard bear a reasonable relationship to the expected benefits. An occupational health standard is neither ‘reasonably necessary’ nor ‘feasible,’ as required by the statute, if it calls for expenditures wholly disproportionate to the expected health and safety benefits.” Id. at 667 (Powell, J., concurring in part).
27 See id. at 687 (Rehnquist, J., concurring in judgment) (“It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge.”).
The question of costs and benefits proved unavoidable in the next term’s *Cotton Dust* case. There, OSHA had promulgated a standard tightening the PEL for cotton dust across a number of different processes within the cotton industry. 28 Industry representatives argued that Sections 3(8) and 6(b)(5), when read together, required “OSHA to demonstrate that its Standard reflects a reasonable relationship between the costs and benefits associated with the Standard.” 29 This time, a majority of the Court reached the cost-benefit issue and rejected the industry’s position. The majority opinion, authored by Justice Brennan, held:

In effect then, . . . Congress itself defined the basic relationship between costs and benefits, by placing the “benefit” of worker health above all other considerations save those making attainment of this “benefit” unachievable. . . . Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is. 30

The feasibility analysis that OSHA had conducted, and that the Court appeared to endorse, 31 involved two distinct components: technological feasibility and economic feasibility. 32 The meaning of technological feasibility was not squarely at issue in *Cotton Dust*, 33 and has not been definitively articulated by the Supreme Court. One Court of Appeals put the inquiry this way: “To show that a standard is technologically feasible, OSHA must demonstrate ‘that modern technology has at least conceived

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28 The existing standard, an “established Federal standard” that had been adopted as an interim standard shortly after passage of the Act pursuant to Section 6(a) of the Act, included a PEL of 1,000 micrograms per cubic meter (ug/m³). See Am. Textile Mfrs. Inst. v. Donovan (*Cotton Dust*), 452 U.S. 490, 499 (1981). OSHA had promulgated a new, more restrictive cotton dust standard that included a PEL of 200 ug/m³ for yarn manufacturing processes, 750 ug/m³ for slashing and weaving, and 500 ug/m³ for all other cotton processes. See id. at 501–02.

29 Id. at 494.

30 Id. at 509.

31 Importantly, the *Cotton Dust* case was decided three years prior to the Court’s landmark administrative law decision in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). Thus, the Court did not employ Chevron’s two-step inquiry in reviewing OSHA’s interpretation of the OSH Act.

32 *Cotton Dust*, 452 U.S. at 495 (“They interpret the Act as mandating that OSHA enact the most protective standard possible to eliminate a significant risk of material health impairment, subject to the constraints of economic and technological feasibility.”). In finding that the legislative history supported the Secretary’s interpretation of the statute, the majority wrote: “Congress was concerned that the Act might be thought to require achievement of absolute safety, an impossible standard, and therefore insisted that health and safety goals be capable of economic and technological accomplishment.” Id. at 514. Justice Rehnquist also interpreted the majority decision as “adopt[ing] the Secretary’s view that feasibility means ‘technological and economic feasibility.’” Id. at 546 (Rehnquist, J., dissenting). The separate components of technological and economic feasibility are considered in detail in the following subpart.

33 See id. at 529 n.53 (“We also note that, although petitioners challenged the technological feasibility of the final Cotton Dust Standard in the Court of Appeals, they have abandoned such challenge here.”).
some industrial strategies or devices which are likely to be capable of meeting the PEL and which the industries are generally capable of adopting." The economic feasibility standard used by OSHA, and tacitly endorsed by the Court, in Cotton Dust generally asks whether compliance with a proposed standard would threaten "the long-term profitability and competitiveness of an industry." Precisely how OSHA has applied this standard in practice is discussed in the following subpart.

Justice Rehnquist, of course, believed that this supposed "feasibility analysis" was nothing more than a meaningless concept, drawn from ambiguous words chosen by Congress to avoid resolving the "hard policy choices" that were really at issue, including whether OSHA should be (a) required to, (b) permitted to, or (c) prohibited from, weighing the expected costs of a new permanent health standard against the expected benefits of that standard. Justice Rehnquist, therefore, would have invalidated the statute as an unconstitutional delegation of legislative authority.

Despite the protests of Justice Rehnquist, this time joined by Chief Justice Burger, it was Justice Brennan’s interpretation of Section 6(b)(5) and "feasibility analysis" that prevailed in Cotton Dust, and that has guided OSHA in its promulgation of health standards ever since. Cotton Dust remains the leading precedent on how the costs imposed by an occupational health standard should be taken into account, if at all, by OSHA when setting permanent standards. The next subpart examines OSHA’s inconsistency in applying the feasibility analysis endorsed in Cotton Dust.

C. OSHA’s Economic Feasibility Test in Practice

The literature debating the respective virtues of feasibility analysis and cost-benefit analysis contains samplings of OSHA’s treatment of economic feasibility in practice. For example, Professors Masur and Posner in


35 See Cotton Dust, 452 U.S. at 530–31 n.55. The Court appeared to leave open the possibility that an even more forgiving test of economic feasibility (from a regulator’s perspective) could be applied by OSHA, stating, “[T]hese cases do not present, and we do not decide, the question whether a standard that threatens the long-term profitability and competitiveness of an industry is ‘feasible’ within the meaning of § 6(b)(5) of the Act.” Id.

36 Id. at 543–44 (Rehnquist, J., dissenting).

37 Id. at 548.

38 For present purposes, economic feasibility is the more relevant of the two components of feasibility analysis, as it is directed to some consideration of whether the costs of compliance cause the standard to fail the statutory feasibility requirement.
Against Feasibility Analysis, use a case study to meticulously examine the economic feasibility analysis performed by OSHA in its 2006 promulgation of the Hexavalent Chromium Standard. But the literature does not yet include a more comprehensive examination of how OSHA has implemented economic feasibility across many different health standards. This subpart fills that void in the literature by taking a wider look at OSHA’s economic feasibility test, as actually applied by OSHA across thirteen different major substance-specific health standards that OSHA has successfully promulgated since the Cotton Dust case was decided in 1981. This overview reveals a striking inconsistency in OSHA’s own tests for economic feasibility; an inconsistency that ultimately lends credibility to CBA proponents’ claim that OSHA’s current feasibility analysis lacks a principled foundation.

Since the OSH Act became effective in 1971, OSHA has successfully promulgated or revised only approximately thirty major permanent health standards. Only twenty of those standards were promulgated or revised after the 1981 Cotton Dust case. The table below briefly summarizes how OSHA applied the concept of economic feasibility in promulgating thirteen of those standards that dealt with exposures to specific substances or toxins, including bloodborne pathogens.

<table>
<thead>
<tr>
<th>Standard</th>
<th>Year</th>
<th>Economic Feasibility Analysis Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ethylene Oxide</td>
<td>1984</td>
<td>Economic feasibility not specifically defined, and no specific thresholds identified. Compliance cost analysis determined that for ethylene oxide producers and ethoxylator sectors, compliance costs were approximately 0.2% and 0.1% of total annual sales. OSHA</td>
</tr>
</tbody>
</table>

See Masur & Posner, supra note 7, at 670–80 (outlining the authors’ examination of the OSHA economic feasibility analysis).

The health standards reviewed herein are hazard- or substance-specific standards. Accordingly, this review does not include OSHA’s Hazard Communication Standard, Field Sanitation Standard, Access to Medical Records Standard, Chemical Exposures in Laboratories Standard, Hearing Conservation, or Respiratory Protection Standard. Nor does this review include OSHA’s comprehensive update to the PELs for 428 different airborne contaminants, which was vacated by the U.S. Court of Appeals for the Eleventh Circuit in AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992).


NACOSH, supra note 40.
<table>
<thead>
<tr>
<th>Substance</th>
<th>Year</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cotton Dust</td>
<td>1985</td>
<td>For textile industries, economic feasibility was demonstrated by data from 1978 standard, and revised standard made compliance even more cost effective. Economic feasibility was not challenged, and compliance had largely been already achieved. For non-textile industries, including waste recycling and garnneting, upper-bound estimates of 10.4% of total revenues and 1% of total revenues, respectively, were not economically infeasible. OSHA also noted ability of these two sectors to pass through some costs. Even at higher cost estimates, no garnneting operations were predicted to close, although some might process synthetic rather than cotton wastes.</td>
</tr>
<tr>
<td>Benzene</td>
<td>1987</td>
<td>No specific thresholds identified. OSHA found that compliance costs, if fully absorbed by firms, would result in average 2% profit decline in affected product lines, except in iron and steel sectors, including coke and coal chemical. OSHA noted that the domestic steel industry was facing a financial crisis. For these sectors, OSHA permitted a longer five-year (as opposed to two-year) phase-in period for compliance. Given longer phase-in period, compliance was economically feasible for these sectors.</td>
</tr>
<tr>
<td>Formaldehyde</td>
<td>1987</td>
<td>Determined based on data showing that most industry sectors were operating at proposed PEL already; therefore, changes in cost to profit ratio were minimal and could be passed on to consumers where necessary. Annual compliance costs were less than 0.5% of</td>
</tr>
</tbody>
</table>

45 Id. at 51,169–71.
46 Id. at 51,170.
<table>
<thead>
<tr>
<th>Sector</th>
<th>Year</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bloodborne Pathogens</td>
<td>1991</td>
<td>No specific thresholds identified. Found that the average costs totaled less than 1% of revenue and 7% of profits for most sectors, with a maximum of 8.4% of profits for one sector. OSHA also provided evidence of strong demand for health care services, allowing firms to more readily absorb compliance costs. Standard was therefore economically feasible.</td>
</tr>
<tr>
<td>4,4 Methylendianiline (MDA)</td>
<td>1992</td>
<td>No specific thresholds identified. For general industry, predicted total annualized compliance costs of $10 million can be passed through to consumers; price increases will not be large; cost not large compared to net income; therefore, economically feasible. For construction industry, firms would face annualized costs of approximately $5450 each, which could readily be passed through with extremely small price increases or absorbed by the firms.</td>
</tr>
<tr>
<td>Cadmium</td>
<td>1992</td>
<td>Specific threshold of compliance costs identified at 20% of profits. Where proposed PEL engineering compliance cost met or exceeded 20% of industry profits, a less costly separate engineering control air limit (SECAL) was considered.</td>
</tr>
</tbody>
</table>

