ARTICLES

REGULATORY REFORM: THE NEW LOCHNERISM?

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This Article explores the question of whether contemporary regulatory reformers' attitudes toward government regulation have anything in common with those of the Lochner era Court. It finds that both groups tend to favor value neutral law guided by cost-benefit analysis over legislative value choices. Their skepticism toward redistributive legislation reflects shared beliefs that regulation often proves counterproductive in terms of its own objectives, fails demanding tests for rationality, and violates the natural order. This parallelism raises fresh questions about claims of neutrality and heightened rationality, which serve as important justifications modern regulatory reform.

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I. INTRODUCTION

In *Whitman v. American Trucking Associations* (*American Trucking*),[1] cost-benefit analysis (CBA) proponents urged the Supreme Court to strike down section 109 of the Clean Air Act[2] under a constitutional doctrine not used since the end of the Lochner era, the nondelegation doctrine, or to create a canon of statutory construction favoring CBA to avoid the nondelegation issue. Their argument for a cost-benefit canon portrayed regulation aiming to protect public health as irrational because of the one-sidedness of the health protection principle.[3] By asking the Court to base its ruling on its view of the reasonableness of section 109's health protection principle, they sought, in essence, to revive an approach that prevailed during the Lochner period, when the Court discredited itself by using dubious substantive due process theories to strike down regulatory schemes that it found unreasonable.[4] Harvard Law Professor Laurence Tribe implicitly recognized that some of the CBA proponents' arguments sounded in Lochnerism, for his brief for General Electric disclaimed any reliance on

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[1] 531 U.S. 457 (2001).

[2] 42 U.S.C. § 7409 (2000).

[3] *See, e.g.*, Brief for General Electric as Amicus Curiae Supporting Cross-Petitioners at 22, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (No. 99-1426) [hereinafter GE Brief] (arguing that administrative decisions that do not take costs and risk trade-offs into account are not reasoned); Brief of Respondents Appalachian Power Company et al. at 4, *Am. Trucking*, 531 U.S. 457 (2001) (No. 99-1426) (evaluation of tradeoffs are part of "any sound risk management decision").

[4] *See* WILLIAM M. WIECEK, LIBERTY UNDER LAW 123–25 (1988) (explaining that *Lochner v. New York*, 198 U.S. 45 (1905), has become an exemplar of a malfunctioning Supreme Court).

substantive due process to avoid the taint emanating from the *Lochner* line of cases.[5]

The CBA proponents deployed these arguments for Lochnerian activism attacking Clean Air Act section 109,[6] which requires the Environmental Protection Agency (EPA) to promulgate national ambient air quality standards protecting public health.[7] This provision reflects a specific value choice, favoring public health protection over competing economic considerations.[8] Accordingly, the *American Trucking* Court held that enactment of section 109 did not violate the nondelegation doctrine, which prohibits congressional delegation of legislative authority.[9] The Court also rejected CBA proponents' request to construe section 109 to require consideration of cost.[10] In essence, the Court's decision recognized that the Constitution does not prohibit one-sided legislation.[11]

This Article examines a question suggested by Professor Tribe's brief. To what extent does modern regulatory reform rely upon Lochnerian views of legislation? The diversity of scholarly views about what precisely Lochnerism was about makes this question difficult to answer.[12] One frequently lamented Lochnerian vice, judicial misinterpretation of the Constitution, has played at most a very minor role in the regulatory reform debate. Yet, Lochnerian views about legislation, which played an important

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5 GE Brief, *supra* note 3, at 18 n.37 (stating that "it would [not] necessarily be irrational to the point of unconstitutionality for Congress" to preclude agency consideration of cost); Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 674–75 (1980) (Rehnquist, J., concurring) (referring to the "general disrepute" of Lochnerism); Jack M. Balkin, "*Wrong the Day it Was Decided": Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 678 (2005) (both academics and judges until quite recently treated *Lochner* as a "central" example "of how courts should not decide constitutional cases"); *cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1362 (2000) (suggesting that that wholesale abandonment of substantive due process review may be unfortunate, even if *Lochner* itself is problematic). The author's brief for the United States Public Interest Research Group (USPIRG) Education Fund in *American Trucking* addressed many of Professor Tribe's arguments for GE. This Article expresses the author's opinion, not that of the USPIRG Education Fund.

6 42 U.S.C. § 7409 (2000).

7 *Id.*

8 *See* Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1149 (D.C. Cir. 1980) (Congress deliberately decided to subordinate health and feasibility concerns to health protection goals).

9 *Am. Trucking*, 531 U.S. at 474 (finding the "scope of discretion § 109(b)(1) allows well within the outer limits" of the Court's nondelegation doctrine precedent).

10 *Id.* at 464–71.

11 This point emerged more clearly in oral argument than in the Court's written opinion. American Trucking Associations argued that the Court could solve the problem of section 109 being unintelligible by requiring EPA to consider costs. *See* Christopher H. Schroeder, *The Story of American Trucking: The Blockbuster Case that Misfired*, *in* ENVIRONMENTAL LAW STORIES 321, 344 (Richard J. Lazarus & Oliver A. Houck eds., 2005). This argument did not persuade the Court because, as Justice Scalia said during the oral argument, adding more factors—i.e. creating balance—does not "bring more certainty to the statute." *Id.* The Court's ruling requires intelligible legislative principles, not legislative neutrality or balance.

12 *See* Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 881–82 (2005) (describing the shift from looking at Lochnerism as a product of commitment to laissez-faire economics to a view of Lochnerism as a set of obstacles to class legislation); David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 374 (2003) (stating that while nearly all agree that *Lochner* is a "pariah" there is "no consensus on why it was wrong").

role in that period's jurisprudence, play a central role in the regulatory reform debate, as this Article will show. Both the Lochner era Court and modern regulatory reformers derive their views from economic theory with natural law origins. Both Lochnerism and regulatory reform share skepticism of legislative value choices and implicitly embrace the idea that legislation should be neutral.[13] The skepticism of legislation that both share leads to remarkably similar demands for hyper-rationality in regulatory decisions. And both equate CBA with rationality.

Examining the link between modern regulatory reform and Lochnerism brings the arcane regulatory reform debate into a broader constitutional and administrative law context. Regulatory reformers' arguments serve a Lochnerian vision of neutral, largely value-free, legislative decisions. This Article argues that such a view of legislation is out of place in the post-*Lochner* administrative state, as *American Trucking* implicitly recognized. Part II provides relevant background on CBA. Part III discusses Lochnerism. Part IV draws parallels between various aspects of Lochnerism and modern regulatory reform. Part V develops the implications of these parallels for the regulatory reform debate.

II. CBA: AN INTRODUCTION

Calls for regulatory reform have greatly influenced government in recent years.[14] Regulatory reformers have argued that we need much more emphasis on CBA and much less on health protective policies, like the policy found in section 109 of the Clean Air Act.[15] This Section defines CBA and reviews some of its history.

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[13] Cushman, *supra* note 12, at 886 (noting that "legal commentators writing about the Lochner era" viewed due process doctrine as "suffused with norms of neutrality, equality, and generality"); Matthew D. Adler, *Rational Choice, Rational Agenda-Setting, and Constitutional Law: Does the Constitution Require Basic or Strengthened Public Rationality?*, in LINKING POLITICS AND LAW 109, 120 (Christoph Engel & Adrienne Heritier eds., 2003) (arguing that Congress does not choose values, just actions).

[14] *See* Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7, 34 (1998) (discussing support for CBA from large corporations and their allies); Stephen F. Williams, *Squaring the Vicious Circle*, 53 ADMIN. L. REV. 257, 264–70 (2000) (A defense of CBA by a D.C. Circuit judge.); Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, § 202(a), 109 Stat. 64 (codified as amended at 2 U.S.C. § 1532 (2000)) (requiring CBA of extremely expensive measures); Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1418–19 (2005) (contrasting congressional skepticism toward CBA in the 1960s and 1970s with recent attitudes toward it). *See generally* Cass R. Sunstein, *Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 307 (1996) (concluding that "[t]he regulatory state is becoming something like a cost-benefit state").

[15] *See, e.g.*, Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 308 (1999) (the Clean Air Act has been subject to "telling criticism" for its failure to balance costs and benefits).

A. CBA: A Definition

CBA of a proposed rule requires a regulator to compare compliance costs to the harms a rule will avoid, which most writers refer to as benefits.[16] In order to facilitate this comparison, CBA requires the analyst to express the value of the avoided harms in dollar terms to the extent possible.[17] This analysis of avoided harm requires two steps. The regulator must undertake a quantitative risk assessment to estimate the number of deaths and illnesses and the amount of environmental harm a regulation will avoid.[18] The regulator must then assign a dollar value to each death, habitat saved, illness avoided, etc.[19] Using these two steps, the regulator can, in principle, estimate the value of some of a regulation's benefits in dollar terms.

The first step, quantitative risk assessment, usually proves impossible for all environmental effects and many health effects as well.[20] Data gaps and a lack of basic scientific understanding often preclude even crude estimation of the amount of death, illness, and environmental destruction a particular regulation will avoid.[21] When estimation proves possible, uncertainties often lead to an enormous range of scientifically plausible benefits estimates.[22]

CBA advocates tend to equate all of this quantification with objectivity.[23] But risk assessment and monetization require policy decisions

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[16] *See* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L.Q. 545, 560, 561 & n.67 (1997) (distinguishing harm avoidance from benefit creation).

[17] *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 39 (2004) (CBA requires reducing benefits of environmental protection to "dollar values."); William H. Rodgers, *Benefits, Costs, and Risks: Oversight of Health and Environmental Decision-making*, 4 HARV. ENVTL. L. REV. 191, 193 (1980) (defining CBA as a comparison between costs and benefits in dollar terms); *cf.* Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 101 (1987) (comparing CBA in the narrow sense employed here with a broader definition of CBA).

[18] *See* McGarity, *supra* note 14, at 12 (stating that CBA in the health and environmental context begins with quantitative risk assessment).

[19] *See* Rodgers, *supra* note 17, at 193 (noting that CBA "seeks to reduce all concerns to a common denominator—the dollar").

[20] *See* OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REGULATORY AFFAIRS, PROGRESS IN REGULATORY REFORM: 2004 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 9 (2004) (finding that many of the major rules the Office of Management and Budget (OMB) has reviewed in the last ten years "have important non-quantified benefits and costs"); *see, e.g.*, Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 180–83 (2004) (discussing the difficulties of quantifying the benefits of critical habitat designation under the Endangered Species Act); Thomas O. McGarity, *Professor Sunstein's Fuzzy Math*, 90 GEO. L.J. 2341, 2351–52 (2002) (discussing serious health effects associated with arsenic that EPA could not quantify).

[21] *See* Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1382–1400 (2003) (providing numerous examples of failure to count non-quantifiable benefits); CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 21 (2002) (admitting that "[q]uantification will be . . . impossible in some cases").

[22] *See* Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255, 2257 (2002) (finding that a "benefits range" sometimes proves so "exceedingly wide" that it does little to "discipline judgment").

[23] *See* ACKERMAN & HEINZERLING, *supra* note 17, at 35 ("[C]ost-benefit analysis presents itself

in order to extrapolate risk estimates from limited data and to assign dollar values to particular consequences.[24]

CBA supporters have varying positions about what role CBA should play in the regulatory process.[25] Sometimes they advocate the "indeterminate position," which simply maintains that regulators should consider CBA.[26] This position does not tell us how precisely regulators should respond to CBA or what role it should play.[27] At other times, however, they advocate some sort of cost-benefit criterion, such as a requirement that the costs of a regulation not exceed its benefits, which provides somewhat clearer guidance.[28] This distinction between the

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as the soul of rationality, an impartial, objective standard for good decisions."); *see, e.g.*, ROBERT W. HAHN, REVIVING REGULATORY REFORM: A GLOBAL PERSPECTIVE 3–4 (2000) (selling cost-benefit analysis by referring repeatedly to "a *neutral* economist's benefit-cost test" (emphasis added)).

[24] David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 403–05 (2006); *see* ACKERMAN & HEINZERLING, *supra* note 17, at 61–90, 179–203 (identifying and critiquing some of the value choices made in monetization); Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, 29 J. LEGAL STUD. 971, 972 (2000) (finding many of the value choices implicit in CBA "stupid"); *see, e.g.*, Parker, *supra* note 21, at 1370–75 (critiquing methodologies used to value life and uses of discount rates); Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 950–55 (1999) (discussing the value choices involved in discounting); Lisa Heinzerling, *Discounting Life*, 108 YALE L.J. 1911, 1911–14 (1999) (same); Lisa Heinzerling, *Discounting Our Future*, 34 LAND & WATER L. REV. 39, 57–64 (1999) (same); Thomas O. McGarity, *Media-Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation*, 46 LAW & CONTEMP. PROBS. 159, 171 (1983) (arguing that "wage premiums" are not set by willingness to accept risk, but by the unemployment rate and the level of desperation of currently employed workers); *cf.* McGarity, *supra* note 20, at 2353–54 (discussing EPA's failure to adjust death valuations to account for numerous relevant factors); Lisa Heinzerling, *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV. 189 (2000) (arguing that economists have "sidestepped" moral and ethical issues through the creation of the "statistical person"); Armatya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931, 945–47 (2000) (discussing considerations that emphasis on "willingness to pay" leaves out); Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729, 734–35 (criticizing discounting and use of "wage premiums" as basis for dollar estimates of a human life's value).

[25] *See* David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 48–49 (2005) (describing several positions about how to take costs and benefits into account).

[26] *See* Driesen, *supra* note 24, at 342–43 (distinguishing between the "indeterminate position" that regulators should consider CBA and the use of a cost-benefit criterion); *see, e.g.*, Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1498 (2002) (stating that CBA is a tool and a procedure, not a rigid formula to determine outcomes); Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 195 (1999) (describing CBA as a "decision procedure").

[27] CASS R. SUNSTEIN, LAWS OF FEAR 130 (2005) (stating that CBA does not establish a rule governing choices).

[28] *See* Driesen, *supra* note 24, at 394–402 (analyzing various cost-benefit criteria); *see, e.g.*, Hahn & Sunstein, *supra* note 26, at 1498 (arguing for a presumption against regulation with costs exceeding benefits).

indeterminate position and support for a cost-benefit criterion will aid Part IV's analysis.

B. Origins and History

The CBA idea comes from economic theory and relies upon an analogy between environmental protection and the purchase of goods and services.[29] CBA treats government regulation as a purchase of a benefit, rather than as an effort to protect people from harm.[30] Just as a rational consumer purchasing a good or service would not pay more than the benefit is worth, economic theory suggests that the government should not write regulations that cause society to incur costs that outweigh the environmental and health benefits a regulation will bring.[31] This analogy between government regulation and purchase decisions leads to a view that government agencies should consider CBA when writing regulations.

The courts have interpreted the Toxic Substances Control Act (TSCA)[32] and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[33] as requiring application of a cost-benefit approach.[34] Most other environmental, health, and safety statutes employ some combination of mandates to protect public health and safety (such as the mandate found in section 109 of the Clean Air Act)[35] and to require reductions achievable through use of

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[29] *See* Driesen, *supra* note 16, at 577 (explaining that CBA rests upon the idea that clean air and water are amenities like other products and services); WILLIAM F. BAXTER, PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION 12 (1974) (arguing for this approach).

[30] Driesen, *supra* note 16, at 560–63 (explaining why a cost-benefit criterion allows harm to continue).

[31] *Id.* at 578 (stating that economists assume citizens would pay no more than a cost reflecting the value of the effects of the prevented pollution).

[32] 15 U.S.C. §§ 2601–2692 (2000).

[33] Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2000).

[34] *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001) (holding that pesticide registration does not obviate the need for a Clean Water Act permit because FIFRA is based on CBA); Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1215 (5th Cir. 1991) (interpreting TSCA to require CBA); Save Our Ecosystems v. Clark, 747 F.2d 1240, 1248 (9th Cir. 1984) (holding that pesticide registration does not eliminate the need for an environmental impact statement, because "FIFRA registration is a cost-benefit analysis"); Environmental Def. Fund v. EPA, 548 F.2d 998, 1005 (D.C. Cir. 1976) (stating that the proponent of a pesticide must show that its benefits outweigh its risks); McGarity, *supra* note 20, at 2343 (identifying cost-benefit balancing as the "core regulatory concept" of TSCA and FIFRA); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 541–49 (1997) (critiquing the interpretation of TSCA as imposing a cost-benefit test). Congress, however, amended FIFRA in 1996 to modify the cost-benefit balancing approach for pesticides used in food. *See* Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1513 (codified in scattered sections of 7 U.S.C. (2000)) (containing the session law that amended FIFRA). Congress has also given CBA a limited role under the most recent amendments to the Safe Drinking Water Act (SDWA). *See* SDWA Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (codified as amended at 42 U.S.C. §§ 300f–300j-25 (Supp. 1999)); McGarity, *supra* note 20, at 2343–44 (analyzing the cost-benefit and risk-risk balancing amendments); Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1393 (2002) (explaining the SDWA's hybrid test).

[35] 42 U.S.C. § 7409(b)(1) (2000); *see, e.g.*, *id.* § 7412(f)(2)(A) (2000).

appropriate technology (i.e. technology-based standards).[36] Technology-based standard setting provisions, which are ubiquitous in environmental law, require agencies to consider cost, but do not contemplate comparing those costs to benefits.[37] As a result, regulators crafting technology-based standards may avoid quantifying benefits.

Nevertheless, a series of executive orders has often required CBA, even under statutes that do not embrace the technique.[38] President Reagan's executive order had the explicit goal of simply reducing the burden of regulation, an objective in some tension with the aims of the Congresses that enacted many of the modern regulatory statutes in the 1970s.[39] In keeping with the Justice Department's view that the President could not authorize agencies to transgress boundaries set by Congress, the order only applies "to the extent permitted by law."[40] The Office of Management and Budget (OMB), an office consisting mostly of economists, not lawyers,[41] administers

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[36] *See, e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b)(5) (2000); Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(b)(2)(A), 1316(a) (2000) (requiring the "best available technology economically achievable" under the Clean Water Act); 42 U.S.C. §§ 7411(a)(1), 7412(d), 7503(a)(2), 7475(a)(4) (2000).

