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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* J.D. 1989, Yale Law School; Visiting Professor, University of Michigan Law School (fall, 2006); Angela S. Cooney Professor, Syracuse University College of Law; Adjunct Professor, State University of New York; College of Environmental Science and Forestry Affiliate; Maxwell School of Citizenship Center for Environmental Policy and Administration. The author would like to thank Bill Banks, David Bernstein, Amy Sinden, William Wiecek, and the faculties of UCLA Law School, Syracuse University College of Law, and Florida State University College of Law for useful comments, Dean Hannah Arterian for research support, Molly Curtis for research assistance, and the wonderful staff of the Barclay Law Library at Syracuse University College of Law for their responsiveness to his never-ending stream of requests.
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 Act2 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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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 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.


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. 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. 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. This Section defines CBA and reviews some of its history.

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 Herriter eds., 2003) (arguing that Congress does not choose values, just actions).


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. 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. 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. The regulator must then assign a dollar value to each death, habitat saved, illness avoided, etc. 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. 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. When estimation proves possible, uncertainties often lead to an enormous range of scientifically plausible benefits estimates.

CBA advocates tend to equate all of this quantification with objectivity. But risk assessment and monetization require policy decisions...
in order to extrapolate risk estimates from limited data and to assign dollar values to particular consequences.\textsuperscript{24}

CBA supporters have varying positions about what role CBA should play in the regulatory process.\textsuperscript{25} Sometimes they advocate the “indeterminate position,” which simply maintains that regulators should consider CBA.\textsuperscript{26} This position does not tell us how precisely regulators should respond to CBA or what role it should play.\textsuperscript{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.\textsuperscript{28} This distinction between the


\textsuperscript{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”).

\textsuperscript{27} Cass R. Sunstein, LAWS OF FEAR 130 (2005) (stating that CBA does not establish a rule governing choices).

\textsuperscript{28} See Driesen, supra note 24, at 1394–402 (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.\textsuperscript{29} CBA treats government regulation as a purchase of a benefit, rather than as an effort to protect people from harm.\textsuperscript{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.\textsuperscript{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)\textsuperscript{32} and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)\textsuperscript{33} as requiring application of a cost-benefit approach.\textsuperscript{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)\textsuperscript{35} and to require reductions achievable through use of

\textsuperscript{29} See Driesen, \textit{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, \textit{PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION} 12 (1974) (arguing for this approach).

\textsuperscript{30} Driesen, \textit{supra} note 16, at 560–63 (explaining why a cost-benefit criterion allows harm to continue).

\textsuperscript{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).


\textsuperscript{33} 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, \textit{supra} note 20, at 2343 (identifying cost-benefit balancing as the “core regulatory concept” of TSCA and FIFRA); Thomas O. McGarity, \textit{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).


appropriate technology (i.e., technology-based standards). 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. 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. 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. 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." The Office of Management and Budget (OMB), an office consisting mostly of economists, not lawyers, administers

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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).


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


III. LOCHNERISM

Scholars traditionally associate Lochnerism with the creation of substantive due process doctrine recognizing economic rights not literally present in the Constitution. Viewed this way, the Lochner period involved subjective misreading of the Constitution. 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. 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*, in which the Court struck down a statute limiting bakers’ working hours as an unconstitutional interference with liberty of contract violative of due process. Holmes protested that the “Constitution does not enact Mr. Herbert Spencer’s social statistics,” 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. While laissez-faire did not command universal support at the time, it enjoyed significant support among many well educated lawyers and businessmen.

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. Indeed, just a few years

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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*. Laissez-faire ideology strongly influenced the Court, but it did not invariably dictate anti-government results.

**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.

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. The *Lochner* Court declared that “[t]he general right to make a contract . . . is part of the liberty interest protected by the 14th Amendment.” 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. 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.” Thus, it viewed liberty
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 clause and to British common law traditions opposing monopolies).


63 Lochner, 198 U.S. at 53.


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. 602, 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. 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.

Professor Gillman has argued that the Lochner era Court implicitly used this idea that “class legislation” lacked constitutional legitimacy to strike down regulatory legislation. 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.

While Congress intended anti-trust statutes to limit businesses’ power, 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. 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 (1903) (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 D Env. 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) (pickets coercively interfere with a property right); see also Loewe v. Lawlor, 208 U.S. 161, 188–202, 205 (1912) (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, 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. This view melded with a belief in the neutrality of common law and natural law. 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.

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. 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. 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.

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. 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).