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51 Id. at 35,644.
<table>
<thead>
<tr>
<th>Substance</th>
<th>Year</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lead (construction)</td>
<td>1993</td>
<td>Formal economic feasibility analysis not required, due to specific authorizing legislation. In conducting regulatory impact analysis, no specific threshold identified for cost of compliance vs. annual payroll, sales, or profits.</td>
</tr>
<tr>
<td>Asbestos (multiple revisions)</td>
<td>1994</td>
<td>Latest Revision (1994): No specific thresholds identified. Found that the average incremental compliance costs total 0.6% of profits, therefore economically feasible. Where sectors had significant profit reductions, including friction materials (26.2%) and gaskets and packing (7.3%), they could be made up by passing cost to consumers.</td>
</tr>
<tr>
<td>1,3 Butadiene</td>
<td>1996</td>
<td>No specific thresholds identified. Found that the decrease in revenue is less than 0.5% and the profit loss is less than 4% in all industries, therefore economically feasible.</td>
</tr>
<tr>
<td>Methylene Chloride</td>
<td>1997</td>
<td>No specific thresholds identified. Compliance costs would average 0.18% of industry sales and 3.79% of industry profits, therefore economically feasible.</td>
</tr>
<tr>
<td>Hexavalent Chromium</td>
<td>2006</td>
<td>Specific threshold providing that cost of compliance should be less than 1% of revenue and less than 10% of profit to be considered economically feasible. Several industry-specific exceptions to threshold permitted.</td>
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<td>53 The Interim Final Rule for Lead Exposure in Construction was the result of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3924, which specifically directed the Secretary of Labor to issue an interim final rule for lead exposures in construction. The construction industry had been exempted from OSHA’s 1978 revision of the Lead Standard for General Industry from 200 ug/m³ to 50 ug/m³. OSHA Interim Final Rule, Lead Exposure in Construction, 58 Fed. Reg. 26,590, 26,590-91 (May 4, 1993). Because the interim final rule was issued pursuant to the authority of the Housing and Community Development Act, rather than the OSH Act, OSHA was “not required to comply with any of the requirements of the OSH Act for 6(b) rulemakings.” Id. at 26,592. Thus, OSHA was not required to “provide a formal analysis of economic and technological feasibility.” Id.</td>
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<td>58 Occupational Exposure to Hexavalent Chromium, 71 Fed. Reg. 10,100, 10,299–10,300 (Feb. 28, 2006) (“And while there is no hard and fast rule, in the absence of evidence to the contrary OSHA generally considers a standard economically feasible when the costs of compliance are less than one percent of revenues.”).</td>
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As is readily apparent from the table above, OSHA has been inconsistent in its implementation of an economic feasibility analysis. For some standards, such as the Cadmium Standard and the most recent Hexavalent Chromium and Silica Dust Standards, the agency declares a threshold or a decision rule based on compliance costs calculated as a percentage of annualized revenues, profits, or both. In other cases, OSHA does not indicate any such threshold, and simply determines that a certain compliance cost level is economically feasible for a given industry or sector, sometimes after comparing costs to that industry’s revenue or profit level. And even on the few occasions that OSHA has clearly articulated a threshold for economic feasibility, those thresholds have varied significantly! While 20% of profits were thought to be a critical cutoff for the Cadmium Standard, the thresholds for the more recent Hexavalent Chromium and Silica Dust Standards were set at 1% of revenue and 10% of profits.

This type of inconsistency is compounded by a number of ad hoc exceptions that OSHA sometimes determines to be appropriate for given industries or given applications of a substance. For example, in reducing the PEL for methylene chloride from 500 parts per million (ppm) to 25 ppm, OSHA estimated, based on several studies, that compliance costs would average 0.18% of industry sales and 3.79% of industry profits. But for three particular applications, compliance costs as a percentage of profits were significantly higher, including one that was an order of magnitude higher—furniture stripping, at 39.4% of profits. OSHA concluded that those few sectors would easily be able to pass the

| Respirable Crystalline Silica (Silica Dust) | 2016 | Specific threshold providing that cost of compliance should be less than 1% of revenue and less than 10% of profit to be considered economically feasible. OSHA identified eight industries in the General Industry and Maritime groups where costs exceed 10% of profit. OSHA noted that these industries “do not appear to be perfectly elastic or close to it,” and that they would “generally be able to pass on most or all of the costs of the final rule” through price increases rather than suffering decreased profits.59 |

61 Id. The other two applications were flexible polyurethane foam manufacturing (9.23%) and construction (9.67%). Id.
compliance costs through to consumers with a 2.1% or less increase in purchase prices. Further, OSHA found that many furniture-stripping applications were in market niches unlikely to be sensitive to such minor increases in purchase prices.

A similar ad hoc approach was taken when OSHA issued a standard in 1994 reducing the PEL for asbestos from 0.2 fibers per cubic centimeter (f/cc) to 0.1 f/cc. OSHA estimated that the incremental increase in compliance costs as a percentage of profits were moderate across affected industries, except for two industry sectors: friction materials and gaskets and packing. In those two sectors, OSHA estimated that compliance costs would be 26.2% and 7.3%, respectively. Nonetheless, OSHA found economic feasibility even as to these two sectors, reasoning that they could minimize the impact on profits by passing compliance costs through to consumers, resulting in a product price increase of less than 2%. OSHA determined that this modest price increase would not likely affect the demand for the sector products.

Likewise, Professors Masur and Posner reviewed OSHA’s feasibility analysis for the Hexavalent Chromium Standard and detailed twelve instances of industry-specific exceptions to the stated thresholds for economic feasibility (1% of revenue and 10% of profits). OSHA defended these departures primarily based on relatively weakly supported claims of price inelasticity, even for industries where compliance costs as a percentage of profits exceeded 20 or 30%. Similar observations about price elasticity were used to justify the imposition of compliance costs exceeding 10% of profits for certain industries in OSHA’s recent Silica Dust Standard.

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62 Id.
63 Id. at 1568 (“Approximately half of all furniture refinishing sales derive from antique refinishing, a market niche that is unlikely to be sensitive to a 2.0 percent change in price. Even in the area of used furniture refinishing, which constitutes the remaining half of the furniture refinishing market, a 2.0 percent price increase would be unlikely to significantly alter the amount of furniture being refinised.”).
64 Occupational Exposure to Asbestos, 59 Fed. Reg. 40,964, 40,978. The Asbestos Standard had already been revised a number of times since the first PEL for asbestos was promulgated in 1971, at a level of 12 f/cc. Id. at 40,964.
65 Id. at 41,050.
66 Id.
67 Id. (“For reasons given below, OSHA believes that profit impacts will be minimized by the ability of firms to pass forward costs to consumers. The small increases in product prices (less than 2 percent) necessary to cover the increased costs of production would be unlikely to affect the demand for these products.”).
68 Id.
69 Masur & Posner, supra note 7, at 678–79.
70 Id.
71 Occupational Exposure to Respirable Crystalline Silica, 81 Fed. Reg. 16,286, 16,545 (Mar. 25, 2016) (discussing predicted effects on demand of modest price increases in “brick and structural clay,
OSHA's inconsistency on economic feasibility analysis and its ad hoc approach to certain industries and applications lends credibility to the primary critique of feasibility analysis—that it is ultimately unprincipled. As Professors Masur and Posner put it, feasibility analysis as currently understood and implemented by OSHA "offers no theoretical way to determine the correct balance."  

III. CBA ALTERNATIVES TO FEASIBILITY

A. Full-Flavored CBA

In administrative law, the type of economic feasibility analysis described above is the exception rather than the rule. Beginning with an executive order issued by President Ronald Reagan in 1981, CBA has been required for all major regulations to the extent permitted by law.  

This general approach favoring some version of CBA for most regulations has been followed by subsequent presidential administrations, including President Barack Obama's administration. The promulgation of occupational health standards under Section 6(b)(5) of the OSH Act, however, has been interpreted to require feasibility analysis instead of

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72 Id. at 706.

73 Executive Order No. 12291, 46 Fed. Reg. 13,193, 13,194 (Feb. 17, 1981); see also Masur & Posner, supra note 7, at 659 (stating that when a statutory scheme forbids an agency from considering CBA, it still performs the analysis, merely disregarding the results in their decision-making). The 1981 Executive Order provides, in part:

In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies, to the extent permitted by law, shall adhere to the following requirements: . . . (b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society; [and] (c) Regulatory objectives shall be chosen to maximize the net benefits to society.

Executive Order No. 12291, 46 Fed. Reg. at 13,193. The Executive Order further provides that for all "major" rules, defined as those having an annual effect of $100 million or more on the economy, id., agencies must prepare a Regulatory Impact Analysis containing a description of the potential costs and benefits of the rule, along with a determination of the rule's potential net benefits. Id. at 13194.

74 See Executive Order No. 13563, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) ("[T]o the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify) . . ."). This 2011 Executive Order, and particularly its reference to benefits that "justify" costs, reflects the influence of CBA Lite, as advocated by Cass Sunstein, who served as the Administrator of OIRA from 2009 to 2012. Cass R. Sunstein, The Office of Information and Regulatory Affairs: Myths and Realities, ADMIN. & REG. L. NEWS, Summer 2013, at 8, 8; Memorandum from Cass R. Sunstein, Adm'r, Office of Mgmt. & Budget, to Heads of Exec. Dep'ts & Agencies, & of Indep. Regulatory Agencies 1 (Feb. 2, 2011), http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf [https://perma.cc/8V4V-VUXJ] (indicating that Executive Order No. 13563 permits consideration of values that are "difficult or impossible to quantify").
CBA, given the text of Congress’s statutory directive.\textsuperscript{75} As Justice Brennan’s majority opinion in \textit{Cotton Dust} put it: “cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is.”\textsuperscript{76} Most courts and commentators have construed the majority opinion in \textit{Cotton Dust} to mean that CBA analysis is not permitted in setting Section 6(b)(5) occupational health standards.\textsuperscript{77}

Nonetheless, even after \textit{Cotton Dust}, some CBA adherents have urged OSHA to employ CBA on all occupational health and safety standards, including Section 6(b)(5) health standards dealing with toxins.\textsuperscript{78} Formal CBA would require that the quantified aggregate benefits of a proposed