[37] *See* Driesen, *supra* note 25, at 8–12 (stating that "regulators must compare cost, not to benefits, but to net earnings prior to regulation and the value of corporate assets"). The Federal Water Pollution Control Act's technology-based "best practicable control technology" provisions do require a reasonable relationship between costs and benefits. *See* 33 U.S.C. §§ 1311(b)(1)(B), 1314(b)(1)(B) (2000). But the courts, following legislative history, have construed this requirement as requiring marginal cost effectiveness analysis, rather than a comparison of costs to the dollar value of environmental effects. *See* Driesen, *supra* note 25, at 23–24 (stating that the Federal Water Pollution Control Act (CWA) does not use CBA as it is conventionally understood); Ass'n of Pac. Fisheries v. EPA, 615 F.2d 794, 805 (9th Cir. 1980) (stating that the Environmental Protection Agency has broad discretion in weighing factors related to Best Practical Technology (BPT) when implementing the CWA); *see also* Bruce La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 IOWA L. REV. 771, 819–20 (1977) (describing the one case to deviate from *Pac. Fisheries'* rejection of consideration of ecological benefits as a "major aberration"); *cf.* EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 76–77 (1980) (noting that BPT limitations reflect an agency conclusion that the costs imposed on industry are worth the benefits).

[38] *See* Exec. Order No. 12,291, §§ 2–3, 3 C.F.R. 127, 128 (1982), *reprinted in* 5 U.S.C. § 601 (1982) (requiring that benefits outweigh costs "to the extent permitted by law"); Exec. Order No. 12,866, § 1, 3 C.F.R. 635, 638–49 (1994), *reprinted in* 5 U.S.C. § 601 (1996). For more background on these orders, see Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1476–79 (1996).

[39] *Compare* 3 C.F.R. 127, Preamble (1982) (seeking "to reduce the burdens of existing and future regulations") *with* 33 U.S.C. § 1251(a) (2000) *and* 42 U.S.C. § 7401(b)(1) (2000).

[40] 3 C.F.R. 127, 128, 131–32 (1982); *see* Robert V. Percival, *Rediscovering the Limits of the Regulatory Review Authority of the Office of Management and Budget*, 17 Envtl. L. Rep. 10,017, 10,018 (1987) (discussing Executive Order (E.O.) 12,291 and the controversy surrounding the possibility that it undermines congressional authority). Furthermore E.O. 12,291 specifies that nothing in the order "shall be construed as displacing the agencies' responsibilities delegated by law." 3 C.F.R. 127, 130.

[41] *See* Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L REV. 219, 226 (1994) (noting OMB's lack of expertise on legal issues).

the cost-benefit executive orders and has used that authority to give CBA much greater primacy than environmental, health, and safety statutes called for.[42]

Support for CBA has grown both within government and among academics. While originally the executive orders excited a great deal of angst in Congress, in 1995 Congress passed the Unfunded Mandates Act, which generally required its use in considering rules likely to generate $100 million or more in costs.[43] Some judges have also expressed support for CBA.[44] And, in recent years, several very prominent academics have devoted significant amounts of their time to defending increased use of CBA in setting environmental, health, and safety standards.[45]

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42 *See* Bluewater Network v. EPA, 370 F.3d 1, 9–10 (D.C. Cir. 2004) (rejecting lax agency rule passed to satisfy OMB demands); Public Health Research Group v. Tyson, 796 F.2d 1479, 1507 (D.C. Cir. 1986) (reversing agency action crossing out standards at the behest of OMB); Envtl. Def. Fund v. Thomas, 627 F. Supp. 556, 571 (D.D.C. 1986) (reversing OMB's action in delaying rule issuance beyond a statutory deadline); Herz, *supra* note 41, at 219 ("OMB . . . displaced agency decision-making" regarding the content of the Clean Air Act's operating permit rule); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 461 (1987) (stating that the executive orders "expressly" recognize the agency's "ultimate" regulatory authority even if this principle is "not followed in practice"); Oliver A Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. U. L. REV. 535, 540 (1987) (OMB has favored deregulation rather than "faithful execution of the laws"); Eric Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES 1, 51 (1984) (explaining that OMB "goes beyond the terms of . . . the . . . enabling statute" in exercising its review function).

43 2 U.S.C. § 1532(a) (2000).

44 *See, e.g.*, Int'l Union v. OHSA (*Lockout/Tagout*), 938 F.2d 1310, 1319–1321, 1326–27 (D.C. Cir. 1991).

45 *See, e.g.*, Matthew D. Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 CHI.-KENT L. REV. 977, 985–1003 (2004); Matthew D. Adler, *Cost-Benefit Analysis, Static Efficiency, and the Goals of Environmental Law*, 31 B.C. ENVTL. AFF. L. REV. 591, 594–600 (2004); Sunstein, *supra* note 22, at 2267–75; Hahn & Sunstein, *supra* note 26, at 1489 (proposing a new executive order to make CBA more influential); Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 324 (2001) (supporting CBA even while disapproving of a willingness-to-pay basis for estimating benefits); Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences are Distorted*, 29 J. LEGAL STUD. 1105, 1136–41 (2000) [hereinafter Adler & Posner, *Distorted Preferences*]; Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 FLA. ST. U. L. REV. 241, 289–332 (2000) [hereinafter, Adler & Posner, *Welfarist Theory*] (following up on the theory set out in the 1999 article); COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC AND PHILOSOPHICAL PERSPECTIVES (Matthew D. Adler & Eric Posner eds., 2000) (providing a comprehensive discussion of CBA); Adler & Posner, *supra* note 26, at 194–216; Matthew D. Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371, 1383–89 (1998) (addressing arguments that the inability to compare unlike things makes CBA impossible or inappropriate); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 43–52 (1995); Sunstein, *supra* note 42, at 462 (arguing for CBA); *see also* SUNSTEIN, *supra* note 27, at 129–48 (addressing an issue related to CBA); Matthew D. Adler, *Against Individual Risk: A Sympathetic Critique of Risk Assessment* 153 U. PA. L. REV. 1121, 1154–64 (2005) (addressing risk assessment, a component of CBA)*; cf.* Matthew D. Adler, *Risk, Death and Time: A Comment on Judge William's Defense of Cost-Benefit Analysis*, 53 ADMIN. L. REV. 271, 271 (2001) [hereinafter, Adler, *Judge Williams*] (characterizing Adler's support for CBA as more tentative than that of Judge Williams).

III. LOCHNERISM

Scholars traditionally associate Lochnerism with the creation of substantive due process doctrine recognizing economic rights not literally present in the Constitution.[46] Viewed this way, the Lochner period involved subjective misreading of the Constitution.[47] Viewed narrowly as only a mode of constitutional interpretation, Lochnerism has little to do with regulatory reform. But neither the Supreme Court nor modern legal historians have viewed Lochnerism quite this narrowly.[48] They have examined the attitudes, doctrines, and approaches that lay behind the Lochner era Court's decisions. The treatment below does not attempt to settle the debate about how to properly interpret Lochnerism. But it does try to flesh out some of the Lochnerism concepts relevant to contemporary regulatory reform.

A. Ideology

Justice Holmes famously chastised the Court for reading its own value choices into the Constitution in his dissent in *Lochner v. New York*,[49] in which the Court struck down a statute limiting bakers' working hours as an unconstitutional interference with liberty of contract violative of due process.[50] Holmes protested that the "Constitution does not enact Mr. Herbert Spencer's social statistics,"[51] a reference to nineteenth century economic theory that still enjoyed a following at the time. He accused the Court of basing its decision "upon an economic theory which a large part of the country does not entertain," presumably that of laissez-faire.[52] While laissez-faire did not command universal support at the time, it enjoyed significant support among many well educated lawyers and businessmen.[53]

Lochnerian ideology did not invariably lead to anti-government results. While the Lochner era Court struck down many statutes for reasons that appear wholly indefensible to most contemporary observers, it upheld the overwhelming majority of statutes it reviewed.[54] Indeed, just a few years

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46 *Cf.* HOWARD GILLMAN, THE CONSTITUTION BESIEGED 3 (1993) (claiming that legal scholars generally embrace this view).

47 *See* Howard Gillman, *De-Lochnerizing* Lochner, 85 B.U. L. REV. 859, 860–61 (2005) (explaining how *Lochner* came to be a symbol of inappropriate judicial activism).

48 *See, e.g.*, WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA 1886–1937, at 3–4 (1998) (describing the ideology dominating legal thought between 1886 and 1937 as a "classical outlook" addressing important jurisprudential questions); GILLMAN, *supra* note 46, at 10 (arguing that the Lochner period featured an effort to distinguish valid economic legislation from "invalid 'class' legislation"); United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter, J., dissenting) (suggesting that the Lochner era Court used "notions of liberty and property characteristic of laissez-faire economics" as "fulcrums of judicial review").

49 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

50 *Id.* at 52–53, 56–57 (majority opinion).

51 *Id.* at 75 (Holmes, J., dissenting).

52 *Id.*

53 Wiecek, *supra* note 48, at 82.

54 *See* Keith E. Whittington, *Congress Before the* Lochner *Court*, 85 B.U. L. REV. 821, 830–32

before the *Lochner* Court invalidated limits on bakers' hours, the Court had upheld similar limitations on miners' hours in *Holden v. Hardy*.[55] Laissez-faire ideology strongly influenced the Court, but it did not invariably dictate anti-government results.[56]

B. Natural Law Origins

While contemporary laissez-faire ideology helps explain the Court's rulings, the Court did not see itself as ideological. Rather, it saw itself as a neutral actor advancing legal ideals with neutral origins outside of the judges' personal preferences.[57]

Some accounts of Lochnerism associate it with legal historicism, the idea that principles not expressly found in the Constitution, such as liberty of contract, merit judicial protection as objective natural law principles embedded in our legal tradition.[58] The *Lochner* Court declared that "[t]he general right to make a contract . . . is part of the liberty interest protected by the 14th Amendment."[59] Because a maximum hours law prohibited the employer and employee from contracting for more work hours than the statute permitted, it interfered with liberty of contract.[60] The Court, drawing on common law tradition, viewed the ability to enter into contracts as an aspect of the liberty to freely pursue a livelihood, which it considered part of the pursuit of happiness, a right with which men are, in the Declaration of Independence's words, "endowed by their Creator."[61] Thus, it viewed liberty

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(2005) (reviewing the success rate of governments defending both federal and state statutes from constitutional attack); Charles Warren, *A Bulwark to the State Police Power-The United States Supreme Court*, 13 COLUM. L. REV. 667, 695 (1913) (finding that the Court frequently upheld state action in both the due process and commerce clause context); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294–95 (1913) (finding that the Court invalidated only 37 statutes in making 560 decisions under the 14th Amendment between 1887 and 1911).

[55] 169 U.S. 366 (1897).

[56] *See* WIECEK, *supra* note 48, at 7 (claiming that the Court was ideological, but not consistently so).

[57] *See id.* at 5 (linking Lochnerism's use of abstraction with neutrality, purportedly preventing a judge's personal sympathy from swaying him); Cass Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 878 (1987) (noting that the due process clause commanded "neutrality" in the view of the Lochner era Court).

[58] *See, e.g.*, JAMES HACKNEY, UNDER COVER OF SCIENCE (2006) (forthcoming) (describing *Lochner* as "the most infamous application of the natural law worldview"); Note, *Meet Me at the (West Coast) Hotel: The Lochner Era and the Demise of* Roe v. Wade, 90 MINN. L. REV. 500, 509–510 (2005) (arguing that the *Adkins* Court rested its holding "on a particular philosophical anthropology of the human person and that theory's consonant *natural rights*" (emphasis added)); David E. Bernstein, Lochner *Era Revisionism Revised: Lochner and the Origins of Fundamental Rights*, 92 GEO. L.J. 1, 35–39 (2003) (describing the evolution of fundamental rights during the Lochner era from the American natural rights tradition).

[59] *See* Lochner v. New York, 198 U.S. 45, 53 (1905).

[60] *Id.* at 52.

[61] *See* Allgeyer v. Louisiana, 165 U.S. 578, 589–90 (1897) (linking liberty of contract to the "pursuit of happiness" right mentioned in the Declaration of Independence through the right to pursue a livelihood); Butchers' Union Slaughterhouse & Livestock Landing Co. v. Crescent City Livestock Landing & Slaughterhouse Co., 111 U.S. 746, 761–62 (1884) (Bradley, J., concurring) (linking the right to pursue a livelihood to the Declaration of Independence's inalienable rights

of contract as having natural law origins, which it identified with the common law.[62]

C. Skepticism Toward Non-Neutral Legislation

In spite of the natural, indeed divine, origins of liberty of contract, the Lochner era Court did not view that liberty as an absolute right. It recognized that the state may "prevent the individual from making certain kinds of contracts," provided that the state acted within the scope of its "legitimate . . . police power."[63] Since the Court generally found that the police power embraced all "reasonable" regulation, judicial assessment of a regulation's reasonableness determined the scope of legitimate police power legislation.[64] The Court's attitudes toward legislation, then, often proved dispositive to Lochner era cases.[65]

The Lochner era Court viewed government regulation with some skepticism. Because modern regulatory reform proponents echo Lochner era attitudes toward regulation, an examination of the nature of the Court's approach to legislation will prove worthwhile.

1. Class Legislation

Even before the Lochner period, the Supreme Court distinguished between "general legislation," which it usually upheld, and "class" or "special" legislation.[66] This ideal of neutral legislation may have performed the useful function of discouraging special interest legislation in a society

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clause and to British common law traditions opposing monopolies).

62 Jeffrey M. Shaman, *On the 100th Anniversary of* Lochner v. New York, 72 TENN. L. REV. 455, 489 (2005) (arguing that the *Lochner* Court employed "common law categories and presumptions" to "deif[y]" markets as a "natural state of affairs"); Laurence Tribe, *Clarence Thomas and "Natural Law,"* N.Y. TIMES, July 15, 1991, at A15 (stating that the *Lochner* Court relied upon natural law); Griswold v. Connecticut, 381 U.S. 479, 515 (1965) (Black, J., dissenting) (claiming that *Lochner* embodies a "natural law due process philosophy"); *see* Francis J. Mootz, *Law in Flux, Philosophical Hermeneutics*, 11 YALE J.L. & HUMAN., 311, 334–35 (1999) (pointing out that Aquinas treated natural law as coming from God); Philip Sofer, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2397, 2405 (1991–1992) (pointing out that some natural law theories suggest that "God's will can . . . be the source of moral truth"); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. IN L. & SOC'Y 3, 5 (1980) (describing *Lochner* as a synthesis of a "positivist science of law, natural rights constitutionalism, and Classical Economics").

63 *Lochner*, 198 U.S. at 53.

64 *See* OWEN M. FISS, 8 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE 1888–1910, 161–63 (1993) (stating that Justice Peckham's *Lochner* opinion sought to preserve limits on the police power).

65 *See Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting) (suggesting that the *Lochner* majority's decision hinged upon the majority's "convictions or prejudices").

66 *See, e.g.*, Caldwell v. Texas, 137 U.S. 692, 697–98 (1891) (unanimous opinion) (laws operating "on all alike" secure due process but "special, partial, and arbitrary" legislation offends due process); Dent v. West Virginia, 129 U.S. 111, 124 (1889) (unanimous opinion) ("legislation" is not open to substantive due process challenge if it is "general in its operation").

where wealth and power were not highly concentrated.[67] But by the time of the Lochner period, the idea that the Constitution frowned upon class legislation was widely seen as counterproductive, because it sometimes prevented legislatures from addressing great disparities of power and wealth that had arisen with the growth of modern corporations.[68]

Professor Gillman has argued that the Lochner era Court implicitly used this idea that "class legislation" lacked constitutional legitimacy to strike down regulatory legislation.[69] The sense that one-sided legislation lacked legitimacy also animated decisions interpreting the anti-trust laws as authorizing the use of injunctions as a weapon against organized labor.[70] While Congress intended anti-trust statutes to limit businesses' power,[71] the background constitutional principle that law should be general, and hence neutral, led the Court to use anti-trust law as a justification for enjoining labor actions.[72] Thus, the Lochner era Court's rulings suggest suspicion of the idea that Congress might legitimately choose non-neutral policies to address imbalances in a society where everybody is not on an equal footing. And this hostility toward legislative value choices influenced not just the Court's substantive due process decisions, but contemporaneous statutory interpretation as well.

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[67] *See generally* Sunstein, *supra* note 57, at 878–79 (equating the Lochner era requirement of a public purpose for legislation with hostility to "special-interest legislation").

[68] *See* J. M. Balkin, *Ideology and Counter-Ideology from* Lochner *to* Garcia, 54 UMKC L. REV. 175, 176 n.7 (1985–1986) (pointing out that "the Court's exaltation of liberty of contract concealed the economic coercion" that free contracts may produce when parties have unequal bargaining power).

[69] *See generally* GILLMAN, *supra* note 46. *See* FISS, *supra* note 64, at 160–61 (1993) (explaining that the *Lochner* Court did not regard alteration of the "distribution of power or wealth" as a legitimate end of legislation); Balkin, *supra* note 68, at 182–83 (arguing that the Lochner era Court considered redistributive law suspect); *cf.* Bernstein, *supra* note 58, at 12 (accusing Gillman of "greatly" exaggerating the role of class legislation concerns in Lochner era jurisprudence); Michael J. Phillips, *The Progressiveness of the* Lochner *Court*, 75 DENV. U. L. REV. 453, 497 (1998) (admitting that Gillman's class legislation thesis "has some plausibility" but expressing some doubts about it).