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, 389 (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.\textsuperscript{80} \textit{Lochner} itself illustrates this use of neutral abstract distinctions. The Court that struck down New York's limitations on bakers' hours in \textit{Lochner} had upheld similar legislation limiting miners' hours.\textsuperscript{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.\textsuperscript{82} It found regulation of bakers' hours arbitrary, but similar restrictions on miners' hours reasonable.\textsuperscript{83}

Justice Holmes's \textit{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."\textsuperscript{84} And Holmes wrote that "[e]very opinion tends to become a law,"\textsuperscript{85} thereby suggesting that the Justices' personal opinions, not the formal legal categories employed, controlled the cases. Indeed, the \textit{Lochner} majority opined that long working hours for bakers posed no health hazard justifying regulation,\textsuperscript{86} while Justice Harlan's dissent expressed a willingness to credit the legislative judgment that too much baking damages a baker's health.\textsuperscript{87} The \textit{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.\textsuperscript{88}

\begin{footnotesize}
\begin{enumerate}
\item 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 \textit{Lochner} era Court used the direct/indirect distinction to subject economic regulation to judicial policy judgments).
\item See Holden v. Hardy, 169 U.S. 366, 380, 398 (1898).
\item See \textit{Lochner} v. \textit{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, \textit{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").
\item See \textit{Holden}, 169 U.S. 366 (upholding a law limiting the work day of underground miners).
\item See \textit{Lochner}, 198 U.S. at 76 (Holmes, J., dissenting). \textit{See also id. at 59} (expressing view that baking for long hours creates no health hazard justifying regulation (majority opinion)).
\item Id. at 76 (Holmes, J., dissenting).
\item \textit{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 . . . .").
\item \textit{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).
\end{enumerate}
\end{footnotesize}
This skepticism toward legislation also manifested itself in a demanding approach to the rationales offered for government regulation. 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. 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.” 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. 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. Adkins v. Children’s...
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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

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 437. 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, 520 (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 \textit{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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\(^{102}\) 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).


\(^{107}\) 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. 306, 309 (1920) (invalidating an order requiring owner of a narrow gauge railroad to operate at a loss); Myles Salt Co. v. Board of Comm’rs, 230 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. In doing so, it expressly recognized the necessity and legitimacy of legislative value choice.

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). The modern Court’s substantive due process and equal protection cases specifically repudiate the tradition of viewing “class” legislation as suspect. The modern doctrine requires the Court to uphold any legislative distinctions (between classes or otherwise) unless the distinctions drawn wholly lack a “rational basis.” 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. 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. Finally, in *Erie Railroad Co. v. Tompkins*, the Court repudiated the natural law tradition that partially underlay legal historicism.

**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. 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, which conservative think tanks and business groups, the leading drivers of regulatory reform, support along with CBA. The Court has prohibited “grossly excessive” punitive damage awards as a matter of substantive due process. 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).
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. In developing this test for judicial tort reform, the Court relied upon several Lochner era precedents. 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.”

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. 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. 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. 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.

These cases do not reflect Lochnerian attitudes toward legislation, for they are not directed toward legislation. Rather, they reflect skepticism toward juries. 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 TXO, 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

reflecting jury “bias, passion, or prejudice”); id. at 474 (O’Connor, J., dissenting) (claiming that “arbitrariness, 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”).


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 HOU. L. REV. 565, 605–19 (2005) (explaining how the Court has used common law causation concepts to narrow the scope of environmental statutes).


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.\footnote{136}

Increased judicial willingness to limit congressional power over commerce could threaten environmental law.\footnote{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.\footnote{138} The dissenters in \textit{United States v. Lopez}\footnote{139} and \textit{United States v. Florida Prepaid Postsecondary Educ. Expense Bd.} have complicated the enforcement of laws at times.

See generally : Florida Prepaid, 527 U.S. at 701–04 (charging that sovereign immunity, like \textit{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”); \textit{id.} at 655–60 (explaining why immunizing states from private suits for patent infringement may leave patent holders with inadequate remedies).