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\textsuperscript{75} Am. Textile Mfrs. Inst. v. Donovan (\textit{Cotton Dust}), 452 U.S. 490, 509 (1981). Congress’s apparent rejection of formal CBA in statutory text also appears in several environmental statutes. The Clean Air Act (CAA), 42 U.S.C. §§ 7401–7515 (2012), and the Clean Water Act (CWA), 33 U.S.C. §§ 1251–1388 (2012), are frequently cited examples of environmental statutes with Congressional directives that require feasibility analysis. \textit{Sunstein, Risk and Reason}, \textit{supra} note 10 (arguing that agencies should be required to show that the benefits justify the costs); Gregory Keating, \textit{Pricelessness and Life: An Essay for Guido Calabresi}, 64 Md. L. Rev. 159, 187 (2005) (citing the CWA as an example of a statute requiring economic feasibility analysis); Michael A. Livermore & Richard L. Revesz, \textit{Rethinking Health-Based Environmental Standards}, 89 N.Y.U. L. Rev. 1184, 1193 (2014) ("Best available technology standards in the Clean Air Act and Clean Water Act are prominent examples of feasibility standards."); Cass R. Sunstein, \textit{Cost-Benefit Default Principles}, 99 Mich. L. Rev. 1651, 1665 n.83 (2001) (citing Section 6(b)(5) of the OSH Act and the CAA as examples of statutory directives that have been interpreted as requiring feasibility analysis). A third approach, “health-based” standards that are entirely cost blind, is even required for some forms of environmental regulation, including in setting National Ambient Air Quality Standards (NAAQS) under the CAA. Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 471 (2000) ("The text of § 109(b), interpreted in its statutory and historical context and within appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA."); Livermore & Revesz, \textit{supra}, at 1193–94 ("Health-based standards . . . are the third principal approach to determining the stringency of environmental regulation . . . . They differ from feasibility standards because they are not constrained by what a particular industry could achieve without going out of business."); Noah M. Sachs, \textit{Rescuing the Strong Precautionary Principle from Its Critics}, 2011 U. Ill. L. Rev. 1285, 1310 n.121 ("In 2001, the Supreme Court affirmed that the NAAQS are health-based standards that EPA must establish without reliance on cost-benefit analysis.").

\textsuperscript{76} \textit{Cotton Dust}, 452 U.S. at 509.

\textsuperscript{77} Pub. Citizen Health Research Grp. v. U.S. Dep’t of Labor, 557 F.3d 165, 177 (3d Cir. 2009) ("We note that the Supreme Court has conclusively ruled that economic feasibility does not involve a cost-benefit analysis."); Am. Dental Ass’n v. Martin, 984 F.2d 823, 825 (7th Cir. 1993) ("OSHA did not (indeed is not authorized to) compare the benefits with the costs and impose the restrictions on finding that the former exceeded the latter."); Bldg. & Constr. Trades Dep’t v. Brock, 838 F.2d 1258, 1264 (D.C. Cir. 1988) ("In \textit{Cotton Dust} the Court held that the ‘feasibility’ standard of §6(b)(5) does not require the Secretary to balance cost and benefit in defining a standard, and clearly manifested the Court’s belief that the Act did not permit the Secretary to do so"); Randy S. Rabinowitz & Mark M. Hager, \textit{Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada}, 33 CORNELL INT’L L.J. 373, 382 (2000) ("In deciding whether to regulate toxins, OSHA may not use cost-benefit analysis, which generally yields less protection than would feasibility analysis. . . . Rather, it must reduce significant risk so long as such reductions are economically and technically feasible."). \textit{But see} Masur & Posner, \textit{supra} note 7, at 669–70 (contending that OSHA should be permitted to use CBA instead of feasibility analysis as a proper exercise of \textit{Chevron} discretion).

\textsuperscript{78} E.g., Masur & Posner, \textit{supra} note 7, at 669–70.
occupational health regulation exceed the quantified aggregate costs of complying with that regulation. Professors Masur and Posner contend that CBA is the only principled approach to setting Section 6(b)(5) occupational health standards. For Masur and Posner, CBA uniquely offers a clear and coherent guiding principle—the maximization of total social welfare—while feasibility is essentially rudderless.

Masur and Posner make their case primarily by attacking feasibility analysis as an unworthy alternative to CBA. They offer a range of critiques of feasibility analysis, broadly summarized as follows:

(a) that feasibility analysis does not provide a coherent stopping point for how far regulation should go;

(b) that feasibility analysis overregulates because it ignores the costs of regulations imposed on consumers. This permits regulation at a level that would fail CBA because negative effects on consumers outweigh benefits, but that would pass feasibility because it would not lead to widespread plant closures;

(c) that feasibility analysis overregulates by focusing on plant closures, rather than total job loss, thereby ignoring widespread increases in unemployment that do not cause plant closures;

(d) that feasibility analysis underregulates by prohibiting a regulation that would substantially reduce a significant risk of harm simply because it may close some plants, even though the overall benefits may outweigh the costs;

(e) that feasibility analysis provides no clarity, leaving agencies to the use of arbitrary presumptions or rules, with ad

79 Id. at 706.
80 Id. at 698–99, 706.
81 See id. at 702 (“But [feasibility analysis] does not explain how far regulation should go: at what point should we regard suppression of economic activity as too great to justify a regulation that reduces risk?”).
82 See id. (“A regulation that reduces risks of harm very little, while imposing very high costs on consumers, should not be issued even if it does not close any plants.”).
83 See id. at 703 (“And this is not even to mention the fact that regulations that do not cause ‘widespread plant closings’ could nonetheless lead to widespread layoffs—that is, layoffs from plants that are not entirely shut down.”); see also Jonathan S. Masur & Eric A. Posner, Regulation, Unemployment, and Cost-Benefit Analysis, 98 Va. L. Rev. 579, 585 (2012) (noting that neither bankruptcy rates nor widespread plant shutdowns “necessarily implicate[] unemployment—workers at firms that close might be hired by the firms that remain open or be absorbed into other industries.”).
84 Masur & Posner, supra note 7, at 702.
hoc exceptions that are inadequately justified; and finally, (f) that feasibility analysis creates a path dependency problem. This critique posits that, under feasibility analysis, risks considered earlier in time arbitrarily will tend to be regulated more heavily, as there are more industry profits available to put toward compliance without running afoul of economic feasibility, while risks considered later in time will tend to be underregulated, as industry’s profits have already been depleted by earlier regulations, leaving less resources available for compliance costs without violating economic feasibility.

Masur and Posner recognize that CBA is not perfect, either. The quantification of some inputs in the CBA calculation (most obviously health benefits) is a troubling issue, although attempts have been made to estimate the value of statistical lives using available data. Some benefits often get left out of the equation altogether, as do many nonfatal, non-cancer illnesses. There are also arbitrary but critical decisions to be made in CBA, such as identifying the proper discount rate for costs that are not incurred, or benefits that are not accrued, until some point in the future. In sum, Masur and Posner acknowledge that, like feasibility, “CBA also uses vague terms, and requires some choices that are relatively arbitrary.”

85 See id. at 706 (“As the [OSHA hexavalent] chromium and [EPA] paper mill regulations illustrate, the agencies’ use of the test seems to be ad hoc. The explanations are unpersuasive, the presumptions or rules they use arbitrary, and the recourse to exceptions frequent and inadequately justified.”).

86 See id. at 698 (“Finally, feasibility analysis is path dependent and can result in underregulation if more hazardous activities are discovered after regulations addressing less hazardous activities are issued.”). Masur and Posner note that agencies might avoid this path dependency problem by refraining from issuing regulations that will require an overly large portion of industry profits for compliance. But they contend that any such self-imposed restraint by the regulators only reveals the potential for underregulation—areas where tighter regulations might be cost-benefit justified, but where the agency does not want to exceed some arbitrary percentage of profits in compliance costs. Id. at 696-97.

87 See id. at 701 (summarizing these quantification issues, and noting that CBA “analysts have struggled with these problems and proposed a range of imaginative methods for estimating and monetizing harms”). Masur and Posner cite the well-known work of W. Kip Viscusi and others who have, among other techniques, used evidence of compensatory wage differentials—risk premiums—to estimate the value that individuals place on their own lives. Id. at 701 n.206 (citing, inter alia, W. Kip Viscusi & Joseph E. Aldy, The Value of Statistical Life: A Critical Review of Market Estimates Throughout the World, 27 J. RISK & UNCERTAINTY 5 (2003)). For more such studies, see also Driesen, Two Cheers, supra note 6, at 317 (noting the “controversial assumptions” inherent in monetizing health or environmental risks).

88 For instance, in estimating the benefits of the Hexavalent Chromium Standard, only illnesses caused by cancer or dermatitis were considered. Masur & Posner, supra note 7, at 671.

89 See id. at 674 (noting that in the Hexavalent Chromium Standard calculations, the choice between a seven percent and three percent discount rate affected the estimated benefits of various levels of regulation by a factor of almost two).

90 Id. at 705.
Yet, they maintain that CBA is superior to feasibility because only CBA has a coherent normative basis. They write:

But if the analyst keeps the overall goal of CBA in mind—the promotion of public well-being—then the ambiguities [inherent in CBA] can be resolved. Feasibility analysis's notion of balancing employment with health and safety provides no similar guidance because it offers no theoretical way to determine the correct balance.91

In this passage Masur and Posner make it quite clear that the normative guiding principle for CBA should be the maximization of overall total welfare. They do not consider that the maximization of only worker welfare might be an alternative normative basis that could provide just as much guidance to an analyst.

In responding to Masur and Posner's critique, Professor Driesen acknowledged some of the shortcomings of feasibility.92 Indeed, the title of his response paper, Two Cheers for Feasible Regulation, reflects an understanding that feasibility is not "a perfect ideal for regulation, but [rather] a rational norm among several plausible ones."93 Nonetheless, Driesen argues that Masur and Posner's accusations of under- and over-regulation were measured against the yardstick of monetized costs and benefits—thus "assum[ing] what they try to prove."94 Driesen argues that Masur and Posner never examine or justify their answer to the key question: "Is the equation of aggregate costs and benefits at the margin the proper ideal for regulation?"95

B. CBA Lite

Recognizing many of the traditionally identified weaknesses with formal CBA, including the quantification of health benefits or deaths avoided, some have proposed a qualified version of CBA that asks whether the benefits of a regulation justify its costs. The leading proponent of this view is former Administrator of OIRA Cass Sunstein. As an academic, Sunstein developed his version of CBA in a series of books and articles.96 Some have referred to Sunstein's approach as CBA Lite or Soft CBA.97

The critical difference between Sunstein's CBA Lite and full-flavored

91 Id. at 705–06.
92 Driesen, Two Cheers, supra note 6, at 315 ("I agree with Masur and Posner's characterization of that practice as less than wholly satisfactory.").
93 Id.
94 Id.
95 Id.
96 See sources cited supra note 10.
97 See supra notes 8–9 and accompanying text.
CBA is that CBA Lite recognizes that some qualitative benefits cannot be easily quantified, yet may provide justification for a regulation that might otherwise fail a CBA test that turned solely on quantified marginal costs and marginal benefits. As Professor Sunstein describes this view, analysts employing CBA should have before them a “full accounting” of the consequences of regulation, “in both qualitative and quantitative terms.” The regulatory officials should then make decisions without being tightly bound by the numbers, but they should “be prepared to explain how the benefits justify the costs, or if not, why it is nonetheless worthwhile to go forward.”