[70] *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 471 (1920) (construing section of law limiting labor injunctions narrowly as class legislation); Am. Steel Foundries v. Tri-Cities Cent. Trades Council, 257 U.S. 184, 202, 205 (1921) (picketers coercively interfere with a property right); *see also* Loewe v. Lawlor, 208 U.S. 161, 188–202, 205 (1921) (finding a union in violation of anti-trust statutes); Adair v. United States, 208 U.S. 161, 172 (1908) (finding a statute criminalizing employer discrimination against union members to be "repugnant" to the Fifth Amendment); *In re* Debs, 158 U.S. 564 (1895) (upholding injunction prohibiting a labor action against railroads); *cf.* United States v. E.C. Knight Co., 156 U.S. 1, 9, 16–18 (1895) (anti-trust laws do not regulate sugar monopoly). *See generally* GILLMAN, *supra* note 46, at 1–2 (identifying Lochnerism with the "use of the injunction against" labor); FISS, *supra* note 64, at 3–5 (explaining that labor injunctions helped make the Court's performance an issue in several presidential elections and led to passage of remedial legislation); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT, 98–127 (1991) (discussing the impact of the labor injunction upon the labor movement).

[71] *See Duplex Printing*, 254 U.S. at 468 n.1 (setting out statutory language that appears to prohibit anti-labor injunctions, even though the statute clearly authorizes injunctions against business combinations in restraint of trade).

[72] *See id.* at 471 (construing section that prohibits injunctions in employment disputes narrowly, because it creates a "special privilege" for a "particular class").

This neutrality ideal, however, went beyond the formal doctrinal distinction between class and general legislation. That doctrinal distinction offered but one manifestation of a more general view that law should be neutral, in the sense of not favoring one group over another.[73] This view melded with a belief in the neutrality of common law and natural law.[74] So, for example, the Court favored liberty of contract in part because it perceived freedom from state imposed regulation superseding potential contractual agreements as affecting both parties to contracts equally.[75]

This belief in neutrality manifested itself in a failure to believe that law properly tipped the scales in favor of one class or the other. In *Lochner*, for example, Justice Harlan's dissent recognized that the legislature viewed the ten hour work day as protecting bakers from being forced to work longer hours.[76] The majority, however, refused to credit the idea that employers might enjoy stronger bargaining power than workers, treating the statute limiting bakers' hours as perversely limiting a baker's ability to voluntarily contract for long hours in order to provide for his family.[77] Thus, the ideal of neutral law led to an assumption that laws designed to favor one class over another would fail to achieve their objectives of bettering the favored class's lot.[78]

2. Formalism and Neutral Categories

In keeping with an ideal of law as a value-free objective enterprise, the Court used formal neutral distinctions as a general method for decision making, employing the sort of mechanical formalism that the legal realists decried.[79] For example, the Court distinguished activities that directly

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[73] *See* Cushman, *supra* note 12, at 886–88 (describing how contemporary scholars and case law suggest that an ideal of neutrality and equal treatment animated interpretation of the 14th Amendment); Note, *supra* note 58, at 511 (discussing a "principle of neutrality" governing judicial intervention in police power regulation).

[74] *See* Charles W. McCurdy, *The Roots of Liberty of Contract Reconsidered: Major Premises in the Law of Employment, 1867–1937*, Y.B. SUP. CT. HIST. SOC'Y 20, 20–21 (1984) (stating that the Court identified objectivity with common law doctrine).

[75] *See* Lochner v. New York, 198 U.S. 45, 52–53 (1905) (portraying the limitation of bakers' working hours as interfering with both the employee's and the employer's liberty to contract freely).

[76] *See id.* at 69 (arguing that the statute reflected a belief that employees were "compelled to . . . submit" to overly long hours).

[77] The statute at issue prohibited employers from requiring workers to labor for more than ten hours in a day. *Id.* at 45 n.†. Justice Peckham begins his opinion for the majority by denying that the statute prohibits coercion. *Id.* at 52. He argues that the statute prohibits nothing more than a voluntary contract. *Id.* He portrays the statute not as protecting the employee from being forced to labor long hours to avoid being fired, but from interfering with an employee's voluntary decision to work longer hours to earn more money. *Id.* at 52–53. Later Justice Peckham writes that the statute "might seriously cripple the ability of the laborer to support himself and his family." *Id.* at 59.

[78] *Cf.* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) (recognizing that workers often do not have sufficient bargaining power to obtain a living wage).

[79] *See* Note, *supra* note 58, at 510 (pointing out that the Court prior to the *Nebbia v. New York*, 291 U.S. 502 (1934), case employed "formal categories to distinguish . . . types of

affected commerce, which Congress could regulate, from activities that indirectly affected commerce, which Congress could not regulate.[80] *Lochner* itself illustrates this use of neutral abstract distinctions. The Court that struck down New York's limitations on bakers' hours in *Lochner* had upheld similar legislation limiting miners' hours.[81] The Court justified this discrepancy in terms of an abstract categorical distinction between "arbitrary" regulation, which the due process clause prohibited, and "reasonable" regulation, which the due process clause allowed.[82] It found regulation of bakers' hours arbitrary, but similar restrictions on miners' hours reasonable.[83]

Justice Holmes's *Lochner* dissent famously expressed skepticism about neutral distinctions' capacity to lead to neutral, or even defensible, decisions. He wrote, "[g]eneral propositions do not decide concrete cases."[84] And Holmes wrote that "[e]very opinion tends to become a law,"[85] thereby suggesting that the Justices' personal opinions, not the formal legal categories employed, controlled the cases. Indeed, the *Lochner* majority opined that long working hours for bakers posed no health hazard justifying regulation,[86] while Justice Harlan's dissent expressed a willingness to credit the legislative judgment that too much baking damages a baker's health.[87] The Lochner era Court sometimes used abstract categories to mask decisions based on the decision makers' personal opinions, as both Holmes and many modern Supreme Court Justices have pointed out.[88]

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economic activity"); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, AND THEORY 77–79 (2004) (discussing legal realist critiques of "conceptual" and "rule" formalism); WIECEK, *supra* note 48, at 4–5 (describing "[l]egal classicism" as "abstract, formal, conceptualist, categorical, and (sometimes) deductive" and noting that this "[a]bstraction promoted neutrality"); *cf.* Balkin, *supra* note 68 at 180–82 (discussing a similar notion of conceptualism as typifying Lochner era jurisprudence). *See generally* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (presenting a legal realist critique of formalism).

80 *See* Carter v. Carter Coal Co., 298 U.S. 238, 307–09 (1936) (striking down minimum wage and labor regulations benefiting coal miners because such regulation only has an "indirect" effect on interstate commerce); United States v. Lopez, 514 U.S. 549, 605–07 (1995) (Souter, J., dissenting) (suggesting that the Lochner era Court used the direct/indirect distinction to subject economic regulation to judicial policy judgments).

81 *See* Holden v. Hardy, 169 U.S. 366, 380, 398 (1898).

82 *See Lochner v. New York*, 198 U.S. 45, 56 (1905) (framing the constitutional question economic legislation raised as whether the legislation was "an unreasonable, unnecessary, and arbitrary" interference with personal liberty or a "reasonable . . . exercise of the police power"). *See generally* Robert P. Reeder, *Is Unreasonable Legislation Unconstitutional?*, 62 U. PA. L. REV. 191, 191 (1914) (explaining that substantive due process cases declare that the Court may strike down legislation it finds "unreasonable or arbitrary").

83 *See Holden*, 169 U.S. 366 (upholding a law limiting the work day of underground miners).

84 *See Lochner*, 198 U.S. at 76 (Holmes, J., dissenting). *See also id.* at 59 (expressing view that baking for long hours creates no health hazard justifying regulation (majority opinion)).

85 *Id.* at 76 (Holmes, J., dissenting).

86 *See id.* at 59 (majority opinion) ("We think that there can be no fair doubt that the trade of a baker . . . is not an unhealthy one . . . .").

87 *See id.* at 69–71 (expressing a willingness to defer to legislative judgment in light of expert support for the proposition that baking can be hazardous).

88 *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (characterizing *Lochner* as imposing a "particular economic ideology upon the Constitution"); United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter, J., dissenting)

3. Hyper-Rationalism

This skepticism toward legislation also manifested itself in a demanding approach to the rationales offered for government regulation.[89] The Court often expected not just a plausible justification for a regulation, but a rather compelling case, which might be very difficult to make for any regulation involving precise line drawing.[90] For example, the *Lochner* Court found the argument that "ten hours" of work is healthful, but ten-and-a-half hours is not "unreasonable and entirely arbitrary."[91] Part IV presents more examples of this hyper-rationalism in explaining how closely it resembles modern regulatory reformers' approaches. Importantly, the Court's rationality concept involved a strong tendency to view "class legislation" as arbitrary.[92] Hence, hyper-rationalism derived much of its content from an ideal of value-free general legislation.

D. The Gilded Age's Cost-Benefit State

The Court frequently employed a rough cost-benefit test to distinguish arbitrary from reasonable government regulation.[93] *Adkins v. Children's*

(characterizing Lochnerism as involving "exacting judicial scrutiny" of legislative means and ends); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 491–92 (1993) (O'Connor, J., dissenting) (describing *Lochner* as a decision constitutionalizing economic ideology); *cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861–62 (1992) (describing *Lochner* as premised on false factual assumptions about the capacity of unregulated markets to provide for minimal welfare); *TXO*, 509 U.S. at 470–71 (Scalia, J., concurring) (identifying *Lochner* with the creation of unenumerated rights under the 14th Amendment).

89 *See Lopez*, 514 U.S. at 606 (Souter, J., dissenting) (identifying Lochnerism with "exacting judicial scrutiny" of legislative choices); TRIBE, *supra* note 5, at 1346 (characterizing *Lochner* as exemplifying "strict and skeptical means-ends analysis").

90 *See* Tribe, *supra* note 5, at 1346–47 (noting that the *Lochner* Court found that long hours did not harm a baker's health, in spite of "considerable evidence" that it did).

91 *Lochner*, 198 U.S. at 62. The *Lochner* Court framed this contention in terms of whether the bread, not the baker, becomes unhealthy when the baker works more than ten hours. *See id.* This framing came from the idea that protecting the baker's health is an illegitimate private end. *Id.* at 59–61 (finding that a baker's employment is not so unhealthy as to justify upholding the law as a health law).

92 *See* Cushman, *supra* note 12, at 886–88 (explaining how contemporary Lochner era scholars equated "arbitrary" legislation with legislation favoring one group over another or redistributing resources).

93 *See generally* Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 393 (1988) (arguing that the Lochner period judges "wrote into the Constitution a unique American perspective on classical economics"). The Court did, however, prohibit price regulation in industries not affected with some substantial public interest. *See* Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 535 (1923) (describing three classes of businesses that are sufficiently "affected with a public interest" as to justify regulation of wages and employment terms); Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U.S. 418, 431–32 (1927) (same). *See generally* Walton H. Hamilton, *Affectation with Public Interest*, 39 YALE L.J. 1089, 1091–92 (1930) (explaining that price fixing regulation "found valid only" if it regulates a business affected with a public interest); Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759 (1930) (surveying the history of the Supreme Court's use of the distinction between business affected with a public interest and merely private business).

Hospital,[94] the second most famous exemplar of Lochnerism, illustrates the Court's embrace of CBA. The *Adkins* Court struck down a statute authorizing an administrative agency to establish a minimum wage for women.[95] In explaining why the legislation was so unreasonable as to offend due process, Justice Sutherland, writing for the *Adkins* majority, explained that the law required the employer to pay the administratively established wage "because the employee need[ed] it, but [the law] require[d] no service of equivalent value from the employee."[96] This suggests a familiar economic model. A wage payment, like any other payment for a good or service, should secure benefits to the payer at least equal to the cost. If the employer must pay more than the services are worth to the employer, the costs (the wage payments) exceed the benefits (services rendered), for, as the Court explains, the premium that the minimum wage law extracts does not generate any corresponding extra benefit.[97] Accordingly, the *Adkins* Court, in explaining why it found the law arbitrary, complained that "efficiency . . . forms no part of the policy of the legislation."[98] This case is one of numerous cases in which a cost-benefit model informed the Court's effort to distinguish arbitrary class legislation from reasonable permissible regulation.[99]

Rough CBA also played a prominent role in the era's cases addressing regulation of prices charged by public utilities, railroads, and similar entities.[100] In *Smyth v. Ames*, a leading rate regulation case of the period, the Court held that states may not establish railroad rates below the level needed to justly compensate the railroad for providing service to the public.[101] Again, this reflects a cost-benefit model, suggesting that a carrier

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94 261 U.S. 525 (1923).

95 *Id.* at 539, 562.

96 *Id.* at 557.

97 *See id.* at 558 (complaining that the "moral requirement implicit in every contract . . . that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored"). While the Court employed a cost-benefit model, it probably did not have a neoclassical economic conception of marginal cost theory in mind. As Professor Hovenkamp has explained, *Adkins* reflects a contemporary economic theory rejected by the neoclassical economists, called the "wage-fund doctrine." *See* Hovenkamp, *supra* note 93 at 431–37. Under this doctrine, forced transfers between capitalists and laborers would produce disasters for the laborer. *Id.* at 433. This idea found expression in the *Adkins* opinion. *See id.* at 437 (citing *Adkins*, 261 U.S. at 557). This discrepancy between neoclassical economics and the particulars of Lochnerism hardly harms the analogy between Lochnerism and regulatory reform, because the details of marginal cost theory have not figured prominently in the regulatory reformers' case for CBA.

98 *Adkins*, 261 U.S. at 557.

99 *See* Cushman, *supra* note 12, at 885–88, 896 (defining class legislation as that which arbitrarily transfers property "from A to B" and showing how *Adkins's* CBA led to the conclusion that the minimum wage statute was class legislation in this sense).

100 *See generally* Hovenkamp, *supra* note 93, at 440 (arguing that the Supreme Court of the Lochner period permitted "state intervention only where the classical economists . . . would have permitted it").

101 Smyth v. Ames, 169 U.S. 466, 526 (1898) (requiring states to establish rates that will "admit of the carrier earning such compensation as under all the circumstances is just to it and to the public"); *see* Cushman, *supra* note 12, at 909 (describing *Smyth v. Ames* as the culmination of a line of rate making cases); *see also* Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 410 (1894) (suggesting that just as equal protection of the laws forbids compelling "one

should receive payments roughly commensurate with the cost of providing its service. While the Court failed to agree upon a precise methodology to calculate the required "just" rate of return on investment, this concept dominated subsequent rate-making cases.[102] And this cost-benefit test led the Court to strike down rate regulations in some thirty-nine cases between 1897 and 1937.[103]

A cost-benefit framework also played a role in decisions upholding rate regulations. For example, in *Dayton-Goose Creek Railway Co. v. United States*,[104] the Court upheld a statute confiscating "excess" profits from heavily traveled railroad lines to subsidize service on less traveled routes.[105] Policies that allow firms to charge rents in excess of benefits conferred conflict with economic models, which define efficient policies as those equating benefits and costs.[106] Even though the statute forced, in effect, a transfer payment "from A to B," the Court unanimously upheld it, because it did not impose costs exceeding benefits. As Justice Taft explained, the Constitution does not guarantee "more than a fair net operating income," so the owner "can not expect . . . high . . . dividends."[107]

In many cases outside the rate-making context as well, a CBA-like model proved influential.[108] Hence, a CBA-like model played a leading role in

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class . . . to suffer loss that others may . . . gain," justice forbids "use for the public benefit at less than its market value").

[102] *See, e.g.*, Mississippi R.R. Comm'n v. Mobile & Ohio R.R. Co., 244 U.S. 388, 391 (1917) (describing rates that prevent "a fair return upon the property invested" as "arbitrary" and therefore void as repugnant to due process).

[103] Phillips, *supra* note 69, at 466 n.89, 463 nn.68–69.

[104] 263 U.S. 456 (1924).

[105] *Id.* at 485 (showing that Congress provided for the distribution of excessive profits and upholding the law on that basis).

[106] *See* HANDBOOK OF ENVIRONMENTAL ECONOMICS: ENVIRONMENTAL DEGRADATION AND INSTITUTIONAL RESPONSES 253–54 (2003) (defining the "social optimum" regulation or tax as one that equates marginal abatement cost to marginal damage); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 725 (1996) (assuming that a rule where costs equals benefits is ideal); JOHN GOWDY & SABINE O'HARA, ECONOMIC THEORY FOR ENVIRONMENTALISTS 16 (1995).

[107] *Dayton-Goose*, 263 U.S. at 481.

[108] *See, e.g.*, Railroad Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 349 (1935) (invalidating requirement that railroad reemploying a worker who left a railroad's service before the statute's enactment include that service in pension calculations, because that premium pays "for services fully compensated" under the previous contract for service); Chicago, R.I. & Pac. R.R. Co. v. United States, 284 U.S. 80, 97, 100 (1931) (invalidating exemption of "short line" railroads from obligation to pay fees for use of other lines' cars, because mandating free use of property is "arbitrary and unreasonable"); Brooks-Scanlon Co. v. Railroad Comm'n of La., 251 U.S. 396, 399 (1920) (invalidating an order requiring owner of a narrow gauge railroad to operate at a loss); Myles Salt Co. v. Board of Comm'rs, 239 U.S. 478, 485 (1916) (prohibiting a drainage district from taxing a property that would receive no benefits corresponding to the tax); Chicago, Milwaukee, & St. Paul R.R. Co. v. Wisconsin, 238 U.S. 491, 499 (1915) (invalidating a statute prohibiting lowering of an unoccupied upper berth in a sleeping car where a passenger has occupied a lower berth because this prohibition takes "salable space without pay"); St. Louis, Iron Mountain, & S. R.R. Co. v. Wynne, 224 U.S. 354, 358–59 (1912) (invalidating requirement that railroad pay claims for injured livestock within 30 days of demand to avoid double damages and a fee award when it creates "extraordinary liability" for "refusing to pay" an "*excessive* demand," i.e. one exceeding the value of the livestock) (emphasis added).

a significant portion of the Court's economic due process cases.