See also : Robert W. Adler, \textit{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).
v. Morrison\textsuperscript{40} 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.\textsuperscript{141} But these decisions are not divorced from constitutional text as the old substantive due process jurisprudence was.\textsuperscript{142} The Constitution clearly does contemplate a federal government of limited power.\textsuperscript{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.\textsuperscript{144} So far, these decisions have not led courts to declare any environmental law unconstitutional.\textsuperscript{145}

The more important realm for judicial activism in the service of regulatory reform has involved statutory interpretation, not constitutional law.\textsuperscript{146} Thus, statutory cases like Duplex Printing Press Co. v. Deering\textsuperscript{47} and

\textsuperscript{40} 529 U.S. 598 (2000).
\textsuperscript{41} 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).
\textsuperscript{42} Lopez, 514 U.S. at 601 n.9 (claiming that Lopez, unlike Lochner, “enforces . . . the Constitution, not judicial policy judgments”).
\textsuperscript{43} 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 630 (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).
\textsuperscript{44} 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).
\textsuperscript{46} 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,\textsuperscript{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.\textsuperscript{149} They share with Lochner not only a disregard for textual limits, but also solicitude toward common law rights and opposition to “class” legislation.\textsuperscript{150}

Cass Sunstein, a prolific CBA supporter, has argued for a cost-benefit canon of construction.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{153}

Still, judicial support for regulatory reform has played a role in several important cases.\textsuperscript{154} The dissenting Justices in Industrial Union Department v.
American Petroleum Institute (Benzene)\textsuperscript{155} associated judicial support for regulatory reform with Lochnerism.\textsuperscript{156} The dissenters claimed that the Benzene Court struck “its own balance between the costs and benefits of occupational safety standards.”\textsuperscript{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.\textsuperscript{158} The plurality opinion required a finding of significant risk before regulation of toxic substances could occur under the Occupational Safety and Health Act.\textsuperscript{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.”\textsuperscript{160} Only Justice Powell, however, read the Occupational Safety and Health Act as requiring CBA.\textsuperscript{161} And the Supreme Court squarely rejected that view in American Textile Manufacturers Institute v. Donovan (Cotton Dust).\textsuperscript{162}

The Benzene decision, 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”).


\textsuperscript{156} Id. at 723–24 (Marshall, J., dissenting).

\textsuperscript{157} Id.

\textsuperscript{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).

\textsuperscript{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”).

\textsuperscript{160} Id. at 645.

\textsuperscript{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”).

\textsuperscript{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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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 straitjacket” 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 destroy 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)).


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*, the United States Court of Appeals for the Fifth Circuit interpreted section 6 of the Toxic Substances Control Act (TSCA) as requiring CBA of each regulatory alternative considered. Section 6 requires EPA to regulate “to the extent necessary to protect adequately against . . . risk using the least burdensome requirements.” 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. 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. Section 6 explicitly requires adoption of an option that adequately protects the public. Yet, the *Corrosion Proof Fittings* court required CBA of each option.

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.” 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

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168 947 F.2d 1201 (5th Cir. 1991).
170 See *Corrosion Proof Fittings*, 947 F.2d at 1217.
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.
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 CBA181 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

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.”).
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).
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

\(^{186}\) 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. 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. 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. And many observers have read Smith as teaching that such contracts, reflecting rational choices of consumers pursuing their own ends, end up benefiting society. CBA appears natural to many of its advocates, because it reflects the same sort of logic found in the natural order represented by contract.

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. 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. Nevertheless, they all conclude that CBA is justified.

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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).


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. 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. 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.

C. Attitudes Toward Legislation

As suggested previously, clearer and more significant parallels with Lochnerism appear when we look beyond the modern judiciary. For modern
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 Act204 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

203 See supra notes 66–77 and accompanying text.
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.
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

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 pursuing 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).

Regulatory Reform

Sunstein, along with others, argues that CBA reduces special interest influence over legislation. 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. 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. Mathew Adler and Eric Posner likewise convey support for something akin to general legislation when they argue that CBA improves “overall well-being.” 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. The legislator need not choose between protecting the public health and the environment and protecting industry from regulations’ burdens. 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).


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”).


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.\textsuperscript{220} Properly conducted CBA, in their view, offers, in all likelihood, a neutral method for achieving an objectively desirable end.\textsuperscript{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 \textit{Lockout/Tagout} decision,\textsuperscript{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.\textsuperscript{223} This approach suggests that statutes should assure that agencies write regulations that are neither too strict nor too lenient.\textsuperscript{224} The \textit{Lockout/Tagout} court clearly indicated that CBA’s use saves the statute from any

\textsuperscript{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. \textit{See} Adler, supra note 13, at 144 (describing “overall well-being” as a “particular public value”); Matthew D. Adler, \textit{Cost-Benefit Analysis, Static Efficiency, and the Goals of Environmental Law}, 31 B.C. ENVT. 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. \textit{Compare} Adler, supra, at 600–01 (rejecting the idea of deontological considerations) with Adler & Posner, \textit{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).

\textsuperscript{221} A key part of Adler and Posner’s theory involves a distinctive view of what constitutes properly conducted CBA. \textit{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).