CBA Lite suffers from some of the same drawbacks as formal CBA. It relies, to a large extent, on a quantification and monetization of the health benefits of regulation. That exercise is fraught with uncertainty, both practical and theoretical. Yet, a CBA Lite approach may also suffer from the sort of uncertainty that Masur and Posner abhor. What kinds of qualitative factors should be deemed sufficient to “justify” the imposition of regulations that are not mathematically justified by a comparison of quantified marginal benefits to quantified marginal costs? If feasibility analysis lacks a guiding principle for regulators, then it would appear that CBA Lite is similarly lacking.

IV. THE ANTI-HEALTH THEFT PRINCIPLE

Proponents of CBA and CBA Lite have a point. Feasibility analysis, at least as it is currently understood and applied by OSHA, is unprincipled. Differing thresholds for compliance costs as a percentage of profits and revenue show that OSHA is not operating with a clear decision rule. Likewise, ad hoc exceptions for certain industries or applications that OSHA rationalizes with conclusory statements about market niches and price elasticity make it difficult to comprehend exactly what OSHA means by “economic feasibility.” Why are elasticity of demand and potential price increases mentioned only for certain industries in certain regulatory impact analyses, when compliance costs as a percentage of revenue or profits appear to be OSHA’s preferred measures of economic feasibility?

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98 SUNSTEIN, RISK AND REASON, supra note 10, at 106–07.
99 Id. at 107.
100 McGarity, supra note 9, at 2344–45 (“When addressed to credible risks to human health, however, this monetization function encounters not only large measurement uncertainties, but also serious theoretical impediments, including the daunting question of whether the proper measure is ‘willingness-to-pay’ or ‘willingness-to-sell.’”). Professor McGarity contends that Sunstein recognizes the great degree of uncertainty inherent in quantifying health benefits, yet adheres to his favored form of soft CBA because of his apparent contempt for the way ordinary individuals make decisions about risk. Id. at 2365, 2376.
101 See Graham, supra note 9, at 437, 447–48 (describing “intuitive balancing,” an essentially unprincipled form of weighing test which is part of CBA Lite).
What, exactly, is the guiding theory that feasibility analysis can offer for selecting a PEL that reaches the correct balance, avoiding both under-regulation and over-regulation? Identifying a stopping point is important, regardless of whether the yardstick is aggregate costs and benefits at the margins or something else. CBA proponents believe feasibility offers no such alternative theory, leaving CBA (or perhaps CBA Lite) as the only principled alternative for occupational health regulation.

Yet, accepting that OSHA's current economic feasibility standard is unprincipled does not require that one accept CBA proponents' normative theory of the correct balance. Masur and Posner argue that, unlike feasibility analysis, CBA offers an overall goal—"the promotion of public well-being"—to guide regulators. By "public well-being," Masur and Posner are decidedly referring to the maximization of overall social welfare. But acknowledgement of the problems with OSHA's current understanding of feasibility analysis does not necessarily require acceptance of the proposition that maximization of overall public well-being is or should be the goal of the OSH Act. There is another possible goal for occupational health regulation; one that has been accepted in other regulatory contexts, but that was not considered by Professors Driesen, Masur and Posner, or Sunstein. That goal is the maximization of worker welfare.

A. Worker Welfare, Not Overall Social Welfare

Many economists, including Masur and Posner, generally take as an appropriate policy goal the maximization of overall social welfare. The maximization of overall social welfare in any given market involves the maximization of the sum of two separate components of social welfare—consumer surplus and producer surplus. The sum of these two components is sometimes referred to as "total welfare" or "total surplus." In the classic graphical depiction of partial market equilibrium for a given good in a competitive market, consumer surplus and producer surplus are represented in Figure 1.

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102 Masur & Posner, supra note 7, at 698.
103 Id.
104 Id.
105 See N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 145 (6th ed. 2012) ("[T]he economic well-being of a society ... [can be] measured as the sum of consumer and producer surplus, which we call total surplus.").
In the labor market, workers are the producers of the market good (labor) and employers purchase their labor for a price (wages, benefits, and other terms of employment). Figure 2 depicts a partial equilibrium model of the labor market. In Figure 2, producer surplus can now be labeled "worker surplus," while consumer surplus can now be labeled "employer surplus." In the assumptions behind this hypothetical labor market model, the labor supply curve intersects with the price axis at point M, representing the lowest price that any worker in this market would be willing to accept for his or her labor (here, $1$).
Worker surplus is depicted by the area bounded by $P-E-M$ in Figure 2, and represents the total amount of welfare that workers, as a group, receive by trading their labor for the market-rate package of wages and benefits (here, $P = 5$), when they would have been willing to work for less. Conversely, "employer surplus" represents the total amount of welfare that employers obtain by purchasing workers' labor at that same market rate, when they would have been willing to pay more for the same labor. Employer surplus most immediately benefits the employing firm in the form of increased profits. Employer surplus will, in some measure, also redound to the benefit of the shareholders of the employing firm in the form of increased share value or increased dividend payments. Some portion of any increase in employer surplus may also be reflected in benefits to consumers in the market for the goods produced by the employing firm, either in the form of decreased prices for that good or increased output quantity of that good.

Maximizing total welfare often makes sense as a regulatory policy goal, especially where there is reason to believe that markets are
functioning reasonably well. But some markets do not operate efficiently, often due to the failure of one or more of a set of assumptions underlying microeconomic theory’s predictions about markets in perfect competition (e.g., imperfect information) or due to a positive or negative market externality (a cost imposed or a benefit conferred upon parties outside the relevant market). From an economic viewpoint, some type of governmental regulation is most justified where there are such recognized market failures.

In the context of occupational health standards, there is a virtual consensus among observers that market failure is at work. Indeed, even academics with an antiregulatory bent who tend to favor market-based solutions, such as Professors W. Kip Viscusi and Thomas Lambert, have recognized that information failures and externalities prevent an unregulated labor market from arriving at an efficient level of health precautions. Although those scholars would likely advocate some form of CBA for mandatory OSHA health standards, or some alternative means of correcting the market failure, they appear to at least acknowledge that an unregulated free labor market does a poor job of arriving at efficient

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107 See Hammer, supra note 106, at 860 (“Markets are imperfect and often fail. In the presence of market failures, arrangements that might otherwise be considered undesirable, like the presence of a monopoly, may in fact be welfare-enhancing.”); see also Stephen Breyer, Regulation and Its Reform 23, 26–28 (1982) (describing the classic justifications for regulating in response to externalities (or spillovers) and in response to inadequate information).


110 See Lambert, supra note 109, at 1070–71 (advocating opt-out OSHA standards, combined with an information-forcing provision that would require employers wishing to opt out to provide risk information to employees).
levels of risk and precaution regarding occupational exposures to hazardous substances.

This market failure is central to the thesis of this Article, because it results in health theft by employers. As Professor Lambert points out, one major source of market failure is imperfect information. Workers typically have poor information about the health hazards of exposure to hazardous substances in the workplace, and are also quite poor at assessing those risks. OSHA’s Hazard Communication Standard is an attempt to combat that recognized problem, but the information problem persists. Many employees remain unaware of the precise substances to which they are exposed at work, the levels at which they are exposed, and the health risks presented to them at those levels. Prospective employees have even less information than current employees. Even where the employee knows of exposure to a particular substance, the health risks are often scientifically unknown and are therefore not disclosed in the Material Safety Data Sheet (MSDS) required by OSHA’s Hazard Communication Standard. And even where health risks are known and disclosed, employees are only human, and generally do a poor job of evaluating and rationally weighing those risks in their decision-making process. Thus, employees do not demand the wages and benefits that they would otherwise demand to compensate for the health risks. In other words, employers can expose workers to health risks for which the employers ultimately do not have to pay compensation in the form of higher wages, better benefits, or other improved terms or conditions of employment; nor are employers likely to pay for these health costs through workers’ compensation claims or employee turnover, given the information failure. Employers benefit from a wealth transfer from employees, as a

111 See id. at 1009 ("[T]he primary market failure with respect to hazardous substances in the workplace is inadequate information." (footnote omitted)).

112 See Martha T. McCluskey, The Illusion of Efficiency in Workers’ Compensation “Reform,” 50 RUTGERS L. REV. 657, 773–74 (1998) ("For example, workers may not be able to choose higher compensation, or to quit a job with high risks of cancer or other diseases because of the length of time it takes to discover disease risks, the difficulty of recognizing the source and symptoms of occupational diseases, the expertise needed to evaluate the risks, and the difficulty of obtaining proprietary and technical data from employers and manufacturers about these risks.").

113 29 C.F.R. § 1910.1200(c) (2013).

114 Bent, supra note 109, at 1423–24.


116 Professor Charlotte Alexander advances a framework for analyzing the effectiveness of mechanisms for “transmitting” the externalized health costs of an employer’s activities from the injured employee back onto the employer. See Charlotte S. Alexander, Transmitting the Costs of Unsafe Work 5 (Mar. 5, 2016) (unpublished manuscript) (on file with author). Alexander’s framework looks at the efficacy of compensating wage demands, employee quits, complaints to government regulators, union activity, and workers’ compensation claims as possible mechanisms for cost transmission back to employers. The unique characteristics of occupational disease described above leave employees in a particularly poor position to transmit the health costs imposed by occupational exposures back to
group, due to the market failure. The effects of workers’ inadequate access to information about exposures to health risks in the workplace are depicted in Figure 3.

The information failure causes a distortion in the supply curve of the labor market, from S to S*. Workers supply their labor at a market wage employers by way of wage demands, quits, or workers’ compensation claims. The routes for transmission of costs back to employers are further limited due to the OSH Act’s lack of a private right of action. See Pedraza v. Shell Oil Co., 942 F.2d 48, 52 (1st Cir. 1991) (“[E]very court faced with the issue has held that OSHA creates no private right of action.”); Charlotte S. Alexander & Arthi Prasad, Bottom-Up Workplace Law Enforcement: An Empirical Analysis, 89 IND. L.J. 1069, 1070 n.1 (2014) (explaining that “bottom up” enforcement by private claims is unavailable under the OSH Act). Under Alexander’s framework, these restrictions on effective transmission mean that, in the absence of strong union activity or vigilant top-down regulatory enforcement, employers are likely to retain the benefits of health theft in the context of occupational exposures.