E. Repudiation of Lochnerism

The Supreme Court eventually rejected searching judicial review of economic legislation's reasonableness.[109] In doing so, it expressly recognized the necessity and legitimacy of legislative value choice.[110]

The acceptance of legislative value choices led not only to the abandonment of substantive due process review of economic regulation, but also to the practice of generally accepting legislative line drawing under the equal protection clause (at least where no suspect classification is involved).[111] The modern Court's substantive due process and equal protection cases specifically repudiate the tradition of viewing "class" legislation as suspect.[112] The modern doctrine requires the Court to uphold any legislative distinctions (between classes or otherwise) unless the distinctions drawn wholly lack a "rational basis."[113] The Court's decisions recognize that its prior approach to judicial review had led to the creation of legal principles based on judges' economic and social views, in spite of (or perhaps because of) the use of neutral categories.[114] The Court also recognized, at about the same time that it repudiated its Lochner era constitutional jurisprudence, that Congress considered the Court's neutralist

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109 *See* Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) (proclaiming that "the day is gone when this Court uses" Due Process "to strike-down" regulations as "unwise"); Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) (repudiating unreasonableness test for substantive due process because it leads judges to "strike down laws" thought "unwise or incompatible with some particular economic or social philosophy"); *cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (warning of the danger of enacting judicial "prejudices into legal principles" through review of social and economic legislation under the "arbitrary" and "capricious" standard of substantive due process).

110 *Ferguson*, 372 U.S. at 729 ("[L]egislatures . . . must decide upon the wisdom and utility of legislation.").

111 *See, e.g.*, *id.* at 732 (stating that the Equal Protection Clause only prevents invidious discrimination); *Williamson*, 348 U.S. at 489 (same). *See generally* Cushman, *supra* note 12, at 888–95 (explaining that during the Lochner period the Court often did not sharply distinguish due process from equal protection).

112 *See* West Coast Hotel v. Parish, 300 U.S. 379, 397 (1937) (approving of the *Adkins* dissent's view that the legislature may properly sustain a minimum wage because it benefits "employees" as a class). The *Parish* Court also recognized the inequality of bargaining power between employers and employees. *Id.* at 393–94, 398–99. It accordingly overruled a leading Lochner era case, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). *Parish*, 300 U.S. at 400.

113 *See* United States v. Carolene Prods., 304 U.S. 144, 152 (1938) (holding legislation will be upheld unless it precludes the "assumption that it rests upon a rational basis"); *Williamson*, 348 U.S. at 491 (upholding regulation because the regulation has a rational relation to an objective); Adler, *supra* note 13, at 118–19 (noting that both the Equal Protection Clause and the Due Process Clause require a minimal rational relationship between a law and a legitimate government purpose).

114 *See Ferguson*, 372 U.S. at 729–30 (tracing the Court's return to "the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of the legislative bodies, who are elected to pass laws"); *Williamson*, 348 U.S. at 488 (stating that "the day is gone when this Court uses the Due Process Clause to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought").

anti-trust jurisprudence a similar abuse of power and abandoned the use of the labor injunction under anti-trust statutes.[115] Finally, in *Erie Railroad Co. v. Tompkins*,[116] the Court repudiated the natural law tradition that partially underlay legal historicism.[117]

IV. PARALLELS WITH REGULATORY REFORM

As suggested previously, contemporary regulatory reformers' attitudes toward legislation resemble those of the *Lochner* Court. Before developing this parallel, it will prove helpful to review the role of economic ideology and judicial activism in regulatory reform.[118] While in this realm contemporary regulatory reform does not perfectly resemble Lochnerism, judicial activism and economic ideology have played important roles in regulatory reform, just as they did in advancing laissez-faire capitalism in the Lochner period.

A. Judicial Activism

The modern Court's rejection of substantive due process review of economic regulation has made that weapon off limits to regulatory reformers challenging regulatory statutes. We have already seen that the Court rejected an effort to revive the nondelegation doctrine as a check on regulatory legislation in *American Trucking*. Indeed, constitutional law generally plays a much lesser role in contemporary regulatory reform than it did in the Lochnerian attack on regulation. The executive orders requiring CBA have certainly been more important to regulatory reform than constitutional law.

Yet, the Court has employed substantive due process to carry out tort reform,[119] which conservative think tanks and business groups, the leading drivers of regulatory reform, support along with CBA.[120] The Court has prohibited "grossly excessive" punitive damage awards as a matter of substantive due process.[121] The Court employs a rough cost-benefit test, an evaluation of the ratio of the punitive damages to the actual harm inflicted

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115 *See* Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91, 102–03 (1940) (discussing congressional findings of "abuses of judicial power" and misinterpretation of anti-trust law).

116 304 U.S. 64 (1938).

117 *See id.* at 79 (rejecting the existence of a "transcendental body of law").

118 *See generally* Shaman, *supra* note 62, at 490 (noting that some insist that the main problem with the Lochner Court was excessive activism).

119 *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 561 n.* (1996) (Scalia, J., dissenting) (listing business groups and Washington Legal Foundation, a conservative think tank, as supporting constitutional limits on punitive damage awards); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 445 n.* (1993) (Scalia, J., concurring in the judgment) (same).

120 Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 8 n.4 (1991) (listing business groups appearing as amici seeking substantive due process limits on punitive damage awards). *See generally*, Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093 (2005) (discussing recent Supreme Court tort reform jurisprudence).

121 *See, e.g.*, *BMW*, 517 U.S. at 568 (citing *TXO*, 509 U.S. 456).

upon the plaintiff, as a significant element of its approach to determining excessiveness.[122] In developing this test for judicial tort reform, the Court relied upon several Lochner era precedents.[123] In the debate about what test to apply to damage awards, Justice O'Connor noted the relationship between regulatory reform and Lochnerism. She opined that "'[J]ust as the Fourteenth Amendment does not enact Herbert Spencer's Social Statistics,' . . . it does not require us to adopt the views of the Law and Economics school either."[124] Yet, when the Court for the first time in its history actually struck down a damages award under the Lochner era substantive due process excessiveness test, Justice Breyer's concurrence faulted the Alabama Supreme Court for failing to apply "*any* economic theory" to support its punitive damages award.[125] Justice O'Connor signed on to the Breyer concurrence, apparently because it distinguishes judicial insistence that the Constitution embodies "some economic theory" from judicial insistence that the Constitution embodies a particular economic theory.[126] This concurring view would, in essence, constitutionalize a central tenet of the regulatory reform movement, which generally employs an approach to regulation predicated upon economic concepts without any evident agreement about details.[127] Justices Scalia and Thomas have rejected the excessiveness inquiry precisely because it reflects the Lochnerian error of finding unenumerated substantive rights in the Fourteenth Amendment.[128]

These cases do not reflect Lochnerian attitudes toward legislation, for they are not directed toward legislation. Rather, they reflect skepticism toward juries.[129] Furthermore, this use of Lochnerism in the service of tort

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122 *BMW*, 517 U.S. at 580 (citing this factor as "perhaps the most commonly cited indicium [sic] of . . . excessive punitive damages").

123 *See TXO*, 509 U.S. at 453–54 (plurality opinion) (citing *Seaboard Air Lines Ry. Co. v. Seegers*, 207 U.S. 73, 78 (1907); St. Louis, I.M. & S.R. Co. v. Williams, 251 U.S. 63, 66–67 (1919); and Standard Oil Co. of Ind. v. Missouri, 224 U.S. 270, 286 (1912)) (stating that the Fourteenth Amendment imposes a substantive limit upon penalties); *BMW*, 517 U.S. at 568 (citing *TXO*, 509 U.S. at 456) (to support the notion of substantive due process imposing a limit on punitive damage awards); *see also BMW*, 517 U.S. at 600–01 (discussing the Court's reliance on Lochner era precedents). A majority in *TXO* defended reliance on these Lochner era precedents on the grounds that the *Lochner* dissenters joined the opinions upon which they relied. *TXO*, 509 U.S. at 455 (plurality opinion for three Justices); *id.* at 479–80 (dissenting opinion for three Justices) (agreeing with the plurality's adherence to these precedents).

124 *TXO*, 509 U.S. at 491 (O'Connor, J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

125 *BMW*, 517 U.S. at 593 (Breyer, J., concurring).

126 *See id.* (drawing this distinction).

127 *See generally*, Sen, *supra* note 24, at 932–33 (noting that proponents of CBA do not agree about precisely what it means).

128 *See TX*O, 509 U.S. at 470–71 (Scalia, J., concurring) (declining to find a "secret repository of . . . unenumerated substantive rights" in the Due Process Clause and finding it "particularly difficult to imagine" that the Clause authorizes judicial limits on punitive damages); *see also BMW*, 517 U.S. at 599–602 (Scalia, J., dissenting) (claiming that the Lochner era cases upon which the Court relies "simply fabricated the 'substantive due process right' at issue").

129 *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417–18 (2003) (expressing concerns about jury verdicts reflecting prejudice, bias, or whims); *TXO*, 509 U.S. at 464 (plurality opinion) (finding that juries hearing about the wealth of a wrongdoer may act based on "prejudice against large corporations"); *id.* at 467 (Kennedy, J., concurring) (suggesting that substantive due process review of jury verdicts should guard against punitive damage awards

reform has proven somewhat limited so far. The Court has only issued two opinions invalidating punitive damages awards to date, but it has also vacated several other jury awards in light of these decisions.[130]

Judicially created doctrines of standing and broad sovereign immunity sometimes impede environmental laws' enforcement.[131] These doctrines reflect the Court's continuing tendency to treat common law baselines as somehow natural and to read them into the Constitution.[132] Thus, for example, while Article III's literal language authorizing adjudication of not only cases, but also "controversies" seems to allow anybody who disagrees with an administrative decision to challenge it,[133] the Court has required a showing of injury that reflects a common law model of a lawsuit.[134] Similarly, the Court has stretched sovereign immunity's scope far beyond what the Eleventh Amendment's text authorizes, relying on the proposition that the framers intended to preserve common law sovereign immunity.[135]

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reflecting jury "bias, passion, or prejudice"); *id.* at 474 (O'Connor, J., dissenting) (claiming that "[a]rbitrariness, caprice, passion, bias, and even malice" infects jurors more often than judges); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (juries inflict "[m]ultimillion dollar losses" upon defendants "on a whim").

[130] *See Campbell*, 538 U.S. at 429 (finding punitive damages award unreasonable); *BMW*, 517 U.S. at 585–86 (finding a punitive damage award "grossly excessive"); Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1365 (2005) (stating that the Court vacated damage awards against five defendants after *Campbell*).

[131] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 563–64, 579 (1992) (plurality and concurring opinions) (requiring plaintiffs to purchase tickets to visit places whence an endangered species might vanish to establish standing to challenge failure of government to apply the Endangered Species Act to federally funded projects overseas); Sierra Club v. Morton, 405 U.S. 727, 734–41 (1972) (requiring the Sierra Club to obtain an affidavit from one of its members who uses the Mineral King Valley before permitting suit aimed at blocking a ski resort there); Burnette v. Carothers, 192 F.3d 52, 57 (2d Cir. 1999) (dismissing, on sovereign immunity grounds, a citizen suit against a state under several environmental statutes).

[132] *See* Sunstein, *supra* note 57, at 878–79 (explaining that the Court tended to view departures from common law baselines defining neutrality as class legislation serving special interests); *see also* Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003–2004 Term*, 42 HOUS. L. REV. 565, 605–19 (2005) (explaining how the Court has used common law causation concepts to narrow the scope of environmental statutes).

[133] *See* David M. Driesen, *Standing for Nothing: The Paradox of Demanding a Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 877 (2004) (claiming that standing has no textual basis in Article III); Robert J. Pushaw, *Article III's Case/Controversy Distinction and the Dual Function of Federal Courts*, 69 NOTRE DAME L. REV. 447, 480–82, 526–27 (1994) (arguing that cases do not necessarily involve controversies between adverse parties); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992) (suggesting that the literal language of Article III cannot justify standing doctrine by pointing out that an "executive inquiry" can be called a "case" and that a "legislative dispute" can be called a "controversy"); *see also* Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969) (calling the idea that the Constitution requires injury "historically unfounded").

[134] *See* Driesen, *supra* note 133, at 835–36 (describing a private law model that undergirds the Court's standing jurisprudence); Sunstein, *supra* note 57, at 893–94 (explaining how modern standing doctrine incorporates common law understandings). *See generally* Owen M. Fiss, *The Supreme Court 1978 Term Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 17 (1979) (describing a private law model of adjudication as dispute resolution).

[135] *See* Driesen, *supra* note 133, at 832 (describing the difference between the Court's version of sovereign immunity and the immunity explicitly set out in the 11th Amendment); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) (acknowledging that the Court has

But still, these doctrines have not materially advanced regulatory reform; they have merely complicated enforcement of some law at times.[136]

Increased judicial willingness to limit congressional power over commerce could threaten environmental law.[137] Judicial limits on federal regulatory power can aid the agenda of some regulatory reformers who seek to transfer power over environmental matters from the federal government to the states.[138] The dissenters in *United States v. Lopez*[139] and *United States*

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extended state immunity to suits from their own citizens even though "by its terms" the 11th Amendment only applies to suits by citizens from another state); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 72–73 (2000) (affirming that the 11th Amendment "stands not so much for what it says, but for the presupposition which it confirms"); Alden v. Maine, 527 U.S. 706, 715–16 (1999) (invoking common law sovereign immunity to justify prohibiting Maine governmental employees from suing their state government for violation of the Fair Labor Standards Act); College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 700 (1999) (Breyer, J., dissenting) (noting that sovereign immunity is a common law doctrine); Seminole Tribe v. Florida, 517 U.S. 44, 102–03 (1996) (Souter, J., dissenting) (discussing sovereign immunity's common law origins); *cf.* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004) (holding that Congress had constitutionally abrogated sovereign immunity under the 14th Amendment in Title II of the Americans with Disabilities Act); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 724–25 (2003) (upholding a waiver of sovereign immunity to allow for private enforcement of The Family and Medical Leave Act of 1993); *Seminole Tribe*, 517 U.S. at 69 (suggesting that sovereign immunity was not only a product of English common law, but part of the "fundamental jurisprudence in all civilized nations" [citation and internal quotation omitted]). *See generally Symposium*: *State Sovereign Immunity*, 75 NOTRE DAME L. REV. 817 (2000) (providing scholarly articles and essays on the 11th Amendment); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 8–13 (1988) (exploring the 11th Amendment and its interpretation prior to the recent change in jurisprudence).

[136] *See generally*, *Florida Prepaid*, 527 U.S. at 701–04 (charging that sovereign immunity, like *Lochner*, threatens to "deprive Congress of necessary legislative flexibility," in part by limiting its ability to rely on "a decentralized system of individual private remedies"); *id.* at 655–60 (explaining why immunizing states from private suits for patent infringement may leave patent holders with inadequate remedies).

[137] *See generally* Branford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 723–24 (2002) (noting that "a broad reading of *Lopez* and *Morrison* might call into question . . . some environmental statutes or regulations"); United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that Congress exceeded its authority under the Commerce Clause in enacting a prohibition on gun possession in school zones).

[138] *See* William F. Pedersen, *Contracting with the Regulated for Better Regulation*, 53 ADMIN. L. REV. 1067, 1074 (2001) (identifying "a regulatory reform contract approach" with "devolution" of responsibility to the states and to regulated entities); Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1496 (1999) (explaining that much of the regulatory reform debate focuses on the question of what level of government should have authority to address environmental problems); Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform*, 81 MINN. L. REV. 97, 99 (1996) (identifying devolution of authority to state and local government as a central tenet of conservative reform efforts); McGarity, *supra* note 38, at 1497, 1506, 1511 (explaining that most schools of regulatory reform favor decentralized decision making); NEWT GINGRICH, TO RENEW AMERICA 9 (1995) (arguing for devolution of power to state and local governments); *see also* Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1140 (1997) (analyzing the Unfunded Mandates concept, which played a key role in the Unfunded Mandates Act, a reform bill advancing both CBA and devolution).

[139] 514 U.S. 549 (1995).

v. Morrison[140] complained that the Court has embraced a formalist distinction, between commercial and non-commercial activities, reminiscent of the Lochner era's mechanical jurisprudence, and as incapable of producing principled results as the old direct/indirect affects distinction.[141] But these decisions are not divorced from constitutional text as the old substantive due process jurisprudence was.[142] The Constitution clearly does contemplate a federal government of limited power.[143] The majority in these cases may have understood that it was risking a return to Lochnerian vices by using formalist distinctions, but found the alternative of foregoing judicial enforcement of some constraint on the Commerce Clause authority unacceptable.[144] So far, these decisions have not led courts to declare any environmental law unconstitutional.[145]

The more important realm for judicial activism in the service of regulatory reform has involved statutory interpretation, not constitutional law.[146] Thus, statutory cases like *Duplex Printing Press Co. v. Deering*[147] and

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[140] 529 U.S. 598 (2000).

[141] *Lopez*, 514 U.S. at 606–08 (Souter, J., dissenting) (analogizing the direct/indirect distinction to the majority's commercial/non-commercial distinction); *id.* at 628–630 (Breyer, J., dissenting) (arguing that the commercial/non-commercial distinction is extremely malleable); *Morrison*, 529 U.S. at 640–43 (arguing that the commercial/non-commercial distinction is unworkable and ignores the "painful" history of the Lochner period); *see also* Gonzales v. Raich, 125 S. Ct. 2195, 2211, 2244 (2005) (disagreement between the majority and dissent about the definition of commercial activity).

[142] *Lopez*, 514 U.S. at 601 n.9 (claiming that *Lopez*, unlike *Lochner*, "enforces . . . the Constitution, not 'judicial policy judgments'").

[143] *See* U.S. CONST., art. I (listing the specific powers of the federal government); *Lopez*, 514 U.S. at 552 (identifying the idea that the Constitution creates a federal government with a few enumerated powers as a first principle); *Morrison*, 529 U.S. at 639 (Souter, J., dissenting) (agreeing with the majority that the Constitution withholds some powers from Congress); H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 654–55 (1995) (noting that the majority assertion that the federal government's power is limited is unsurprising and provokes no challenge from the dissenting Justices).