117 See Christine Jolls, Employment Law, in 2 HANDBOOK OF LAW AND ECONOMICS 1355 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (explaining that this effect on the supply curve will be observed if employees are not aware of the information problem or if they do not change their behavior
rate \((P^* = 4)\) that is less than they otherwise would \((P = 5)\) if they had perfect information about health risks and if they were to demand "correct" compensating wage differentials adequate to offset those risks. While the socially optimal equilibrium lies at point \(E\), the actual market equilibrium, given the workers' actions under the information failure, lies at point \(E^*\). The result is a lower market wage and a higher quantity of labor provided than would be observed in a perfectly competitive market where workers had full information, as shown in Figure 3.

But there is also an important distributive effect. The size of employer surplus increases (relative to the full information equilibrium) by the addition of the trapezoidal area \(P-E-Z-P^*\). The information failure permits an employer to obtain its labor input more cheaply, and these savings will result in either increased profits to the employer (and therefore higher returns to shareholders), or savings passed along to the ultimate consumers of the employer's product in lower prices and/or higher output. But much of this increased employer surplus comes at the expense of lost worker welfare. The trapezoidal area given by \(P-E-Z-P^*\) is transferred directly from worker surplus to employer surplus. This area represents health theft—an uncompensated transfer from worker welfare to employer welfare that is made possible by the information failure.

As a result of health theft, employers have an opportunity to earn more profit than they otherwise would if they had to fully internalize the health risks they impose on workers. Likewise, shareholders may earn more return on their investment in the employer's business than they otherwise would. And, to the extent these savings are passed through to consumers of the goods or services sold by the employer, consumers obtain a benefit in lower product prices than they would face if the employer had to fully internalize the health risks imposed in the product's production. In short, health theft from employees may result in increases in industry profits, increases in shareholder returns on investment, increases in output quantities of the relevant goods and services, and/or decreases in consumer prices, as compared to the efficient equilibrium market levels. Precisely how much consumers and shareholders will share in the fruits of health theft will depend on the price elasticities associated with the goods or services sold by the employer. But ultimately, the result of the market

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In recognition of their informational limitations, Professor Jolls summarizes the information failure's effect on the supply curve as follows:

If employees are unaware of some aspect of the employment relationship that would affect their willingness to supply labor, then observed labor supply will differ from employees' "true" willingness to supply labor. In the case of workplace safety, for instance, employees may lack adequate information about risks and harms and, as a result, may oversupply labor at a given wage rate.

*Id.*
failure is, at least in part, a transfer of some portion of what would otherwise be worker surplus in a perfectly competitive market to employer surplus, which benefits employers, their shareholders, and the consumers of their products. Recognizing the nature of this transfer from worker surplus to employer surplus in the context of occupational health, a regulator might reasonably respond with legislation that has as its goal the maximization of worker welfare, and not the maximization of total social welfare. A standard that has as its goal the maximization of total social welfare, as Masur and Posner advocate, would by definition accept a degree of health theft from worker welfare to the benefit of employer welfare, so long as the losses to worker welfare are exceeded by the gains to employer welfare. A standard that maximizes worker welfare, by contrast, would not accept losses to worker welfare, even if they were more than offset by gains in employer welfare. A standard that focused exclusively on maximizing worker welfare would be unconcerned with the negative effects that additional regulation might have on employer welfare, as reflected in decreased industry revenue, decreased industry profits, or increased prices. Effects on industry would only be relevant to the extent that they caused unemployment, wage decreases, or other negative effects for workers. Instead, a worker welfare standard would be concerned only with maximizing those things that are included in worker surplus—wages, benefits, job security, and terms and conditions of employment, which would necessarily include the health benefits to workers protected by the regulation.

One point frequently raised by CBA proponents merits further discussion: workers are always also consumers and are sometimes also shareholders (whether of their own employer or another firm). Thus, individual workers will always derivatively suffer some negative effect from a shrinking employer surplus. The most obvious example of this is that a worker will face higher prices for consumer goods if occupational health regulation is more stringent than if regulation is less stringent. A pure worker welfare standard, however, would ignore these derivative effects on workers as consumers or workers as shareholders. To the extent that workers gain any derivative benefit, whether as consumers or shareholders, from employer surplus, they also would and have gained an excessive derivative benefit from health theft’s transfer from worker surplus to employer surplus in the absence of regulation. In other words,

118 See Nicola de Luca, Unequal Treatment and Shareholders’ Welfare Growth: “Fairness” v. “Precise Equality”, 34 DEL. J. CORP. L. 853, 906 n.9 (2009) (“Under Kaldor-Hicks efficiency, an outcome is considered more efficient if a Pareto optimal outcome can be reached by arranging some compensation from those that are made better off to those that are made worse off.”).

119 Masur & Posner, supra note 7, at 703–04.
the prices for consumer goods that the worker/consumer faces in the absence of regulation are only as low as they are because of health theft. In a perfectly competitive market with perfect information, the price for that consumer good would be higher; so a regulator opting for a worker welfare standard might rationally choose to ignore the effect of increased consumer prices on workers who are also consumers.

This type of worker welfare standard, while certainly failing Masur and Posner’s regulatory goal of maximizing total social welfare, might nonetheless be justified on distributional grounds. Congress may have decided that, to counter what it perceived as uncompensated health theft transfers from worker surplus to employer surplus occurring in the unregulated labor market, occupational safety standards should have as their guiding principle the maximization of worker welfare, without regard to the effect of compliance costs on employer surplus.

B. A Regulatory Analogy: Antitrust’s Consumer Welfare Standard

A worker welfare standard is not as fanciful as it may sound. In fact, a similar standard is perhaps the leading understanding of the regulatory goal of U.S. antitrust law. A deep and long-running debate in antitrust law scholarship is whether the goal of antitrust law should be the maximization of total welfare or, instead, the maximization of consumer welfare. As Professor Peter Hammer notes, either might be a rational goal for antitrust policy and the regulation of mergers.

The debate is sometimes framed with a relatively simple merger example. Assume that a proposed merger would result in efficiency gains

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120 See, e.g., Jonathan B. Baker, Economics and Politics: Perspectives on the Goals and Future of Antitrust, 81 FORDHAM L. REV. 2175, 2176 (2013) (“The debate first took its modern form three decades ago as a dispute between Chicagoan Robert Bork and critic Robert Lande over antitrust’s origins. . . . Chicagoan Robert Bork read the legislative history to defend an aggregate surplus goal, while critic Robert Lande read it to defend a consumer surplus goal.”); Hammer, supra note 106, at 858–59 n.23 (describing the difference between the consumer welfare model and the total welfare model); Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 65, 93–96 (1982) (arguing in favor of a consumer surplus standard by contending that antitrust law was intended to prevent wealth transfers resulting from monopoly); Steven C. Salop, Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard, 22 LOY. CONSUMER L. REV. 336, 336 (2010) (“There has been long-standing antitrust controversy regarding the economic welfare standard for antitrust. Some commentators favor the aggregate economic welfare standard[] (sometimes called the ‘efficiency’ or ‘total surplus’ standard); other commentators favor what I will refer to as the true consumer welfare standard (sometimes called the ‘pure consumer welfare’ or ‘consumer surplus’ standard).” (footnote omitted)); see also HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 86 & n.19 (4th ed. 2011) (describing the debate between proponents of total welfare and proponents of consumer welfare in the antitrust literature and noting that, in the courts, antitrust policy follows a consumer welfare standard).

121 See Hammer, supra note 106, at 858–59 (“Conceptually, a rational antitrust policy could be designed to maximize either total welfare or consumer surplus.” (footnote omitted)).
by reducing the costs of producing a particular product, thereby increasing producer surplus (the producer's profits). But assume further that the reduced level of competition post merger leaves the rational producer in a position to raise prices above the pre-merger level, even after taking into account the cost savings from the efficiency gains. If the post-merger result is higher prices to consumers, and a resulting loss in consumer surplus, but the size of that lost consumer surplus is less than the resulting gain in producer surplus from increased profits, should antitrust policy condemn the merger? A total welfare standard would not condemn the merger, because total social welfare is increased. The gains to producer surplus (producer profits) outweigh the losses to consumer surplus (increased prices), and the total welfare standard disregards the wealth redistribution from consumer welfare to producer welfare. A consumer welfare standard would condemn the merger, because it decreases consumer welfare; the consumer welfare standard disregards the magnitude of the increased producer profits.

This debate in the antitrust academic literature began in the 1960s and remains ongoing and unresolved. Robert Bork was the leading proponent of the total welfare view, while Robert Lande led the consumer welfare challenge, arguing that Congress intended the antitrust laws to prevent mergers that would result in wealth transfers from consumers to producers, regardless of the merger's effect on total social welfare. In the courts, however, the academic debate is rarely mentioned. Instead, courts

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122 This basic example is presented in Salop, supra note 120, at 337, and also in Hovenkamp, supra note 120, at 86.
123 See Barak Orbach, How Antitrust Lost Its Goal, 81 Fordham L. Rev. 2253, 2269 (2013) (“Until the introduction of the consumer welfare standard in the mid-1960s, the notion that competition was the goal of U.S. competition laws appeared to be uncontroversial.” (footnote omitted)); John B. Kirkwood, The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct, 81 Fordham L. Rev. 2425, 2425 (2013) (“The goals of antitrust law continue to be debated because there is no single goal that is unambiguously correct.”). Professor Kirkwood’s article was part of a symposium held by the Fordham Law Review in 2013 titled, “The Goals of Antitrust,” which in itself demonstrates that the debate between total surplus and consumer surplus in the antitrust literature continues with fervor.
124 Most influential was his book, Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself (1978), making the case for a total welfare standard. Id. at 107–15. It should be noted that Judge Bork used terminology that is widely considered confusing (or perhaps even intentionally misleading) when he used the label “consumer welfare” to refer to what economists would call “total welfare.” See, e.g., Hammer, supra note 106, at 858 n.21 (recognizing Bork’s confusing terminology); Salop, supra note 120, at 336 (“I am using the ‘true’ qualifier because of the confusion that has resulted from Judge Robert Bork’s usage of the term ‘consumer welfare’ in referring to aggregate welfare.”).
125 See Lande, supra note 120, at 93–96 (“The [Congressional] debates strongly suggest that higher prices to consumers were condemned because they unfairly extracted wealth from consumers and turned it into monopoly profit.”).
126 See Hovenkamp, supra note 120, at 86 (“While the issue shows up frequently in the antitrust literature, it rarely appears in the case law, although it could.”).
considering antitrust cases appear to follow, with few exceptions, the consumer welfare standard. In reviewing the antitrust cases for insight into how courts view the goals of antitrust law, Professor James Kirkwood recently reached the following conclusion:

In the last two decades, in short, a majority of decisions, at all levels of the federal courts, have described the overarching goal of the antitrust laws as the protection of consumers rather than the maximization of social welfare. Most decisions, of course, did not address the issue, but those that did typically characterized the ultimate purpose as protecting consumers, not enhancing efficiency. . . . No court has allowed a practice or transaction that was shown likely to harm consumers or small suppliers on the ground that it would improve economic efficiency.

Regardless of which view one holds about the goals of antitrust, both positions are at least defensible as rational approaches to antitrust regulation. A rational and principled policy for anticompetitive mergers could have as its regulatory goal the avoidance of wealth transfers from consumer surplus to producer surplus, regardless of effects on overall total surplus. And this view of antitrust appears to be the prevailing one in the courts.

Recognizing that maximization of consumer surplus can be a legitimate and rational guiding principle in the context of antitrust law reveals that the debate between feasibility and CBA in the context of occupational health regulation has been too circumscribed. CBA advocates’ assertion that only CBA offers a guiding principle for regulators (maximization of total social welfare) is incorrect. As in antitrust law, there

127 See id. ("That is to say, antitrust policy adopts the 'consumer welfare' rather than the more general 'economic welfare' prescription."); Kirkwood, supra note 123, at 2430 ("More importantly, when [courts] address a conflict between these two goals, they always choose consumers. No court has allowed behavior found likely to harm consumers in the relevant market on the ground that it would enhance economic efficiency."); John B. Kirkwood & Robert H. Lande, The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency, 84 NOTRE DAME L. REV. 191, 196 (2008) ("The Chicago School’s efficiency view is not only incorrect on the merits; it has not triumphed in the courts."). But see RICHARD A. POSNER, ANTITRUST LAW, at ix (2d ed. 2001) (asserting a broad agreement that “the only goal of the antitrust laws should be to promote economic welfare”); Michael S. Jacobs, An Essay on the Normative Foundations of Antitrust Economics, 74 N.C. L. REV. 219, 239–40 (1995) (claiming that Robert Bork and the Chicago School had “won the battle for the soul of antitrust”).

128 Kirkwood, supra note 123, at 2443–44 (footnote omitted); see also Herbert Hovenkamp, Implementing Antitrust's Welfare Goals, 81 FORDHAM L. REV. 2471, 2477 (2013) (reaching a similar conclusion that antitrust policy has prioritized consumer welfare over total welfare where the two are in conflict).


130 HOVENKAMP, supra note 120, at 86; Kirkwood, supra note 123, at 2430.
is another possible guiding principle—the maximization of worker welfare, even at the expense of overall total welfare. Was maximization of worker welfare the goal that Congress intended when it enacted the OSH Act? The next Part explores that question.

V. HEALTH THEFT AND THE GOALS OF OSHA

This Part makes the positive claim that the maximization of worker welfare (as opposed to overall social welfare) was Congress’s principal goal in enacting the OSH Act. It begins by briefly reviewing the text chosen by Congress, and then proceeds to examine the key evidence from the legislative history.

A. The OSH Act’s Text

As detailed in Part II, the text of the OSH Act itself gives little indication of how costs and benefits should be weighed. In Cotton Dust, the Court relied on several dictionary definitions of the word “feasible” in Section 6(b)(5), including this one: “capable of being done, executed, or effected.” The Court then reasoned that Section 6(b)(5) requires setting the standard that “most adequately assures ... that no employee will suffer material impairment of health,” limited only by the extent to which this is “capable of being done.” But “capable of being done” obviously carries an implied limitation, a fact that Justice Rehnquist no doubt recognized. Capable of being done ... without causing what, exactly? Regulating all toxins to zero exposure levels or to zero risk levels is capable of being done, at least in the sense that OSHA could promulgate such highly demanding standards, to say nothing of the effects such extreme standards would have on industry. The Court itself implicitly approved one form of an implied limitation—an economic feasibility test that permits the Secretary to promulgate a more lenient standard if necessary to avoid widespread plant shutdowns or to avoid threatening the competitive balance of the industry. Do widespread plant shutdowns in a particular industry make a standard “incapable of being done?” As Masur and Posner rightly point out, a given health standard might well be justified due to overwhelming health benefits, even if it results in widespread plant shutdowns in a particular industry.

A dictionary definition of the word “feasibility” offers little insight into Congress’s goals for the OSH Act. There are, however, other textual

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132 Id. at 509 (quoting 29 U.S.C. § 655(b)(5) (2012)).
133 See supra note 35 and accompanying text.
134 See Masur & Posner, supra note 7, at 704 (“Underregulation occurs because feasibility analysis tolerated dangerous industrial practices if regulation would shut down plants.”).
clues. Congress had expressly required a cost-benefit analysis in other statutes, including the Flood Control Act of 1936 and the Outer Continental Shelf Lands Act Amendments of 1978. As the Cotton Dust majority notes, Congress elected not to use similar language in Section 6(b)(5) of the OSH Act. This suggests that Congress may have accepted occupational health regulation that would benefit workers, even at the potential expense of some loss in overall total social welfare. Yet, as Justice Rehnquist pointed out in the Benzene case, the same textual argument may run just as well against OSHA’s current feasibility approach. Congress has specifically limited regulatory analysis to technological and economic feasibility in some environmental statutes, but did not clearly do so in Section 6(b)(5) of the OSH Act.

Using the OSH Act’s relatively vague text alone, or when comparing it to the text Congress selected for other similar statutes, honest observers would likely admit that either reading is a plausible one. As with the antitrust laws, Congress members likely did not consider the question in the formal economic terms represented by the maximization of total welfare versus the maximization of only worker welfare. A worker welfare interpretation is at least consistent with the statutory text.

One additional textual clue lies in the comparison of Section 6(b)(5) health standards to other occupational safety standards. Section 6(b)(5) applies only to those standards “dealing with toxic materials or harmful physical agents,” and suggests stricter regulation for such standards than for those governed only by the definition of “occupational safety and health standard” found in Section 3(8). This suggests that Congress recognized an important difference between exposures to toxic materials...
and other types of physical safety hazards. Combined with evidence from the legislative history, it appears that Congress carved out exposures to toxic materials for different treatment because Congress recognized that workers were being exposed to such toxic materials without awareness of the risks, without receiving risk premiums for such exposures, and without the likelihood of recovering in tort or workers' compensation for any resulting illnesses. In other words, Section 6(b)(5) risks are treated differently in the text of the statute because such risks are most likely to be associated with health theft by employers.

B. The OSH Act's Legislative History

Evidence from the legislative history provides strong support for the view that the congressional body that enacted the OSH Act in 1970 would have rejected an approach that prioritized the maximization of overall total welfare above the maximization of worker welfare. The legislative history of the OSH Act is overwhelmingly focused on the preservation of worker health and safety. Aside from countless general statements about the importance of preserving worker health, more specific statements in the legislative history show that Congress intended worker welfare to be the primary regulatory concern, even at the expense of lost producer profits or losses to end consumers in the form of higher prices for consumer goods. Congressional statements during the debates on the OSH Act reflected a clear understanding of the market failures that create opportunities for health theft by employers.

Members noted the severe information deficiencies in the area of

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141 The Senate Committee Report accompanying the original Senate bill (S. 2193) stated as the original bill's purpose: "to reduce the number and severity of work-related injuries and illnesses which, despite current efforts of employers and government, are resulting in ever-increasing human misery and economic loss." S. REP. NO. 91-1282, at 1 (1970). The "shared objective" of the original Senate bill (S. 2193) and a substitute bill (S. 4404) is described as "reduce[ing] the number and severity of work-related injuries and illnesses which, in spite of current efforts, continue at high levels, and which cause human misfortune and economic waste." 116 CONG. REC. 35,606 (1970). Individual references to the importance of preserving employee health and safety in the legislative history are too numerous to list. See, e.g., id. at 36,523 (statement of Sen. Saxbe) ("We cannot be detracted by any other interest, of either the union or the employer, from our primary purpose of saving lives and preventing injury to employees."); id. at 37,625 (statement of Sen. Yarborough) ("We are talking about people's lives, not the indifference of some cost accountants."); id. at 37,325 (statement of Sen. Williams) ("The spread of industry and the mobility of the work force combine to make the health and safety of the worker truly a national concern."); id. at 37,345 (statement of Sen. Harris) ("It is both appalling and tragic that as many as 14,500 persons are killed annually as a result of industrial accidents. . . . The situation is equally appalling in the area of occupational health."); id. at 37,628 (statement of Sen. Nelson) ("If we are serious about our concern for providing a healthy environment for all of our citizens we must include as a high priority protection of the working men and women of our Nation in their places of employment.").

142 See supra note 141.

143 See sources cited supra note 141; infra text accompanying notes 146–47.
occupational health, and the inability of scientific knowledge to keep pace with the risks imposed on workers. For example, Senator Williams stated: “New scientific knowledge points to hitherto unsuspected cause-and-effect relationships between occupational exposures and many of the so-called chronic diseases—cancer, respiratory ailments, allergies, heart disease, and others.”

He also made specific reference to “frequent exposures” to a “great variety of toxic materials or harmful physical agents” (thus tracking the language of Section 6(b)(5)), urging: “[Workers] are often unaware of the nature of such exposure or of its extent. In some cases, the consequences of overexposure may [be] severe and immediate; in other cases, effects may be delayed or latent.”

Some members expressly considered the tradeoffs that more protective health regulation would require against increased consumer prices or decreased industry profits. For example, Senator Yarborough expressed his views on price effects: “We know the costs would be put into consumer goods but that is the price we should pay for the 80 million workers in America.” Likewise, Senator Eagleton considered the price that employers would pay in the form of lost producer profits: “The costs that will be incurred by employers in meeting the standards of health and safety to be established under this bill are, in my view, reasonable and necessary costs of doing business.”

One reason that members of Congress seemed willing to focus on preservation of worker health and safety, even at the expense of increased consumer prices or decreased employer profits, was that Congress appeared to believe the unregulated labor market was resulting in what this Article has termed health theft. Congress was concerned that employers were exposing employees to health risks, particularly exposures to hazardous substances, for which the employee was not receiving any compensation in the form of increased wages, benefits, or other improved conditions of employment due to an information inadequacy market failure.