[144] *See Lopez*, 514 U.S. at 566 (stating that the commercial/non-commercial distinction may create some "legal uncertainty," but that the Constitution requires the Court to police the outer bounds of enumerated congressional power).

[145] *See* United States v. Deaton, 332 F.3d 698, 705–08 (4th Cir. 2003) (rejecting Commerce Clause challenge to the Clean Water Act); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 625–31 (5th Cir. 2003) (upholding the Endangered Species Act); Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1066–80 (D.C. Cir. 2003) (same); Gibbs v. Babbitt, 214 F.3d 483, 499–506 (4th Cir. 2000) (same); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1046–57 (D.C. Cir. 1997) (same); United States v. Ho, 311 F.3d 589, 601–04 (5th Cir. 2002) (rejecting Commerce Clause Challenge to work practice standards for asbestos under the Clean Air Act); Allied Local & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61, 81–83 (D.C. Cir. 2000) (rejecting Commerce Clause challenge to the Clean Air Act); *cf.* Solid Waste Agency of N. Cook County v. U. S. Army Corps of Eng'rs, 531 U.S. 159, 166–68 (2001) (interpreting federal jurisdiction over wetlands narrowly while articulating federalism concerns); United States v. Wilson, 133 F.3d 251, 254 (4th Cir. 1997) (same). For an especially perceptive analysis of issues affecting the constitutionality of environmental laws under *Lopez*, see generally John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998).

[146] Judicial activism is difficult to define. *See* Robert E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 347 (1989) (pointing out that application of the term "judicial activism" is often unclear). A

American Steel Foundries v. Tri-Cities Central Trades Council,[148] furnish the most salient Lochnerian analogue to contemporary judicial activism, not *Lochner* itself. Despite a statutory provision forbidding the use of injunctions in labor disputes, these cases authorized injunctions of a labor-related boycott of a printing press and of a picket in support of striking workers at a steel foundry.[149] They share with *Lochner* not only a disregard for textual limits, but also solicitude toward common law rights and opposition to "class" legislation.[150]

Cass Sunstein, a prolific CBA supporter, has argued for a cost-benefit canon of construction.[151] Such a canon would authorize the judiciary to interpret ambiguous statutory language to require CBA. In effect, he urges judges who agree with his policy views to make the judges' policy preferences determinative in many cases. This approach emulates, to some degree, the Lochner era vice of allowing prevailing economic ideologies to influence judicial law-making, a vice evidenced by the Court's strained interpretation of the anti-trust laws. But, as we have seen, the Supreme Court rejected industry requests for such a canon in the *American Trucking* case.[152] This suggests that the modern Supreme Court, at least, has not gone as far as the *Lochner* Court in "erecting [its] prejudices into law."[153]

Still, judicial support for regulatory reform has played a role in several important cases.[154] The dissenting Justices in *Industrial Union Department v.*

working definition of statutory judicial activism would consider a decision activist when conventional techniques of statutory interpretation do not provide at least a reasonably good justification for the result and judicial views about appropriate policy seem to play a large role.

147 254 U.S. 443, 471 (1920) (construing section of law limiting labor injunctions narrowly to allow judiciary to enjoin a labor action).

148 257 U.S. 184, 202, 205 (1921) (enjoining picketers under an anti-trust law).

149 *See* Duplex Printing, 254 U.S. at 468 n.1 (1920) (quoting §§ 6, 20 of the Clayton Act, which forbid restraining orders or injunctions from issuing in a labor dispute unless it was necessary to prevent irreparable injury); *Am. Foundries*, 257 U.S. at 201–02 (quoting § 20 of the Clayton Act).

150 The *Duplex Printing* Court construed the prohibition on labor injunctions of the Clayton Act narrowly because it restricted the "general" operation of anti-trust laws by granting a "special privilege or immunity to a particular class." 254 U.S. at 471. Both cases also treat labor actions as coercive interference with a property right. *See id.* at 465–66, 478–79 (boycott coercively interferes with a property right); *Am. Foundries*, 257 U.S. at 202, 205 (picketers coercively interfere with a property right).

151 *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 487 (1987) (suggesting that courts should presumptively read statutes to require that regulations benefits be at least "roughly commensurate with their costs").

152 531 U.S. 457, 468–71 (2001); *cf.* Michigan v. EPA, 213 F.3d 663, 678–79 (D.C. Cir. 2000) (requiring consideration of cost when the statute does not clearly preclude it); George E. Warren Corp. v. EPA, 159 F.3d 616, 622–24 (D.C. Cir. 1998) (requiring EPA to consider a proposed rule's effect on gasoline price and supply under a statutory provision not mentioning costs); Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 475 (D.C. Cir. 1998) (authorizing the FAA to consider costs to the air tourism industry in deciding how to devise a plan for "substantial restoration of the natural quiet" in the Grand Canyon area).

153 Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829, 833 n.21 (2001) (reviewing EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000)).

154 *See* Levy & Glicksman, *supra* note 146, at 421 (concluding that "the Supreme Court has

American Petroleum Institute (*Benzene*)[155] associated judicial support for regulatory reform with Lochnerism.[156] The dissenters claimed that the *Benzene* Court struck "its own balance between the costs and benefits of occupational safety standards."[157] They suggested that the majority had misread the statute to implement its own views of proper risk management, just as the *Lochner* Court had misread the Constitution in order to implement its own economic philosophy.[158] The plurality opinion required a finding of significant risk before regulation of toxic substances could occur under the Occupational Safety and Health Act.[159] This requirement flowed in part from sympathy toward a cost-benefit framework, for the plurality did not want to "give OSHA the power to impose enormous costs that might produce little, if any, discernible benefit."[160] Only Justice Powell, however, read the Occupational Safety and Health Act as requiring CBA.[161] And the Supreme Court squarely rejected that view in *American Textile Manufacturers Institute v. Donovan* (*Cotton Dust*).[162] The *Benzene* decision,

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elevated economic efficiency to a level of importance not shared by Congress"). I am here defining regulatory reform primarily in terms of a concern with CBA. Other writers have addressed the environmental tendencies of the Court more broadly. *See, e.g.*, Lin, *supra* note 132, at 565–66 (arguing that the Court's October 2003 term continued a trend of gradually eroding environmental law through the use of common law causation analysis, textualism, and federalism); Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 708–36 (1999) (reviewing the voting records of individual Justices in environmental cases); Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547, 547 (1997) (arguing that the Supreme Court has had little impact upon environmental law); Levy & Glicksman, *supra* note 146, at 346 (claiming that "the Supreme Court has pursued a policy far less protective of the environment than the policy intended by Congress"). While none of these general articles ascribe Lochnerian tendencies to the Court as a whole, some of them mention tendencies of individual Justices that seem distinctly Lochnerian. *See* Lazarus, *supra*, at 727 (stating that Justice Scalia seems concerned that environmental law "may promote governmental authority at the expense of individual autonomy, such as in the exercise of property rights").

155 Indus. Union Dep't v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607 (1980).

156 *Id.* at 723–24 (Marshall, J., dissenting).

157 *Id.*

158 *Id.* In context, the dissenter's reference to the majority's "own balance," stands in contrast to the balance struck by Congress. *See id.* at 713 (claiming that the plurality "is obviously more interested in the consequences of its decision than in discerning" Congressional intent). And the dissenters analogize the Court's willingness to enact its own views into law in *Benzene* to the *Lochner* majority's use of laissez-faire philosophy. *See id.* at 723–24 (citing Holmes's suggestion that the *Lochner* majority made Herbert Spencer's Social Statistics into a governing legal principle).

159 *Id.* at 639–40 (plurality opinion) (finding that section 3(8) requires the Secretary to determine that a standard it issues is reasonable necessary to remedy "a significant risk of material health impairment").

160 *Id.* at 645.

161 *Id.* at 667 (Powell, J., concurring) (concluding that the statute requires a "reasonable relationship" between the costs and benefits of regulation). The dissenters apparently intended their accusation of Lochnerism to apply to Justice Powell, for they accused the "Court" of Lochnerism, not just the plurality. *See id.* at 723–24 (Marshall, J., dissenting); *cf. id.* at 708–13 (Marshall, J., dissenting) (addressing itself to the "plurality").

162 452 U.S. 490, 507–23 (1981) (rejecting argument that costs of implementing OSHA toxic

however, pushed government agencies toward greater reliance on quantitative risk assessment, which, as we have seen, serves as a critical element of CBA.[163] Professor McGarity has explained that this decision had an enormous influence on government regulation of carcinogens, discouraging generic cancer policy and significantly reducing the protectiveness of regulation.[164] The Court thus substantially advanced regulatory reform, and it did so with very little statutory support.[165]

The Court also advanced regulatory reform substantially in *Chevron v. Natural Resources Defense Council*,[166] when it upheld an expansion of EPA's "bubble" policy allowing polluters to trade emissions between sources within a facility. But this case involved a very close call from the standpoint of statutory construction, and offers even less support than *Benzene* for a charge of Lochnerian activism.[167]

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standards must bear a reasonable relationship to benefits).

163 *See Benzene*, 448 U.S. at 652–58 (putting a burden of proof upon the agency that would be difficult or impossible to meet without quantifying risk). While the opinion is unclear about whether it in fact requires quantitative risk assessment, see *id.* at 654–55 (disclaiming any intent to impose a "mathematical straightjacket" while relying exclusively on examples of how to meet the Court's requirements of demonstrating significant risk that quantified the probability of harm), the federal agencies have found it difficult to satisfy the opinion's strictures without it. *See* Thomas O. McGarity, *The Story of the Benzene Case: Judicially Imposed Regulatory Reform through Risk Assessment*, *in* ENVIRONMENTAL LAW STORIES 141, 165–68 (Richard J. Lazarus & Oliver A. Houck eds., 2005) (explaining how the Court's decision helped destroyed generic cancer policy and led to reliance on case-by-case quantitative risk assessment); *cf.* Farber, *supra* note 154, at 552–53 (stating that the Court did not offer "clear leadership" on the issue of whether regulation is warranted based on unquantifiable evidence).

164 McGarity, *supra* note 163, at 165–66.

165 *See* Sunstein, *supra* note 15, at 360 n.266 (noting that "no statutory source" supported the *Benzene* plurality's significant risk requirement); Farber, *supra* note 154, at 553 n.27 (noting that "the plurality opinion is quite difficult to square" with the statute's "plain language"); Levy & Glicksman, *supra* note 146, at 380 (finding "the plurality efforts to explain the result in terms of statutory language and legislative history were largely unpersuasive"); Richard I. Goldsmith & William C. Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1, 25 (1983) (finding the plurality's position "implausible on its face"). Section 6(b)(5) of the Occupational Safety and Health Act (OSH Act) requires standards that assure "to the extent feasible . . . that no employee will suffer material" health impairment. *Benzene*, 448 U.S. at 612 (quoting 29 U.S.C. § 655(b)(5) (2000)).

166 467 U.S. 837 (1984).

167 The Court has also supported "market-based" approaches to regulatory reform through its Dormant Commerce Clause jurisprudence. In a line of cases beginning with *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Court has favored interstate markets in waste disposal services over local governmental control of garbage disposal. In *Philadelphia v. New Jersey*, the Court struck down a New Jersey law prohibiting the importation of waste from other states. *Id.* at 618, 628–29. The Court rejected the argument that the claimed statutory purpose, to conserve local landfill space in order to adequately protect the state's environment, justified the ban. *Id.* at 625–27. In so doing, it chose not to rely upon precedent allowing states to ban imports of other materials presenting health hazards. *See id.* at 631–33 (Rehnquist, J., dissenting) (claiming that the majority had not adequately distinguished this precedent). In subsequent cases, the Supreme Court also held that the Dormant Commerce Clause prohibited enactment of "flow control" ordinances and fees, which local governments use to try and establish local control of garbage disposal. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) (invalidating ordinance requiring delivery of local garbage to a local transfer station); Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Or., 511 U.S. 93 (1994) (invalidating a statute charging a larger tipping fee for waste brought from out-of-state than is charged for waste

Lower court judges, however, have sometimes actively advocated regulatory reform. For example, in *Corrosion Proof Fittings v. EPA*,[168] the United States Court of Appeals for the Fifth Circuit interpreted section 6 of the Toxic Substances Control Act[169] (TSCA) as requiring CBA of each regulatory alternative considered.[170] Section 6 requires EPA to regulate "to the extent necessary to protect adequately against . . . risk using the least burdensome requirements."[171] Once EPA has decided to regulate under this section, it must "adequately" protect the public against the risks involved. If several possible requirements adequately protect against the risk, it must choose the least burdensome requirement. It must also consider the economic consequences of any rule it promulgates.[172] The requirement to choose the least burdensome measure adequately protecting the public implies that EPA must compare the costs of adequately protective regulatory options to each other. Nothing in the statute, however, states that EPA must compare a single regulatory option's costs to its benefits. Indeed, in a case where only one regulatory option protected the public adequately, section 6 plainly would require adoption of that option, even if the costs far exceeded the benefits.[173] Section 6 explicitly requires adoption of an option that adequately protects the public. Yet, the *Corrosion Proof Fittings* court required CBA of each option.[174]

Even this decision, while certainly congruent with contemporary economic ideology and perhaps with active enactment of the judges' views into law, may simply reflect poor interpretation of a complex statute. Congress had declared in section 2 of TSCA that it intended that EPA "shall consider the . . . economic . . . impact of any action" that it "takes or proposes."[175] While even this section does not require comparison of costs to benefits or consideration of the costs of alternatives that do not adequately protect health, one can charitably interpret the decision as simply failing to adequately harmonize section 2 with the operative language in section 6. Even so, it is hard to believe that the contemporary intellectual climate did not make the wooden cost-benefit interpretation chosen appear natural to the court, in spite of its incongruity with the specifics of the statute. The

generated within Oregon); Chemical Waste Mgmt. v. Hunt, 504 U.S. 334 (1992) (invalidating a surcharge on hazardous waste generated outside of Alabama); *see also* Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353 (1992) (invalidating ordinance allowing counties to refuse waste from outside of county). These cases do not appear especially activist in a Lochnerian sense, because the tradition of striking down discriminatory regulation has such a long lineage. They do reflect, however, the exercise of discretion in determining the limits of the anti-discrimination principle in a way that favors regulatory reform.

[168] 947 F.2d 1201 (5th Cir. 1991).

[169] 15 U.S.C. §§ 2601–2692 (2000).

[170] *See Corrosion Proof Fittings*, 947 F.2d at 1217.

[171] 15 U.S.C. § 2605(a) (2000).

[172] *Id.* § 2605(c).

[173] Furthermore, in comparing two adequate regulatory options, the statutory language rather plainly requires EPA to choose the least burdensome, even if the least burdensome option has the worst cost-benefit ratio. *Id.* § 2605(a).

[174] *Corrosion Proof Fittings*, 947 F.2d at 1217.

[175] 15 U.S.C. § 2601(c) (2000).

court could easily have harmonized section 2 with section 6 by requiring cost effectiveness comparisons between adequate regulatory alternatives, without requiring any quantification of benefits.

This decision had an enormous impact upon EPA's regulation of toxic substances. Indeed, after this ruling EPA never again proposed to ban or seriously regulate any substance under TSCA section 6, apparently because quantification of benefits proved so daunting.[176]

Judges on the Court of Appeals for the District of Columbia have been more overtly ideological and willing to use the Constitution to advance their ideology.[177] But the decisions evincing this ideology most clearly have not had as large an impact as Lochner era labor injunction cases or *Corrosion Proof Fittings.* For example, in *International Union v. Occupational Safety and Health Administration* (*Lockout/Tagout*),[178] the D.C. Circuit held that OSHA must narrowly construe statutory provisions governing non-toxic workplace hazards to avoid a nondelegation difficulty.[179] The court went on to offer a paean to CBA and to urge the agency to cure the statutory ambiguity leading to nondelegation concerns by adopting CBA.[180] Still, the court did not require CBA[181] and approved an agency interpretation that did not rely upon CBA in a subsequent decision.[182]

The most far reaching attempt to use the Constitution as a regulatory reform engine came in *American Trucking Associations v. EPA*, when the D.C. Circuit held that Clean Air Act section 109's health protection requirement ran afoul of the nondelegation doctrine.[183] But, as we have seen, the Supreme Court unanimously reversed this decision.[184]

The cases examined here suggest that judicial activism on behalf of contemporary regulatory reform has greatly influenced the law (*Benzene* and *Corrosion Proof Fittings* alone justify that conclusion), but has proven less prevalent and gross than Lochner era judicial activism aimed at labor.[185]

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176 McGarity, *supra* note 20 (citing the use of CBA, which *Corrosion Proof Fittings* requires, as the likely reason that "EPA . . . has not taken any significant action to limit exposure to toxic chemicals under TSCA.").

177 *See generally* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (finding that ideology significantly influences this court's decision-making).

178 *Lockout/Tagout*, 938 F.2d 1310 (D.C. Cir. 1991). The case is known as *Lockout/Tagout*, because it addressed a rule requiring employers to tag or lockout (i.e., temporarily disable) devices capable of injuring workers. *Id.* at 1312.

179 *Id.* at 1316, 1321.

180 *Id.* at 1319–21; *id.* at 1326–27 (Williams, J., concurring).

181 *Id.* at 1321 ("[W]e hold only that cost-benefit is a *permissible* interpretation of § 3(8).") (emphasis in original) (majority opinion).

182 United Auto Workers v. OSHA, 37 F.3d 665, 668–69 (D.C. Cir. 1994) (stating that the agency's construction satisfied the nondelegation doctrine notwithstanding its rejection of CBA).

183 175 F.3d 1027, 1038 (D.C. Cir. 1999) (*per curiam*), *rev'd sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

184 *Whitman*, 531 U.S. 457.

185 *See generally* Phillips, *supra* note 69, at 491 ("Most critics of Lochner era substantive due process agree that the doctrine assisted business while disadvantaging workers . . .").