No Representative or Senator used the term “health theft,” of course,

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116 CONG. REC. 37,325 (1970) (statement of Sen. Williams). Senator Williams pointed out that the Public Health Service “conservative[ly]” estimated that there were 390,000 new occurrences of occupational disease each year. Id. He further provided examples of “shameful” neglect of the worker’s health in specific industries: a delayed recognition of byssinosis as a “distinct occupational disease among workers in American cotton mills;” failure to strive to prevent asbestosis, pulmonary cancer, and mesothelioma, despite known risks of exposure to asbestos; and the lack of effective control over the use of pesticides and fungicides in the agricultural industry, “[d]espite the unmistakable danger that these substances present.” Id.

Id. at 37,326 (statement of Sen. Williams). Senator Williams further stressed the importance of both adequate protection “against excessive exposure to fumes, gases, dust, or other substances determined to be harmful” and adequate access to information about such hazards. Id.

Id. at 37,345 (statement of Sen. Yarborough).

Id. at 41,764 (statement of Sen. Eagleton).
but the concept of health theft was nonetheless expressed in the Congressional reports this way:

[T]he fact is that many employers—particularly smaller ones—simply cannot make the necessary investment in health and safety, and survive competitively, unless all are compelled to do so. The competitive disadvantage of the more conscientious employer is especially evident where there is a long period between exposure to a hazard and manifestation of an illness. In such instances a particular employer has no economic incentive to invest in current precautions, not even in the reduction of workmen’s compensation costs, because he will seldom have to pay for the consequences of his own neglect.148

This statement describes the result of a market failure, and it was that market failure that Congress sought to counteract with occupational health regulations under Section 6(b)(5) of the OSH Act. It would be contrary to Congress’s intent to now limit the reach of occupational health standards by placing the goal of maximizing total social welfare above the goal of worker welfare maximization. Congress fully understood that protecting workers from health theft would result in losses to employer surplus in the form of decreased employer profits, decreased returns to investors, and increased consumer prices. It deemed that outcome appropriate, even desirous, because Congress was counteracting what it perceived as a serious imperfection in the labor market that caused a wealth transfer from workers to employers, and derivatively, to consumers and investors.

VI. A PRINCIPLED INTERPRETATION OF FEASIBILITY

This Part makes the normative case that a worker welfare standard is a justifiable and workable alternative to CBA and CBA Lite, that it satisfies most (if not all) of the consistency concerns of CBA advocates, and that OSHA should adopt the worker welfare standard as a reasonable interpretation of Section 6(b)(5) of the OSH Act.

A. Distributional Justification

The decades-long debate over the goals of antitrust law149 shows that a rational regulatory policy might have as its goal either the maximization of total welfare or the maximization of only consumer welfare. Likewise, as Professor Driesen points out, the maximization of overall efficiency, measured by comparing the marginal costs of regulation to its marginal

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149 See supra Section IV.B.
benefits, is just one of several possible rational regulatory schemes for environmental or occupational health risks.\(^{150}\) Maximization of worker welfare is a rational alternative goal, and unlike OSHA’s current application of feasibility analysis, a worker welfare standard would provide a coherent guiding principle that should lead to consistency in application.

The maximization of only worker welfare can easily be justified on distributional grounds. To illustrate, imagine two simplified, hypothetical labor markets, Market A and Market B. In Market A, the assumption of perfect information is met, and the market is competitive. In Market A, 1,000 workers each have quantified welfare equaling $100. This welfare unit measure includes the workers’ wages, benefits, job security, health risk level, job satisfaction, and all other conditions of employment. Total worker welfare in Market A equals $100,000 (1,000 workers x $100). In Market A, employers as a group (industry) have a total welfare of $100,000. Total overall social welfare, the sum of worker welfare and employer welfare, therefore equals $200,000.

In Market B, workers have inadequate information about the health risks to which they are exposed, and long latency periods and problems of proof typically prevent workers from recovering for illnesses in workers’ compensation. The information failures and externalities lead to an oversupply of labor at any given wage. Market B, in other words, reflects the effects of health theft. In Market B, the same 1,000 workers now have quantified welfare equaling $70 each, as $30 each is lost to uncompensated health theft. Importantly, additional workers find employment in Market B, as production costs are lower and wages are lower. Assume that an additional 100 workers have quantified welfare of $70 each after finding work in this labor market, for a total of 1,100 workers with $70 welfare. The total worker welfare in Market B, given these assumptions, is $77,000.

In Market B, employer welfare is significantly expanded. First, employer welfare increases relative to Market A by $30,000 as a result of health theft from the original 1,000 employees. Employers do not have to pay compensating wage differentials for risky work, and they generally avoid paying for the costs of their negligence in the form of workers’ compensation. Employer welfare is also boosted by the ability to hire 100 additional workers at relatively lower wages, leading to increased output and increased profits. Assume the total value of this increase to be $20,000. In Market B, then, the total employer welfare in the labor market

\(^{150}\) See Driesen, Feasibility, supra note 6, at 47 (describing feasibility analysis as a “reasonable congressional judgment about how agencies should address the cost of environmental regulation”); Driesen, Two Cheers, supra note 6, at 314 (“This claim supports the feasibility principle, the idea that administrative agencies should regulate serious health and environmental hazards as stringently as possible without causing widespread plant shutdowns, not as a perfect ideal for regulation, but as a rational norm among several plausible ones.”).
equals $150,000. The gains in employer welfare from health theft, combined with the production efficiency gains, will result in substantial benefits for investors and consumers. Shareholders will earn higher returns and consumers will pay lower prices for the industry’s products. This is reflected in the gains to overall social welfare. The total overall social welfare in Market B, given the assumptions above, would be $227,000, of which $77,000 is worker welfare and $150,000 is employer welfare.

Given the choice between Market A and Market B, reasonable minds could differ about which market to prefer. A welfare-maximizing CBA proponent would likely argue that Market B increases the overall size of the economic pie, total social welfare ($227,000, as opposed to $200,000), which is better for society as a whole. Any distributive concerns might be taken care of through direct redistributive tax or welfare policies. But even Cass Sunstein recognizes that distribution matters when setting regulatory policy, and it certainly mattered to Congress, as unambiguously demonstrated in the OSH Act’s legislative history.

A rational policymaker might just as easily reject the preference for Market B’s larger overall total social welfare, reasoning that workers should have something akin to a property right in their health—yes, they can trade some portion of their health away by taking on risk in exchange for some form of market compensation, but employers cannot obtain that portion of the worker’s health without compensation by taking advantage of well-recognized information failures and externalities in the labor market. The existence of uncompensated health theft in Market B might improve overall social welfare, providing significant gains to consumers and investors, but it comes at the cost of an uncompensated taking of that property right in health from an identifiable group of workers.

See SUNSTEIN, RISK AND REASON, supra note 10, at 125 (“The basic point is right; we do need to know who would bear the costs and enjoy the benefits. That has been and will continue to be one of my principal themes. Recall that I have not urged that the monetized numbers should be decisive.”).

See supra Part V.B (discussing the focus on preservation of worker health and safety in the OSH Act’s legislative history, even if the costs would be distributed amongst producers, employers, and consumers).

Indeed, the overall national economy might be far more productive—with cheaper goods, more production, and higher investor returns generally—if there were no occupational health or safety regulation at all. But that comes at a price that policymakers might reasonably deem to be too high. After the Triangle Shirtwaist Factory fire in 1911, the idea of leaving employees’ working conditions entirely in the hands of the unregulated free market was broadly rejected by the public and eventually led to legislative reform. See generally LEON STEIN, THE TRIANGLE FIRE 135–41, 207–08 (1962) (discussing the protests and memorial meetings that immediately followed the Triangle Shirtwaist Factory fire, the attitude “that a sense of outrage was meaningless unless turned into a force for reform,” and the eventual legislative reform that followed); Eric G. Behrens, Note, The Triangle Shirtwaist Company Fire of 1911: A Lesson in Legislative Manipulation, 62 TEX. L. REV. 361, 362–63 (1983) (noting the public’s “indignation” and “shock” when it learned that the Triangle Shirtwaist Company’s management had disregarded the safety of its workers, and discussing how this public outcry eventually led to legislative reform following the fire of 1911).
policymaker might choose Market A instead, to preserve workers’ property rights in their own health. Even if the policymaker is generally sympathetic to deregulation, the benefits of free exchange, and market-based approaches to regulatory policy, she might still rationally prefer Market A in this situation, recognizing that the productivity gains in Market B are obtained only at the expense of an unjustified intrusion upon workers’ property rights in their health.\footnote{See Richard A. Posner, Economic Analysis of Law 41 (8th ed. 2011) ("The creation of individual (as distinct from collective) ownership rights is a necessary, rather than a sufficient, condition for the efficient use of resources.").}

If a rational policymaker might prefer Market A over Market B, to avoid health theft, then it follows that Congress could rationally choose to regulate in a way that prioritizes the maximization of worker welfare over the maximization of overall total social welfare. Congress, believing that the U.S. labor market was characterized by significant degrees of health theft from market failures, could justifiably set occupational health standards designed to move from a market resembling Market B toward a market that more closely resembles the outcome of the full-information Market A. Placing a formal CBA limit on such regulation would by definition thwart the legislation’s justifiable purpose—the counteraction of perceived health theft in the market. Responding to health theft in a way that maximizes worker welfare is both justified on distributional grounds and an accurate description of Congressional intent, in light of the legislative history of the OSH Act.

B. A Principled Guide for Regulators

Unlike OSHA’s current and inconsistent feasibility analysis, an anti-health theft principle provides clear and principled guidance to the regulator about the proper stopping point for regulation. Thus, OSHA should give to Section 6(b)(5) an interpretation that permits regulation to the extent that it maximizes worker welfare.