B. Ideology and Natural Law Origins

Both CBA and the Lochner era embrace of liberty of contract share a common natural law origin.[186] The CBA idea stems from neoclassical elaboration of efficiency ideals derived from the work of Adam Smith, who posited a law of nature by which an "invisible hand" made the market work to the benefit of all.[187] This same natural law of the invisible hand also supported decentralization of economic power through liberty of contract.[188] Smith himself referred to the "right of trafficking" as a "natural" right.[189] Thus, liberty of contract and CBA come from a natural law tradition, in the sense of a law having a basis in fundamental understandings of human nature.[190]

To be sure, neither the *Lochner* Court nor many contemporary regulatory reformers directly acknowledge natural law's influence upon their views.[191] But the *Lochner* Court's discussion of bakers pursuing happiness through voluntary contracts to work long hours certainly echoes Smith's description of people bettering society through specialized labor and

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[186] *See* Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 597 (1985) (CBA's "intellectual and social heritage . . . lies in the classical eighteenth and nineteenth century economics of unfettered contracts").

[187] SUNSTEIN, *supra* note 27, at 129 (CBA is often justified on grounds of economic efficiency.); LEONIDAS MONTES, ADAM SMITH IN CONTEXT: A CRITICAL REASSESSMENT OF SOME CENTRAL COMPONENTS OF HIS THOUGHT 142–47 (2004) (discussing how Newton inspired social scientists like Smith to search for "first principles" governing human conduct). Professor Montes argues that Smith has "too readily been assimilated to the natural jurisprudential tradition," because this view neglects the "humanist" aspects of Smith's work. *Id.* at 147. Assuming that Professor Montes is correct, this neglect of Smith's humanism does not negate the point made here. The neoclassical economic tradition emphasizes the mechanistic elements of Smith's work, especially the Invisible Hand metaphor. *Id.* at 130. Recognizing that this emphasis distorts Smith's thought does not negate the origins of neoclassical theory in Smith's law of the Invisible Hand. *See id.* at 150–52, 160 (acknowledging this influence).

[188] *See* Balkin, *supra* note 68, at 179; WIECEK, *supra* note 48, at 82 (the elite bar of the Lochner age derived from Adam Smith an idea that the market "set the natural and just price for labor and capital"); Fiss, *supra* note 64, at 47 (Graham Sumner, an influential American proponent of social Darwinism, drew upon the work of Herbert Spencer and Adam Smith); Hovenkamp, *supra* note 93, at 402–07 (tracing Lochnerian views about property and contract back to Adam Smith).

[189] ADAM SMITH LECTURES ON JURISPRUDENCE 8 (R.L. Meek, D.D. Raphael, & P.G. Stein eds., 1978). Smith also posited that the right to adjudication of a breach of contract arose from a natural law of human behavior, namely, that a promise "naturally creates an expectation" that the promise will be fulfilled. *Id.* at 12.

[190] *See* 15 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 10,390, 10,393 (Neil J. Smelser & Paul B. Baltes eds., 2001) (defining natural law as being derived from human nature and citing Adam Smith as an important natural law thinker); Sofer, *supra* note 62, at 2394 (natural law literature emphasizes an "analogy between discovering moral laws by reasoning and discovering the natural laws of science"). *See generally* HACKNEY, *supra* note 58, at 25 (explaining how Blackstone's natural law philosophy embraced laissez-faire and anticipated Adam Smith); JOHN DEWEY, THE QUEST FOR CERTAINTY: A STUDY OF THE RELATIONSHIP OF KNOWLEDGE AND ACTION 212 (1929) (arguing that laissez-faire is a logical conclusion from natural law precepts).

[191] *Cf.* GILLMAN, *supra* note 46, at 158–59 (characterizing an "unnatural" economic advantage as one that is "non-market-based").

voluntarily exchange.[192] Similarly, CBA owes its origins to neoclassical refinement of some of Smith's ideas. An analogy between free contracts and environmental regulation justifies CBA. CBA reflects a belief that government officials enacting regulation purchase environmental benefits on behalf of the public, much as a buyer purchases goods through a contract or other exchange.[193] The need to quantify benefits and compare them to costs flows directly from this vision of environmental regulation as an analogue to a contract for purchase of a good.[194] And many observers have read Smith as teaching that such contracts, reflecting rational choices of consumers pursuing their own ends, end up benefiting society.[195] CBA appears natural to many of its advocates, because it reflects the same sort of logic found in the natural order represented by contract.[196]

Moreover, demands for regulatory reform reflect a broader movement toward less government, based upon a faith in markets owing a great debt to Adam Smith.[197] Regulatory reform thus forms part of a broader move toward laissez-faire, even though neoclassical economics does not recommend the wholesale abandonment of environmental regulation.

Yet, many of the legal academics who embrace regulatory reform, unlike the Lochner era Justices, have explicitly rejected aspects of the economic theory supporting their preferred reforms. Thus, Cass Sunstein, Eric Posner, and Matthew Adler deny that aggregation of consumer preferences forms an adequate basis for regulation, even though aggregation of preferences forms the basis of the economic theory underlying CBA.[198] Nevertheless, they all conclude that CBA is justified.[199]

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[192] *See* Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 882–83 (1999) (describing *Lochner* as the "symbolic high point of Smithian freedom of contract").

[193] *See* Driesen, *supra* note 16, at 577 (economists treat clean air and water as amenities that society must purchase); BAXTER, *supra* note 29, at 10–12.

[194] *See* Driesen, *supra* note 16, at 577 (In order to know whether society is spending "the right amount" on environmental "amenities," society must make sure it pays clean up costs equal to pollution's "social cost."); GOWDY & O'HARA, *supra* note 106, at 104–08 (describing the tradeoffs between the production of consumer goods and pollution).

[195] *Cf.* DiMatteo, *supra* note 192, at 877–82 (arguing that Smith's notion of free contract was not limited to the economic efficiency model and included a concept of just contracting).

[196] *See* James A. Dorn, Cato Institute, *The Case for Market Liberalism*, (Jan. 20, 2004), *available at* http://www.cato.org/dailys/01-20-04.html (describing free market liberalism as "natural").

[197] *See* McGarity, *supra* note 38, at 1484–98 (discussing the commitment of various regulatory reform groups to less government and linking the "radical anti-interventionists'" views to Adam Smith).

[198] *See* Frank & Sunstein, *supra* note 45, at 324 (supporting CBA but disapproving a willingness-to-pay approach to estimating benefits); Adler & Posner, *supra* note 26, at 196 (rejecting reliance on "unrestricted preferences" as the basis for valuing costs and benefits); Sunstein, *supra* note 14, at 253 (stating that CBA would be undesirable if it lead to economic efficient outcomes based on willingness to pay); *see also* McGarity, *supra* note 14, at 10 (1998) (identifying Professor Sunstein as a proponent of a "softer" variety of CBA that that offered by "free marketers").

[199] *See* SUNSTEIN, *supra* note 21, at 25–26 (basing his support for CBA on "common sense informed by behavioral economics and cognitive psychology" rather than "neoclassical economics"); Adler & Posner, *Welfarist Theory*, *supra* note 45, at 289–302 (linking individual welfare to overall well being that Adler identifies with CBA); Adler & Posner, *supra* note 26, at

Natural law remains at least as influential as it was during the Lochner period, but its influence in the courtroom has waned significantly.[200] Today, natural law animates the law and economics movement, which tends to believe regulation will prove counterproductive because it interferes with the natural order represented by free markets.[201] But the Court, while continuing at times to venerate common law models, does not use natural law to justify contemporary deregulation.

In place of natural law, we find a new kind of legal historicism, which emphasizes positive law sources as the basis for neutrality. Hence, textualism and originalism have become influential in constitutional interpretation.[202]

C. Attitudes Toward Legislation

As suggested previously, clearer and more significant parallels with Lochnerism appear when we look beyond the modern judiciary. For modern

194–95 (arguing that CBA tends to advance overall well-being). Professor Adler's support for CBA is subtle and sometimes equivocal. *Cf.* Driesen, *supra* note 25, at 69–75 (questioning whether Adler and Posner's "overall well being" theory adequately supports a choice for CBA). *Compare* Matthew D. Adler, *The Positive Political Theory of Cost-Benefit Analysis: A Comment on Johnston*, 150 U. PA. L. REV. 1429, 1429 (2002) (recognizing that CBA may reduce overall well being), *with* Adler, *Judge Williams*, *supra* note 45, at 271 (supporting CBA but characterizing his support for CBA as "more tentative" than that of Judge Williams).

[200] *See* Mootz, *supra* note 62, at 311 (referring to natural law as "a curiosity outside the mainstream"); Sofer, *supra* note 62, at 2403–04 (describing the unacceptability to society of having a Supreme Court Justice "branded" as a "believer in natural law").

[201] *See generally* HACKNEY, *supra* note 58, at 25 (identifying allegiance to natural law governing economic relations with the view that "any attempt to intervene . . . was necessarily doomed to failure"); Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763, 1793 (2002) ("[R]isk tradeoff analysis began as a tool of deregulation."); Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533 (1996); RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT (John D. Graham & Jonathan Baert Wiener eds., 1995); W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITY FOR RISK (1992); Ralph L. Keeney, *Mortality Risks Induced by Economic Expenditures*, 10 RISK ANAL. 147 (1990); AARON WILDAVSKY, SEARCHING FOR SAFETY (1988) [hereinafter WILDAVSKY, SEARCHING FOR SAFETY]; Aaron Wildavsky, *Richer is Safer*, 60 PUB. INT. 23 (1980).

[202] *See* Adam Liptak, *A Court Remade in Reagan Era's Image*, N.Y. TIMES, Feb. 2, 2006, at A19 (discussing the Court's growing commitment to original intent and textualism); Jonathan G. O'Neall, *Raoul Berger and the Restoration of Originalism*, 96 NW. U. L. REV. 253, 281 (2001) (concluding that Raoul Berger's originalist scholarship has compelled constitutional law and theory to grapple with "the originalist proposition"); *cf.* Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113, 134 (2002) (finding that text has little impact and intent has no impact on Supreme Court decisions); Richard S. Kay, *Originalist Values and Constitutional Interpretation*, 19 HARV. J.L. & PUB. POL'Y 335, 335 (1995) (claiming that originalism describes an adjudication method identified and debated only in the last 20 years). *See generally* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (a polemic on behalf of originalism); MICHAEL J. PERRY, THE CONSTITUTION AND THE COURTS: LAW OR POLITICS? 60 (1994) (characterizing Justice Scalia as "one of the Court's foremost exponents" of originalism); STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED 21 (1994) (pointing out that "virtually every" Supreme Court Justice has, "at one time or another," invoked "originalist arguments").

regulatory reformers' attitudes toward regulation closely resemble those of the Lochner era Court.

1. Favoring Neutrality

We have seen that the Lochner era Court tended to view "class legislation" with suspicion and supported more neutral general legislation. Indeed, in the anti-trust cases the Court converted class legislation into neutral legislation by misinterpreting trust-busting laws as authorizing injunctions against labor as well as business.[203]

Modern regulatory reformers echo this opposition to "class legislation" when they decry the one-sidedness of legislation favoring protection of the public's health over the interests of polluters. While they do not explicitly frame their opposition in "class legislation" terms, a provision like section 109 of the Clean Air Act[204] takes resources from *A* (the polluter) and gives them to *B* (the breather) in the form of health protection.[205] In doing so, the legislation corrects a power imbalance that makes breathers helpless in protecting their own health from pollution absent government intervention, a power imbalance similar to that which the New York Legislature sought to correct in employment relations when it sought to limit bakers' working hours. Cass Sunstein refers to class legislation protecting breathers from polluters as absolutist, thus suggesting that one-sided legislation is irrational, even though as one of the moderate voices in the regulatory reform movement, he suggests that absolutism might be justified in a few cases (such as protection of endangered species).[206] The suggestion that one-sided legislation is not just a value choice but an irrational act is consistent with Lochnerism.

Both the Lochner era Court and modern regulatory reformers often regard one-sided legislation as futile and therefore arbitrary. To justify its holding that limits on bakers' hours were unreasonable, the *Lochner* Court speculated that such limits might prove counterproductive in terms of their

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[203] *See supra* notes 66–77 and accompanying text.

[204] 42 U.S.C. § 7409 (2000).

[205] Section 109 requires EPA to establish standards for ambient air quality sufficient to protect public health. *Id.* Once it does this, states must devise plans, which include binding emission control obligations for polluters, to meet these standards. *See id.* § 7410; Train v. Natural Res. Def. Council, 421 U.S. 60, 64–68 (1975) (describing the basics of the Clean Air Act scheme). These state standards, passed as part of the effort to achieve the national ambient air quality standards, force polluters to install pollution control devices or employ other changes that cost them money but improve the health of those inhaling their emissions.

[206] *See* CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT 213–14 (2002) (suggesting that a rights-based approach might properly apply to the Endangered Species Act); Sunstein, *supra* note 201, at 1534 (contrasting balancing with absolutism); Cass R. Sunstein, *From Consumer Sovereignty to Cost-Benefit Analysis: An Incompletely Theorized Agreement?*, 23 HARV. J.L. & PUB POL'Y 203, 209 (1999) (claiming that the absolutism characterizing 1970s legislation "makes no sense"); Sunstein, *supra* note 14, at 300 (characterizing many current statutes as calling for "absolutism"); *see also* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 742 (1999) (arguing that public hysteria unduly influences regulation); STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 35–36 (1993) (same).

own objectives. Specifically, the Court claimed that limits on work hours "might seriously cripple the ability of the laborer to support his family."[207] This argument resembles a favorite theme of contemporary regulatory reformers—regulation's potential to harm the very people it seeks to protect. They frequently argue that environmental, health, and safety regulation can make its beneficiaries ill by reducing wealth or through direct health and environmental risks created through responses to regulation.[208] Even though Professor McGarity, a leading environmental scholar, has sharply questioned the richer is safer argument against stringent regulation,[209] the Supreme Court characterized the argument as "unquestionably true" in *American Trucking*.[210]

Scholars supporting CBA have portrayed it as a neutral reform and made claims about its neutrality central to their case for CBA.[211] Professor Sunstein, for example, argues that CBA will encourage agencies to make some regulations stricter and others more lenient, thus suggesting that it has a neutral effect.[212] He also argues that CBA improves priority setting, thereby suggesting that it does not so much weaken environmental protection as refocus it.[213] In spite of industry's consistent support of CBA, Professor

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[207] Lochner v. New York, 198 U.S. 45, 59 (1905). *See generally* Balkin, *supra* note 68, at 196 (referring to the argument that economic regulation will hurt the very people it is designed to protect as "a standard individualist argument").

[208] *See* SUNSTEIN, *supra* note 21, at 136–41; ROBERT HAHN ET AL., DO FEDERAL REGULATIONS REDUCE MORTALITY? 6–11 (2000) (arguing that federal regulations can increase mortality); Sunstein, *supra* note 201, at 1535–36 (listing examples of situations where regulations reducing one health or safety risk may increase another); Graham & Wiener, *Resolving Risk Tradeoffs*, *in* RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 226, 226 (John D. Graham & Jonathan Baert Wiener eds., 1995); BREYER, *supra* note 206, at 23 (claiming that the costs of environmental cleanup can deprive individuals of income and lead to poor diet, heart attacks, and suicide); VISCUSI, *supra* note 201, at 4 (arguing that fuel economy improvements can reduce vehicle safety by encouraging production of smaller cars); Keeney, *supra* note 201, at 147–59 (arguing that lower incomes result in increased mortality risks); WILDAVSKY, SEARCHING FOR SAFETY, *supra* note 201, at 59–74 (same).

[209] *See* McGarity, *supra* note 14, at 42–49 (refuting the richer is safer idea).

[210] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 466 (2001) (characterizing the argument that the "economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains" from cleaning the air as "unquestionably true"); *see also* Am. Dental Ass'n v. Martin, 984 F.2d 823, 826 (7th Cir. 1993) (costs of rule for medical establishment will raise costs and reduce demand for medical services, which may kill people); *Lockout/Tagout*, 938 F.2d 1310, 1326–27 (D.C. Cir. 1991) (Williams, J., concurring) (arguing that costly regulation can kill more people than it saves by reducing wealth); *cf.* Bennett v. Spear, 520 U.S. 154, 176–77 (1997) (characterizing the Endangered Species Act's goal as avoiding "needless economic dislocation produced by agency officials zealously but unintelligently pursing their environmental objectives").

[211] *See* Sinden, *supra* note 14, at 1416 (economists have touted CBA as a "politically 'neutral' means" of resolving policy disputes).

[212] SUNSTEIN, *supra* note 21, at 137 (arguing that CBA is for everyone); Sunstein, *supra* note 21, at 2265 (supporting statement that "people with diverse views" should support CBA with examples of CBA producing "more stringent and rapid regulation"); SUNSTEIN, *supra* note 206, at 26–27 (citing examples of CBA causing "more rapid and stringent regulation"); *cf.* Driesen, *supra* note 24 (questioning CBA's neutrality).

[213] *See* Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1060 (2000) (portraying CBA as a way of improving priority setting); Sunstein, *supra* note 14, at 257–

Sunstein, along with others, argues that CBA reduces special interest influence over legislation.[214] Professor Gilman has identified concerns about special interest influence as a major reason for the Court's embrace of "general legislation" both during and before the Lochner period.[215] Thus, both contemporary regulatory reformers and the Lochner era Justices view neutral general legislation as an antidote to special interest influence.

The regulatory reformers' neutrality ideal includes an ideal of general legislation, since they view CBA as a broadly applicable reform.[216] Mathew Adler and Eric Posner likewise convey support for something akin to general legislation when they argue that CBA improves "overall well-being."[217] By identifying overall well-being as a goal for regulation they imply that CBA leads to objectively desirable outcomes, thereby supporting its neutrality. The overall well-being concept suggests that government officials can avoid making value choices favoring one interest over another.[218] The legislator need not choose between protecting the public health and the environment and protecting industry from regulations' burdens.[219] Instead, their concept

60 (discussing the need to reallocate resources to reduce inconsistency and misallocation of resources); *see also* David M. Driesen, *Getting Our Priorities Straight: One Strand of the Regulatory Reform Debate*, 31 Envtl. L. Rep. 10,001, 10,011 (2001) (explaining that the regulatory reformers' emphasis on improved priority setting conveys a false sense of neutrality); BREYER, *supra* note 206, at 10–23 (arguing that risk regulation suffers from poor priority setting); *cf.* McGarity, *supra* note 14, at 34 (questioning the notion that relaxing regulatory stringency helps fund more important health priorities); Driesen, *supra* at 10,017–18 (questioning the link between uneven dollars per life saved, CBA, and priority setting).

214 SUNSTEIN, *supra* note 206, at 107; Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis*, 68 U. CHI. L. REV. 1137, 1174 (2001) (providing a theory explaining why CBA might discourage special interest influence).

215 *See* GILLMAN, *supra* note 46, at 10 (describing the standards guiding Lochner era jurisprudence as hostile to legislation advancing "the special or partial interests of particular groups or classes").

216 *See* Sunstein, *supra* note 14, at 270 (discussing proposals to impose CBA on agency rulemaking under all regulatory statutes). *See generally* William W. Buzbee, *Regulatory Reform or Statutory Muddle: The "Legislative Mirage" of Single Statute Regulatory Reform*, 5 N.Y.U. ENVTL. L.J. 298 (1996) (examining CBA and risk assessment provisions in legislative proposals for regulatory reform).

217 *See* Adler & Posner, *supra* note 26, at 194–95 (arguing that CBA is usually well-justified by the value of pursuing "overall well-being").

218 Indeed, Professor Adler has gone so far as to argue that "Congress doesn't choose values, it chooses actions." Adler, *supra* note 13, at 120. This suggestion is, however, quite questionable. For example, the congressional directive that EPA set air quality standards protecting public health, Clean Air Act, 42 U.S.C. § 7409 (2000), takes no direct action limiting pollution. Instead, Congress chose a value to guide EPA decisions about what levels of ambient air quality to demand. The EPA decisions setting numerical air quality standards, which constitute actions in a legal sense, do not themselves improve air quality. Rather, they establish goals for state air quality programs that impose legal requirements that mandate pollution reductions. David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740 (1983) (harshly criticizing Congress for substituting establishment of abstract goals for specific actions reducing air pollution). By choosing criteria for agency action rather than regulatory levels for polluters, Congress makes a value choice, while leaving actual action to other institutions. *See* John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 249 (1990) (some legislators may support health-based statutes because they establish "public values promoting protection of public health").

219 *See* SUNSTEIN, *supra* note 206, at 113 (CBA should not be contentious because it "does not

suggests that an abstract state exists that provides an objectively better outcome.[220] Properly conducted CBA, in their view, offers, in all likelihood, a neutral method for achieving an objectively desirable end.[221]

Some judicial support likewise exists for the idea of CBA as a kind of desirable general legislation, as opposed to class legislation empowering "special interests." In the previously discussed *Lockout/Tagout* decision,[222] the D.C. Circuit suggested that the nondelegation doctrine requires that statutes provide both a "floor"—a principle establishing a minimum protection level—and a "ceiling"—a principle limiting a regulation's maximum stringency—to guide agency decisions appropriately.[223] This approach suggests that statutes should assure that agencies write regulations that are neither too strict nor too lenient.[224] The *Lockout/Tagout* court clearly indicated that CBA's use saves the statute from any

take a stand on highly controversial questions of what government ought to do").

[220] Professors Adler and Posner, however, have earned a reputation as two of the most thoughtful proponents of CBA because they do address issues of value, albeit in an abstract way suggestive of neutrality. *See* Adler, *supra* note 13, at 144 (describing "overall well-being" as a "particular public value"); Matthew D. Adler, *Cost-Benefit Analysis, Static Efficiency, and the Goals of Environmental Law*, 31 B.C. ENVTL. AFF. L. REV. 591, 592–94 (2004) (explaining that the overall well-being theory involves comparison of objective values advanced or hindered by government regulation and that CBA's link to overall well-being is contingent). On the other hand, Professor Adler has recently rejected the idea that deontological choices could trump the consequentialism undergirding CBA, which might imply more rejection of legislative value choice than his earlier articulation of his views. *Compare* Adler, *supra*, at 600–01 (rejecting the idea of deontological considerations) *with* Adler & Posner, *Distorted Preferences*, *supra* note 45, at 1111 (recognizing that deontological or egalitarian considerations might justify rejecting welfare improving projects) *and* Adler & Posner, *supra* note 26, at 196 (recognizing that deontological and distributional considerations may be more important than overall well-being).

[221] A key part of Adler and Posner's theory involves a distinctive view of what constitutes properly conducted CBA. *See* Adler & Posner, *supra* note 26, at 196–99 (explaining that valuation should be based on consumer desires rather than "unrestricted" preferences); *cf.* Driesen, *supra* note 25, at 69–73 (questioning whether their concept of desire-based measurement logically leads to a preference for CBA).

[222] *Lockout/Tagout*, 938 F.2d 1310 (D.C. Cir. 1991).

[223] *See id.* at 1317 (finding that the agency's construction providing a ceiling did not suffice because it did not create a floor).

[224] Regulatory reform proponent Cass Sunstein endorses the floor-and-ceiling approach to the nondelegation doctrine. *See* Sunstein, *supra* note 15, at 359 (stating that the question of whether the Act sets "ceilings or floors . . . must be answered in order to decide" upon the Clean Air Act's constitutionality). This shows how important neutrality is to regulatory reform proponents, because the notion that the nondelegation doctrine demands floors and ceilings is clearly wrong. All it demands is an intelligible principle. *See* Mistretta v. United States, 488 U.S. 361, 371–79 (1998) (discussing the liberality of the intelligible principle requirement and applying it to uphold sentencing guidelines). The Court, even before *American Trucking*, repeatedly held that general policy guidance containing no definable floor or ceiling satisfies the doctrine. *See id.* at 373–74 (citing cases that upheld statutes directing agencies to regulate as "public interest" requires or set rates that are "reasonable"). The suggestion that legislation must have both a floor and a ceiling, rather than just one or the other, implements a policy value of neutrality and moderation. A statute with a clear floor and no ceiling (or vice versa) would be one-sided, but clearly intelligible. It is hard to imagine what, other than unconscious devotion to neutrality, would induce a knowledgeable administrative and constitutional law scholar like Professor Sunstein to partially echo, rather than correct, this gross error in the D.C. Circuit case law.

constitutional difficulty by allowing an even-handed approach. This ruling suggests that an approach that made a clear value choice would pose a constitutional problem, but that a neutral approach (CBA) would pass muster.[225] The reasoning employed suggests that class legislation favoring workers at the expense of employers was constitutionally suspect and must be subject to some sort of constraint.

2. Hyper-Rationality

Modern regulatory reformers, like the Lochner era Court, suggest that regulators should give compelling reasons for their decisions, rather than meet minimum requirements of bare rationality.[226] CBA's use of quantification leads its supporters to believe that CBA will provide very compelling, indeed mathematical, justifications for precise line drawing. This belief undergirds the D.C. Circuit's ruling in *American Trucking Associations v. EPA*.[227] The court chided EPA for interpreting section 109 of the Clean Air Act in a way that failed to constrain the stringency or the laxness of potential standards.[228] It then held that section 109 of the Act, as interpreted by EPA, failed to provide a "determinate criterion" for setting standards and therefore offended the nondelegation doctrine.[229] This holding suggested, especially when read in conjunction with the earlier ruling in *Lockout/Tagout*, which it discussed, that CBA could provide this

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[225] *Lockout/Tagout*, 938 F.2d at 1321 (remanding to the agency to cure the nondelegation difficulty rather than invalidating the statute because the statute "can reasonably be read as requiring" CBA).

[226] *See* Adler, *supra* note 13, 131–41 (arguing for strengthened rationality requirements in constitutional review); Hahn & Sunstein, *supra* note 26, at 1528 (arguing that an agency has a duty to "provide a well-reasoned analytical justification for the decision reached"); SUNSTEIN, *supra* note 206, at 107 (agencies must explain how the benefits of regulation justify the cost or why the regulation is justified if they do not); Cass R. Sunstein, *Regulating Risks After ATA*, 2001 SUP. CT. REV. 1, 40–42 (suggesting that the courts should invalidate national ambient air quality standards when the agency fails to provide a quantitative justification for the regulation); Sunstein, *supra* note 15, at 305–06 (suggesting that EPA should justify a national ambient air quality standard by explaining why the amount of benefits and the residual risk in the chosen standard makes it a better rule than at least two competing alternatives); Sunstein, *supra* note 42, at 455 (analogizing OMB review to "hard look" judicial review). In defending his proposal for better explanations of rules setting national ambient air quality standards, Professor Sunstein argues that without a "clear and (to the extent possible) quantified presentation of the expected environmental benefits," there can be no assurance that the agency has chosen an optimal regulation. Sunstein, *supra* note 15, at 309. This suggests an abandonment of review for bare rationality in favor of a demand for reasoning sufficient to "assure" an optimal regulation, a very demanding standard for agency explanations in light of the scientific uncertainty bedeviling risk regulation. *Cf. id.* at 306 (demanding that agencies acknowledge uncertainties).

[227] 175 F.3d 1027 (D.C. Cir. 1999), *rev'd sub. nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

[228] *Id.* at 1036–37 (reviewing EPA's approach and characterizing it as leaving EPA free to "pick any point between zero and a hair below the concentrations yielding London's Killer Fog").

[229] *Id.* at 1034–38 (pointing out that "EPA lacks . . . any determinate criterion for drawing lines" and concluding that EPA offers no "intelligible principle," as required by the nondelegation doctrine).

determinate principle if allowed by Congress.[230] Thus, the image of CBA providing a neutral algorithm for determining standards informed the court's judgment that the Clean Air Act violated the nondelegation doctrine for want of a determinate principle.

The reasoning that the Lochner era Court used to strike down economic legislation as unreasonable under the due process clause closely resembles the reasoning CBA advocates use to urge their favorite reform upon the polity. This similarity was strikingly evident in Professor Tribe's *American Trucking* brief. Professor Tribe argued that administrative decision making without consideration of cost was unreasonable in order to support a request for a presumption that Congress intends to mandate the consideration of cost, absent a clear contrary statement in the statute.[231] Industry and scholars supporting their position have employed similar arguments about the unreasonableness of alternatives to CBA in seeking to persuade Congress to enact cost-benefit statutes.

For example, both the Lochner era Court and regulatory reformers frequently use difficulties in justifying precise line drawing to question a regulation's rationality. Thus, as we have seen, the *Lochner* Court called the conclusion that ten hours of work does not endanger health, but ten-and-a-half hours does, "entirely arbitrary."[232] And in *Adkins v. Children's Hospital*,[233] the Court found it impossible to understand how a board charged with defining a minimum wage adequate to provide for women's welfare could use such a general criterion to come up with a precise number, and therefore assumed that the board must have "brought other . . . factors into the problem" than those mentioned in the governing statute.[234] Professor Tribe's *General Electric Brief* similarly claimed that implementing

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[230] In *American Trucking*, the court remanded to EPA to allow that agency to construct an intelligible principle, saving the statute from being struck down. *Id.* at 1038 (remanding to offer EPA "an opportunity to extract a determinate standard on its own"). It then stated that it had mentioned CBA as a possible intelligible principal in *Lockout/Tagout*. *Id.* Since *American Trucking* equates an intelligible principle with a "determinate standard," *id.* (remanding to write a "determinate standard"), this effectively means that the court has mentioned CBA as a means of establishing a "determinate standard." In fact, however, the court did more than just mention CBA in *Lockout/Tagout*. It devoted several pages to arguing that the OSH Act permitted CBA and that CBA was desirable. *Lockout/Tagout*, 938 F.2d 1310, 1317–21 (D.C. Cir. 1991). It then clearly indicated that CBA would cure the nondelegation difficulty it found. *Id.* at 1321. Reading the two cases together strongly suggests that the court believes that CBA provides a determinate principle satisfying even its version of the nondelegation doctrine. *Accord* Schroeder, *supra* note 11, at 330 (characterizing Judge Williams' opinion in *American Trucking* and *Lockout/Tagout* as treating CBA as a means of supplying an intelligible principle). The *American Trucking* court, while willing to endorse CBA as a general cure for the problem of an indeterminate principle, had to rule CBA out as a means of solving the nondelegation problem it saw in section 109—for it recognized that its prior decisions had read section 109 as "barring EPA from considering" costs. *American Trucking*, 175 F.2d at 1038.

[231] *See* GE Brief, *supra* note 3, at 22 (agencies must consider costs in order for their decisions to "qualify as 'reasoned'").

[232] Lochner v. New York, 198 U.S. 45, 62 (1905).

[233] 261 U.S. 525 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

[234] *Adkins*, 261 U.S. at 556–57 (1923).

a directive to protect public health is impossible because scientific information cannot "definitively determine" a precise numerical air quality standard.[235] EPA therefore must have considered a statutorily extraneous factor, namely cost, argued General Electric.[236] Both the Lochner era Court and the modern regulatory reformers tend to assume that something improper, or at least extra-statutory, must be going on when a convincing explanation for a numerical regulatory standard does not appear. Both embrace an expansive view of arbitrary regulation as including any regulation lacking a very convincing explanation for very difficult judgments about precise line drawing.

Both the Lochner era Court and modern regulatory reformers often treat a failure to weigh all pros and cons as unreasonable. Thus, the *Adkins* Court cited an administrative agency's failure to consider the cost to an employer of providing a minimum wage as a reason to find a minimum wage law arbitrary.[237] CBA advocates' arguments challenging the rationality of 1970s environmental legislation because of its alleged failure to consider cost echo the approach to reasonableness review in the Lochner era substantive due process cases. Both tend to treat policy choices that do not weigh costs and benefits as irrational.[238]

D. CBA: Then and Now

We have seen that the Lochner era Court, like modern regulatory reformers, relied heavily on CBA. Justice Holmes's accusation that the *Lochner* Court sought to pursue a laissez-faire vision might lead one to suppose that modern regulatory reformers are much less extreme than the *Lochner* Court. For most modern regulatory reformers do not seek to repeal health and environmental regulation outright, they simply wish to subject it to a cost-benefit test.[239] This reflects modern economic theories' endorsement of regulation of "externalities,"—problems that contracting parties may create for third parties that are not internalized in prices.[240]

But the parallel between the *Lochner* Court and the modern neoclassical position is more extensive than the Holmes dissent suggests. Professor Hovenkamp has explained that the *Lochner* Court permitted

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[235] GE Brief, *supra* note 3, at 17. *Accord* Brief of Cross Petitioners at 43–45, Whitman v. Am Trucking Ass'ns, 531 U.S. 457 (2001) (No. 99-1426).

[236] GE Brief, *supra* note 3, at 18 (EPA considers factors "such as costs" in an "unreviewable back-door fashion").

[237] *See Adkins*, 261 U.S. at 557 (failure to consider cost to employer of providing a minimum wage). *Contra Parrish*, 300 U.S. at 397 (rejecting this approach).

[238] *See* GE Brief, *supra* note 3, at 22 (suggesting that decisions reached without consideration of cost are generally unreasoned); Adler, *supra* note 13, at 111 (assuming that a requirement that all government bodies be rational "might in some contexts reduce to a CBA requirement"); SUNSTEIN, *supra* note 206, at 207 (equating CBA with "sense and rationality"); *cf. Lockout/Tagout*, 938 F.2d 1310, 1319 (D.C. Cir. 1991) (associating CBA with "reasonableness").

[239] *See* McGarity, *supra* note 38, at 1492–95, 1505 (explaining that both "free marketeers" and "modern mugwumps" favor CBA).

[240] *See* Driesen, *supra* note 16, at 553 (explaining the externality-based rationale for regulation).

regulation of businesses where externalities exist.[241] And, as we saw in Part II, the Court generally subjected much of this regulation to something resembling a cost-benefit test.

It might seem surprising that modern regulatory reform bears any resemblance to Lochnerism. But reflection suggests a simple reason for the rough similarity. For all its sophistication, modern regulatory reform forms part of a broad political and intellectual movement that venerates free markets and distrusts government, even though some of the more thoughtful regulatory reformers part company with this broader agenda and set of beliefs in some respects.[242] It is not too surprising that contemporary attitudes toward legislation and regulation would resemble, to some extent, those of powerful adherents of an earlier anti-regulatory movement.[243] And those attitudes might tend to influence legal practice and thinking. Part V explores this similarity's significance for modern regulatory reform.

V. IMPLICATIONS FOR THE REGULATORY REFORM DEBATE

While the Lochner period jurisprudence still has a poor reputation with most scholars and with the sitting Justices, some academics have defended it.[244] The existence of some parallels between modern regulatory reform and Lochnerism condemns neither. But the parallelism, even with all of its limits, gives us a broader view of regulatory reform, and therefore leads to new insights that should form part of the regulatory reform debate.

A. Hyper-rationalism

Some concerns about hyper-rationalism have formed part of the regulatory reform debate. One can view oft-expressed concerns that "soft variables" (such as difficult-to-quantify environmental values) will receive short shrift under CBA as a concern about hyper-rationalism.[245] We need

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241 *See* Hovenkamp, *supra* note 93, at 440–46 (explaining how the classical economic concept of externalities explains seeming anomalies in the case law).

242 *See generally* Shaman, *supra* note 62, at 502 (noting that the "law and economics movement has spawned a new generation of free market adherents who favor as little economic regulation as possible").

243 *See id.* at 502–06 (explaining how some adherents of the law and economics movement have endorsed Lochnerism in one form or another); *see, e.g.*, Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 464 (1998) (arguing that *Lochner's* "economic vision" undergirds arguments favoring the superiority of common law contract and property regimes for digital works).

244 *See* RICHARD A. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 277–80 (1985) (arguing that a closer examination is needed before the ideas should be dismissed); BERNARD SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 274–82 (1980) (defending protection of economic rights from government regulation).