In practice, an anti-health theft principle would maximize worker welfare by considering a proposed regulation’s effect on workers’ health, wages, benefits, employment levels, job security, and other terms and conditions of employment. The secondary interests of workers as consumers paying higher prices for consumer goods, and of workers as investors receiving smaller returns on investment should be ignored. These secondary interests are derivative of gains in employer welfare in the labor market from health theft.\footnote{See supra Part IV.A.} While the current OSHA feasibility approach considers a regulation’s effect on profits or revenues as a sort of proxy for widespread plant shutdowns,\footnote{See supra Part II.C.} a worker welfare standard would
focus directly on employment levels. As Masur and Posner point out, regulatory agencies are capable of directly predicting unemployment effects and have done so in other contexts.\(^{157}\)

The anti-health theft interpretation of Section 6(b)(5) would not only provide a coherent guiding principle for regulators, it would effectively resolve most (if not all) of the other consistency concerns raised by CBA proponents.\(^{158}\) It would provide a coherent stopping point for regulation—the point at which the marginal benefits to workers of additional regulation equal the marginal costs to workers of such regulation.\(^{159}\) Unlike OSHA’s current feasibility test, it would not even arguably overregulate by ignoring widespread unemployment where no plant closures are implicated.\(^{160}\) It would not underregulate by prohibiting beneficial regulations simply because they may close some plants; to the contrary, it would clearly weigh the health benefits to workers against the unemployment costs to workers.\(^{161}\) And it would permit regulators to avoid reliance on arbitrary presumptions or ad hoc exceptions.\(^{162}\)

Like the formal CBA advocated by Masur and Posner,\(^{163}\) an anti-health theft approach to occupational health regulations would of course require some degree of arbitrary valuations and assumptions. For example, how much unemployment hardship is justified to offset the loss of one statistical worker life? But, to paraphrase Masur and Posner’s justification: If the analyst keeps the overall goal of the anti-health theft principle in mind—the promotion of worker well-being—then the ambiguities can be

\(^{157}\) See Masur & Posner, supra note 7 at 695 (“In any event, why use proxies if the real concern is plant closings or job losses? Agencies can estimate these outcomes directly—EPAs did just this in the paper mill regulation—and can evaluate regulations’ feasibility on the basis of them.”); Masur & Posner, supra note 83, at 586–603 (detailing several examples of federal agencies directly estimating job losses either on an industry-wide level or on a national economy level).

\(^{158}\) See supra notes 81–86 and accompanying text (noting a range of critiques regarding feasibility analysis, as posited by Masur and Posner).

\(^{159}\) Cf. supra note 81 and accompanying text (noting the argument that feasibility analysis does not present a coherent stopping point for how far regulation should go).

\(^{160}\) Cf. supra note 83 and accompanying text (noting the argument that by focusing on plant closures, feasibility analysis overregulates, thus ignoring widespread increases in unemployment that do not cause plant closures).

\(^{161}\) Cf. supra note 84 and accompanying text (noting the argument that by prohibiting a regulation where the overall benefits may outweigh the costs, feasibility analysis underregulates by prohibiting regulations that would substantially reduce grave risks of harm simply because they may close some plants).

\(^{162}\) Cf. supra note 85 and accompanying text (noting the lack of clarity provided by feasibility analysis).

\(^{163}\) See Masur & Posner, supra note 7, at 712 (“Where statutes delegate agencies policymaking authority, those agencies should exercise their power under the Chevron doctrine to replace feasibility analysis with CBA or another suitable decision procedure.”).
Two of Masur and Posner’s complaints about feasibility will not be resolved by the anti-health theft principle. First, Masur and Posner criticize feasibility for ignoring the costs of regulations imposed on consumers. Admittedly, an anti-health theft principle would also ignore the costs of occupational health regulations imposed on consumers. But, as explained above, that is entirely consistent with the legislature’s intent. Congress clearly understood that protecting worker health would increase the cost of consumer goods, and the evidence from the legislative history indicates that Congress thought such price increases were appropriate. In fact, a formal CBA that weighs the costs imposed on consumers against the health benefits of regulation would run quite contrary to the declared purposes of the OSH Act. The lower prices that consumers pay in the absence of adequate health regulation is a derivative effect from the gains in employer welfare caused by health theft. Counteracting health theft will necessarily result in higher prices, but imposing those costs is fully justified on the distributional grounds set forth above, as Congress recognized.

Second, the anti-health theft approach may not completely resolve the path dependency issue that Masur and Posner identify. But this concern is likely overstated. The path dependency issue appears to be more of a hypothetical issue with feasibility analysis than a real world problem that has affected regulation. Masur and Posner do not identify any particular instance in which path dependency may have caused regulators to impose less stringent regulation on a later-identified risk, simply because compliance with an earlier-identified risk pushed the industry to the brink of collapse. Even if path dependency is a real problem, the anti-health theft approach will at least reduce the likelihood of its occurrence. Rather than regulating risks to the point at which the competitive balance of an industry is close to upset, a worker welfare standard will in many cases identify an earlier stopping point—where the marginal benefits to workers of more stringent regulation are equal to the marginal costs imposed on workers. An anti-health theft standard, therefore, is less likely than OSHA’s current feasibility approach to push industry to the brink of collapse.

Cf. id. at 705–06 (“Feasibility analysis’s notion of balancing employment with health and safety provides no similar guidance because it offers no theoretical way to determine the correct balance.”).

See supra note 82 and accompanying text.

See 116 Cong. Rec. 37,345 (1970) (statement of Sen. Yarborough) (“We know the costs would be put into consumer goods but that is the price we should pay for the 80 million workers in America.”).

Id.

See supra note 86 and accompanying text (discussing the path dependency problem that feasibility analysis creates).

Further, it is not clear that Masur and Posner’s CBA approach entirely avoids path dependency either. Masur and Posner note that path dependency could be an issue in formal CBA if unemployment...
C. A Reasonable Interpretation of Section 6(b)(5)

Finally, it is worth briefly noting that an anti-health theft understanding of the OSH Act’s directive to OSHA is a reasonable interpretation of Section 6(b)(5) that would be entitled to judicial deference under the Chevron doctrine.\(^{170}\) Under Chevron’s first step, it seems clear that Congress has not “directly spoken to the precise question at issue.”\(^{171}\) The statutory language does not directly answer the question of the appropriate balance between costs and benefits in health regulations dealing with toxins, as amply illustrated in Parts II.A. and V.A. Under Chevron’s second step, the anti-health theft interpretation should be deemed a permissible construction of the statute.\(^{172}\) It is a reasonable construction of the statute, in light of the statutory text and the legislative history of the OSH Act, as set forth above. Moreover, any prior, contrary judicial gloss on the ambiguous “feasibility” language of Section 6(b)(5) would not stand in the way of OSHA adopting a worker welfare standard as a reasonable interpretation of economic feasibility.\(^{173}\)

\(^{170}\) See Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842–843 (1984) (“When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First... whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

\(^{171}\) Id. at 842.

\(^{172}\) Id. at 843; see also Ronald M. Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 CHI.-KENT L. REV. 1253, 1261–62 (1997) (noting that when the Supreme Court reviews an agency’s interpretation, “it either upholds the agency or reverses on the strength of step one,” and questioning whether the second step “serves any useful purpose at all”).

\(^{173}\) OSHA cites language from United Steelworkers of America v. Marshall, 647 F.2d 1189, 1272 (D.C. Cir. 1980) and Industrial Union Department v. Hodgson, 499 F.2d 467, 478 (D.C. Cir. 1974), and similar language in other cases as the basis for its current understanding of economic feasibility. See Occupational Exposure to Respirable Crystalline Silica, 81 Fed. Reg. 16,286, 16,293 (Mar. 25, 2016). Neither Marshall, Hodgson, nor any other judicial consideration of Section 6(b)(5)’s “feasibility” language has held the statutory language to unambiguously require the specific form of economic feasibility inquiry that OSHA employs. As such, a reasonable contrary interpretation of Section 6(b)(5) reached by OSHA would be entitled to deference. See Nat’l Cable & Telecom. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision...”)

\(^{174}\) Costs are considered as part of the analysis. See Masur & Posner, supra note 7, at 697 n.186 (“Path dependency could be introduced if the CBA takes into account hardship from job loss; however, as noted earlier, these costs are generally ignored for largely sensible reasons.”). In a later paper, however, Masur and Posner take the position that the costs imposed by unemployment hardship “are significant and cannot be ignored as rounding errors.” Masur & Posner, supra note 83, at 633. They conclude: “Agencies should attempt to quantify these [unemployment] costs as precisely as possible, including taking into account how easily an industry can absorb regulatory costs, which types of workers will be laid off, and whether they will be able to find other jobs within the same industry.” Id.
To be sure, OSHA’s move from its current feasibility analysis to an anti-health theft approach would represent a change in the way that OSHA interprets and implements its statutory directive in Section 6(b)(5). However, this administrative change would be an example of needed administrative flexibility for better enforcement of the OSH Act, and would likely survive challenge under the leading precedents on changes to administrative interpretations.\footnote{See FCC v. Fox Television Stations, 556 U.S. 502, 514 (2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review."); Chevron, 467 U.S. at 863–64 ("An initial agency interpretation is not instantly carved in stone"). OSHA would need only explain its decision, identifying good reasons for the change. See Fox Television, 556 U.S. at 515 ("[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates."); see also Randy J. Kozel & Jeffrey A. Pojanowski, Administrative Change, 59 UCLA L. REV. 112, 129–35 (2011) (discussing the Fox Television decision as a “[d]octrinal [b]oiling [p]oint,” at which the Court declined to subject administrative reversals to heightened scrutiny); Ronald M. Levin, Hard Look Review, Policy Change, and Fox Television, 65 U. MIAMI L. REV. 555, 573 (2011) (defending the “relatively accommodating attitude” of the Fox Television majority toward administrative policy changes).}

VII. CONCLUSION

OSHA’s feasibility analysis has been imperfect, unprincipled, and inconsistent in practice, as the above survey of OSHA’s major health standards since 1981 demonstrates. But CBA proponents do not hold a monopoly on principled decision rules. The maximization of total social welfare is not the only legitimate goal of occupational health regulation. As demonstrated by the prevailing view of the goals of antitrust regulation, a rational regulatory scheme might focus exclusively on maximizing only worker welfare in an attempt to counteract welfare transfers caused by market imperfections. This type of distributional regulatory goal is particularly appropriate where Congress is concerned about involuntary, uncompensated wealth transfers from one set of players in the labor market (workers) to the other set of players (employers), caused by information failure and externalities in that market.

The legislative history reveals that Congress was indeed concerned about uncompensated health theft by employers, and that Congress intended to counteract the effects of health theft by establishing a regulatory regime for occupational health that would have as its goal the maximization of worker welfare. For that reason, implementing a CBA or CBA Lite regulatory regime that has as its guiding principle the maximization of total social welfare would be misguided and inconsistent with Congressional intent. Instead, OSHA should modify its rudderless understanding of feasibility analysis to expressly acknowledge that the
guiding principle for feasibility analysis is the maximization of worker welfare, even at the possible expense of a potential net loss in total social welfare. This would best effectuate the key Congressional purpose of the OSH Act: to counteract health theft.