245 *Cf.* Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 78 (1959) (characterizing agencies as employing a limited form of rationality); *see generally* THOMAS O. MCGARITY, RETHINKING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991) (comparing "comprehensive rationality," perhaps a type of hyper-rationalism, to instrument rationality).

more discussion of rationality's limits and the relationship between rationality and CBA. Is it really possible to comprehensively consider everything and still produce a non-arbitrary reason for a particular action? How can an agency non-arbitrarily give substantial weight to non-quantifiable variables when operating in a cost-benefit framework? Does CBA provide a mechanism to generate convincing explanations for precise line drawing? Or instead, will CBA create an illusion that convincing explanations are possible without delivering a mechanism, thereby leading to results like that found in *Adkins* and in the D.C. Circuit's *American Trucking* opinion, where the failure to provide a strong justification for a particular number in a regulation led to invalidation?[246] Finally, does CBA advance rationality, or does it hide its limits in poorly reasoned decisions about cost-benefit methodology?[247] This Article cannot answer these questions, but the analogy with Lochnerism reveals the role of demands for heightened rationality and therefore highlights the importance of these questions. Just as Lochnerian attitudes led to rather strict scrutiny of economic legislation, Lochnerian regulatory reform ideas may encourage heightened scrutiny of administrative agency regulations,[248] which raises a host of issues worthy of more attention.

B. Neutral Law and Administrative Agencies

The insight that Lochnerism and regulatory reform share a set of attitudes toward government regulation suggests questions about the role of neutrality ideals in regulatory reform. Should regulatory analysis aid implementation of legislative value choices or implement instead a natural law vision of ideal regulation? Does the very idea of a legislative value choice imply that agencies may not engage in open-ended consideration of all costs and benefits of proposed actions? This section explores some of these issues.

Regulatory reformers want CBA to guide administrative agency decisions, since agencies make many important decisions about how much environmental, health, and safety protection to offer.[249] This poses a problem in terms of the ideal of neutral origins for law. Just as we expect judicial decisions adjudicating constitutional law claims to reflect some reasonable interpretation of the Constitution, we expect administrative decisions to reflect reasonable interpretations of relevant statutes.[250] CBA's

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[246] Driesen, *supra* note 25, at 89–91 (arguing that no reasoning supporting a numerical standard can be precise); Hahn & Sunstein, *supra* note 26, at 1497, 1537 (proposing limited judicial review of CBA).

[247] *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1553 (2002) (characterizing the techniques used to monetize benefits as "a little crazy").

[248] *See* Driesen, *supra* note 16, at 596–99 (explaining how CBA requirements can lead to demanding judicial review).

[249] *See id.*

[250] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–44 (1984) (authorizing courts to reverse administrative interpretations only when contrary to specific congressional intent or unreasonable).

natural law origins in economic theory may make it legitimate in the eyes of some academics, but a court or administrative body's legitimacy hinges on a narrower sense of neutrality. These bodies must, insofar as possible, make decisions having detectable origins in the decisions of a superior positivist authority, namely the legislature.

While some commentators seem to assume that CBA is compatible with following a variety of legislative directions, it is not clear that this is so. *American Trucking* suggests that CBA can be incompatible with the principle that administrative agencies accept congressional value choices. The *American Trucking* Court rejected the consideration of cost in section 109, because Congress directed EPA to protect public health.[251] If EPA were to decline to protect public health, because it believed that the costs of protecting public health outweighed the benefits, it would clearly have violated the mandate to protect public health.[252]

Indeed, when Congress lists factors that an agency must consider in setting standards, such as the factor of public health, considering other factors violates the law. In *Citizens to Preserve Overton Park, Inc. v. Volpe* (*Overton Park*),[253] the Department of Transportation argued that it should be able to employ CBA in deciding whether to put a highway through a state park.[254] But the governing statute required the agency to route highways around parks if feasible.[255] The Supreme Court held that broad consideration of CBA involved a failure to follow the congressional policy, and therefore constituted arbitrary and capricious rulemaking.[256]

Similarly, congressional directives to realize the maximum feasible reductions of pollution, which are found in numerous statutory provisions,[257]

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251 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 464–65 (2001) (suggesting that it's "fairly clear" that the directive to protect public health precludes consideration of cost).

252 Determining what ambient air quality standard adequately protects public health does present line drawing problems, of course. But the D.C. Circuit's suggestion in *American Trucking* that the health protection directive in section 109 offers no guidance at all, Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1036–37 (D.C. Cir. 1999) (*per curiam*), *rev'd sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001), conflicts with the teaching of that court's own precedent. The D.C. Circuit has held that EPA acted arbitrarily when it allowed a pollution level that it knew produced serious documented health problems. *See* Am. Lung Ass'n v. EPA, 134 F.3d 388, 391–92 (D.C. Cir. 1999) (remanded because the agency failed to explain why it was not protecting thousands of asthmatics from atypical physical affects associated with bursts of high sulfur dioxide concentrations). Allowing the agency to consider the cost impacts would authorize relaxing standards even when they failed to protect against serious public health damage in areas of little or no uncertainty.

253 401 U.S. 402 (1971).

254 *Id.* at 411–12.

255 *Id.* at 411.

256 *See id.* at 413, 415–16, 420 (prohibiting wide ranging balancing and requiring agency decisions to be based on "relevant factors"); *see also* Am. Textile Ass'n v. Donovan, 452 U.S. 490, 509 (1981) (stating that CBA is not required when feasibility analysis is); Union Elec. Co. v. EPA, 427 U.S. 246, 256–65 (1976) (finding that an agency may not consider cost and feasibility when the statute does not mention these considerations as relevant factors).

257 *See, e.g.*, 16 U.S.C. § 1455b(g)(5) (2000); Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(b)(2)(A), 1316(a) (2000); Clean Air Act, 42 U.S.C. §§ 7411(a)(1), 7412(d), 7475(a)(4), 7503(a)(2) (2000). *See generally* Driesen, *supra* note 25, at 20–21 (giving examples of provisions

contemplate the consideration of cost, but they do not authorize CBA.[258] Such provisions arguably require that the agency maximize feasible reductions.[259] If EPA gave up a feasible reduction, presumably one that the regulated companies could produce without closing down, because it thought that the costs of maximum feasible reductions outweighed the benefits, it may have violated a statute that embodies such a mandate.[260]

An agency, however, should consider CBA when the governing statute requires it to weigh costs against benefits or to achieve a particular relationship between costs and benefits (e.g., benefits should not greatly outweigh costs).[261] It should do so because CBA produces relevant information for its decision.

In general, *Overton Park* suggests that agencies should conduct directly targeted analysis, i.e., analysis designed to illuminate only the factors governing statutory provisions make relevant. Conducting a broader analysis can only conform to *Overton Park* if the broader analysis is not considered. And it makes no sense to waste time and money on an analysis that cannot be considered when a more focused intensive analysis of relevant factors is an available alternative.[262]

The argument that agencies should "consider" CBA in some indeterminate manner, with no reference to the content of statutes governing agencies, suggests a rejection of a positivist rule of law in favor of natural law. For the heart of a positivist rule of law, at least in the administrative law area, involves agencies implementing congressional views about wise policy and conducting analysis that targets the considerations Congress made relevant through the value choices in the implementing legislation.

Some of the legal scholars supporting regulatory reform, however, have a model of expert decision-making in mind, rather than natural law.[263] This

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generally conforming to the feasibility principle).

[258] *See Donovan*, 452 U.S. at 509 (CBA is not required when feasibility analysis is required.).

[259] Driesen, *supra* note 25, at 20–22; *see, e.g.*, Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 476–77 (2004) (describing requirement that states implement "Best Available Control Technology" requirements under the Clean Air Act as anticipating the most stringent economically available alternative); Nat'l Petroleum Inst. v. EPA, 287 F. 3d 1130, 1134 (D.C. Cir. 2002) (stating that emission standards for diesel engines must "reflect the greatest degree of emission reduction achievable" (quoting 42 U.S.C. § 7521(a)(3) (2000)); Am. Petroleum Inst. v. EPA, 52 F.3d 1113, 1115 (D.C. Cir. 1995) (noting that the Clean Air Act requires the greatest reduction achievable through reformulation of gasoline).

[260] *See Donovan*, 452 U.S. at 509 (CBA is not required when maximum feasible protection from material health impairment is required.).

[261] *See, e.g.*, 33 U.S.C. § 701a (2000) (authorizing construction of flood control projects generating benefits exceeding costs). The text of the best practicable control technology provisions in the Federal Water Pollution Control Act appears to authorize a cost-benefit test. *See* 33 U.S.C. §§ 1311(b)(1)(B), 1314(b)(1)(B) (2000). But reviewing courts have concluded, based largely on legislative history, that Congress did not intend to compare the costs of control to the monetized benefits associated with improved water quality. *See* Ass'n of Pac. Fisheries v. EPA, 615 F.2d 794, 805 (9th Cir. 1980). *See also* Driesen, *supra* note 25, at 23–24 (reviewing the case law).

[262] *See* Driesen, *supra* note 25, at 48–54 (explaining why CBA is more complicated than feasibility analysis).

[263] *See, e.g.*, BREYER, *supra* note 206, at 67 (arguing for expert rulemaking insulated from

would place them in the company of progressive opponents of Lochnerism.[264] Still, their view remains in some tension with the notion of legislative value choice that emerged in the post-Lochner era. The insight that regulatory reformers' position undermines a positivist view of law leads to some new questions even for these "modern mugwumps."[265] Can one have expert decision making without value choices? If there must be value choices, what is the justification for leaving them in the hands of experts?[266]

Accepting a positivist approach would not necessarily eliminate all arguments for CBA. It would, however, eliminate the many arguments that focus on CBA's natural virtues. A positivist analysis would only endorse CBA for legislative provisions embodying efficiency values. But the Congresses of the 1970s, which enacted much of the corpus of modern environmental, health, and safety statutes was not especially even-handed and arguably showed little concern with economic efficiency.[267] Thus, heeding the Lochner era rejection of natural law would bring a significant change in the regulatory reform debate, which has been much more concerned with normative efficacy than interpretive plausibility.

The suggestion that Congress historically has not been much concerned with efficiency leads to the question of whether Congress should require cost-benefit balancing. Should elected representatives legislate with Lochnerian neutrality?

C. Legislation and Value Choice

Legislators create policy rather than interpret others' policies.[268] In the environmental area, a prevalent economic dynamic makes remedial legislation especially appropriate.[269] Environmental problems do not remain

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political pressures).

264 I am grateful to David Bernstein for pointing this out.

265 *See* McGarity, *supra* note 38, at 1498–1500 (characterizing Cass Sunstein and other moderate regulatory reformers as "modern mugwumps").

266 *See generally* Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071 (2006) (analyzing some differences between lay and expert risk assessments).

267 *See* Sinden, *supra* note 14, at 1418 (describing lawmakers of the 1960s and 1970s as "highly skeptical of CBA"); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 363–64 (4th ed. 2003) (describing the "climate" in 1970s Washington as "inhospitable" to CBA); Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267, 1283–84 (1985) (Congress emphasized "prompt injury prevention over the need for an optimal balance between regulatory benefits and costs.").

268 *See* Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 929 (1993) (Wechsler states that courts only apply law, but suggests that Congress creates it).

269 *See* DAVID M. DRIESEN, THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW (2003) (developing the concept of the economic dynamic approach to environmental law); *see also* David M. Driesen, *The Economic Dynamics of Environmental Law: Cost-Benefit Analysis, Emissions Trading, and Priority-Setting*, 31 B.C. ENVTL. AFF. L. REV. 501, 501–616 (2004) [hereinafter Driesen, *Cost-Benefit Analysis*] (discussing the economic dynamic approach and alternatives to it).

static but tend to get worse over time because of the fundamental tendencies of people to multiply and increase consumption, absent some countervailing force.[270] As consumption grows, makers of goods and services amass wealth that enables them to weaken and sometimes fend off government efforts to limit pollution and natural resource destruction.[271] This tendency means that environmental law probably should not be neutral; rather, it should countervail environmentally destructive tendencies in unregulated markets. And it must be designed to function well under substantial monied pressure to become ineffective.[272] Powerful corporations play an important role today as they did during the time of *Lochner*.[273]

As a general matter, legislative value choice is perfectly appropriate. It is fine for a legislative body to choose between peace and war,[274] between bilingual and English only education,[275] between welfare and workfare,[276] between a graduated income tax and a flat tax,[277] between high tariffs and free trade.[278] We elect legislatures precisely to establish non-neutral principles reflecting the value choices of the representatives or their constituents.

While it may be appropriate for legislatures to make stark black and white choices, surely legislatures may properly make more nuanced judgments about how to balance competing policy considerations. Legislatures may decide to lock the prison doors and throw away the keys in response to violent criminal offenses committed by adults of sound mind, but to authorize less punitive treatment for juveniles or the insane.[279] Congress may decide to protect some land as wilderness, while permitting logging on other lands.[280]

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270 *See* David M. Driesen & Charles Hall, *Efficiency, Economic Dynamics, and Climate Change*, 31 DIG. 1, 8–9 (2005).

271 Driesen, *Cost-Benefit Analysis*, *supra* note 269, at 512–13; DRIESEN, *supra* note 268, at 114 (explaining how economic dynamics tend to allow polluters to amass resources to oppose regulation).

272 *See* Latin, *supra*, note 267, at 1270–71, 1293–96 (discussing the strategic behavior of regulated industries and environmentalists).

273 *See* Sinden, *supra* note 14, at 1436–42 (discussing the corporate role in creating a power imbalance in the design and implementation of environmental regulation).

274 U.S. CONST. art. I, § 8.

275 *See, e.g.*, Elementary and Secondary Act of 1965, 20 U.S.C. § 1703(f) (2000); Casteneda v. Pickard, 781 F.2d 456, 470 (1986).

276 Nan Ellis, *Work Is Its Own Reward: Are Workfare Participant Employees Entitled to Protection Under the Fair Labor Standards Act?*, 13 CORNELL J.L. & PUB. POL'Y 1, 2 (2003) (discussing proposed changes in the welfare system to focus participants on employment).

277 U.S. CONST. art. 1, § 8.

278 *Cf.* Silber & Miller, *supra* note 268, at 929 (quoting Wechsler as disagreeing with Ronald Reagan's decision to take benefits out of the hides of the poor and grant larger privileges to the wealthy, but considering this legitimate).

279 *See, e.g.*, Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031–5042 (2000) (mandating procedures for the removal of juveniles form the ordinary criminal process in order to avoid the stigma of prior criminal conviction and to encourage treatment and rehabilitation); Jones v. United States, 463 U.S. 354, 368 (1983) (holding that an individual may be acquitted of criminal charges because of insanity and may be committed to a mental institution to protect him and society from potential dangerousness).

280 *See* National Forest System Land and Resource Management Plans, 16 U.S.C. § 1604 (2000) (permitting logging in certain areas previously listed as wilderness).

Because loss of health disables the victim from enjoying much of what life has to offer and from contributing to society, giving primacy to preventing involuntary risks to health is a defensible value choice.[281] Since the environment provides vital amenities and a life support system,[282] giving primacy to protecting the environment itself also is defensible.

Yet, in their details many environmental statutes embody some congressional balancing of competing considerations. I have argued elsewhere, for example, that the feasibility principle, which animates numerous statutory provisions, reflects a congressional decision to give primacy to protecting health and the environment, except where doing so is likely to lead to widespread plant closures producing significant unemployment.[283] This principle may reflect a judgment that firms should not subject people to involuntarily incurred health risks, except when plant closures may create comparable risks of potentially debilitating unemployment.[284] This judgment offers a nuanced approach that requires an agency to balance competing concerns, but does not pretend that quantification can avoid the need for a value judgment.[285]

These examples illustrate several things. Legislation should not remain neutral on the issues it addresses. It is legitimate for legislation to be very one-sided. Even if it desirable for legislation to be nuanced, the legislature may appropriately make value choices, rather than delegate key value choices to agencies.

Legislatures may choose economic efficiency as a value for legislation (if one believes that efficiency is a value).[286] Such a value choice would appropriately lead to CBA. But justification of a cost-benefit criterion requires the identification and defense of a value choice, a task avoided when scholars treat CBA's neutrality as itself an argument for its adoption.

The legitimacy of value choices also implies the legitimacy of "class legislation," defined as legislation that empowers some groups at the expense of others.[287] Social Security advances the interests of the old at the expense of the young. Similarly, the Clean Air Act advances the interests of breathers at the expense of the interests of industry. This favoritism does not cast doubt on the legitimacy of the legislation, for legislative value choices must, in effect, favor some groups over others. As a result, the regulatory reformers' argument that CBA reduces the influence of "special

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[281] *See* Driesen, *supra* note 25, at 38–39 (explaining how injury to health can devastate individuals); Mark Geistfeld, *Reconciling Cost-Benefit Analysis and the Principle that Safety Matters More than Money*, 76 N.Y.U. L. REV. 114, 177 (2001) (emphasizing the normative significance of the disruptive impact of injury upon individuals).

[282] *See* Brett Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 981–82 (2005) (describing the "ecosystem services" the environment supplies).

[283] Driesen, *supra* note 25, at 9.

[284] *Id.* at 35 (discussing the devastating effect unemployment can have on individuals).

[285] *Id.* at 34–41.

[286] *See generally* Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) (discussing wealth maximization and efficiency).

[287] *See supra* Part III.C.1.

interests" should not count as a good argument for CBA. There is nothing wrong with legislation that advances some interests at the expense of others. That is what legislation is for.

The analysis offered above suggests that appeals to CBA's neutrality provide scant justification for it. Legislation properly involves value choices.

VI. CONCLUSION

The debate about the future of environmental policy should address value choices and the nature of the society we live in. Unfortunately, the image of CBA as a neutral rationalizing reform akin to "general legislation" has appealed to the technocratic instincts of academics and policy makers, but proven unhelpful in clarifying what value choices Congress should make in shaping environmental policy. The analogy between Lochnerism and modern regulatory reform, while incomplete, highlights the limits of neutral rubrics as a guide to policy.