\textsuperscript{222} \textit{Lockout/Tagout}, 938 F.2d 1310 (D.C. Cir. 1991).

\textsuperscript{223} \textit{See id.} at 1317 (finding that the agency’s construction providing a ceiling did not suffice because it did not create a floor).

\textsuperscript{224} Regulatory reform proponent Cass Sunstein endorses the floor-and-ceiling approach to the nondelegation doctrine. \textit{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. \textit{See} Mistretta v. United States, 488 U.S. 361, 371–79 (1988) (discussing the liberality of the intelligible principle requirement and applying it to uphold sentencing guidelines). The Court, even before \textit{American Trucking}, repeatedly held that general policy guidance containing no definable floor or ceiling satisfies the doctrine. \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{229} This holding suggested, especially when read in conjunction with the earlier ruling in Lockout/Tagout, which it discussed, that CBA could provide this

\textsuperscript{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).

\textsuperscript{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 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).


\textsuperscript{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").

\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{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 \textit{Lochner} Court called the conclusion that ten hours of work does not endanger health, but ten-and-a-half hours does, “entirely arbitrary.”\textsuperscript{232} And in \textit{Adkins v. Children’s Hospital},\textsuperscript{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.\textsuperscript{234} Professor Tribe’s \textit{General Electric Brief} similarly claimed that implementing

\textsuperscript{230} In \textit{American Trucking}, the court remanded to EPA to allow that agency to construct an intelligible principle, saving the statute from being struck down. \textit{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 \textit{Lockout/Tagout}. \textit{Id}. Since \textit{American Trucking} equates an intelligible principle with a “determinate standard,” \textit{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 \textit{Lockout/Tagout}. It devoted several pages to arguing that the OSH Act permitted CBA and that CBA was desirable. \textit{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. \textit{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 \textit{American Trucking} and \textit{Lockout/Tagout} as treating CBA as a means of supplying an intelligible principle). The \textit{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. \textit{American Trucking}, 175 F.2d at 1038.

\textsuperscript{231} See \textit{GE Brief}, supra note 3, at 22 (agencies must consider costs in order for their decisions to “qualify as ‘reasoned’”).


\textsuperscript{233} 261 U.S. 525 (1923), overruled by \textit{West Coast Hotel Co. v. Parrish}, 300 U.S. 379, 400 (1937).

\textsuperscript{234} \textit{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. EPA therefore must have considered a statutorily extraneous factor, namely cost, argued General Electric. 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. 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.

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. 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. 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

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 307 (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 muggumps” favor CBA).
240 See Driesen, supra note 16, at 553 (explaining the externality-based rationale for regulation).
regulation of businesses where externalities exist. 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. 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. 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. 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. We need

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).
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 80–91 (arguing that no reasoning supporting a numerical standard can be precise); Hahn & Sunstein, *supra* note 26, at 1407, 1537 (proposing limited judicial review of CBA).


\(^{248}\) See Driesen, *supra* note 16, at 506–99 (explaining how CBA requirements can lead to demanding judicial review).

\(^{249}\) See id.

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. 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.

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)*, the Department of Transportation argued that it should be able to employ CBA in deciding whether to put a highway through a state park. But the governing statute required the agency to route highways around parks if feasible. The Supreme Court held that broad consideration of CBA involved a failure to follow the congressional policy, and therefore constituted arbitrary and capricious rulemaking.

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

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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'n v. EPA, 175 F.3d 1027, 1036–37 (D.C. Cir. 1999) (*per curiam*, rev'd sub nom. Whitman v. Am. Trucking Ass'n, 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.


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).

contemplate the consideration of cost, but they do not authorize CBA.\footnote{See Donovan, 452 U.S. at 509 (CBA is not required when feasibility analysis is required.).} Such provisions arguably require that the agency maximize feasible reductions.\footnote{See 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).} 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.\footnote{See Donovan, 452 U.S. at 509 (CBA is not required when maximum feasible protection from material health impairment is required.).} 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).\footnote{See Driesen, supra note 25, at 48–54 (explaining why CBA is more complicated than feasibility analysis).} It should do so because CBA produces relevant information for its decision.

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).\footnote{See, e.g., BREYER, supra note 206, at 67 (arguing for expert rulemaking insulated from generally conforming to the feasibility principle).} 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. 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). 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.\footnote{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).}{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).} 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.\footnote{See, e.g., Breyer, supra note 206, at 67 (arguing for expert rulemaking insulated from generally conforming to the feasibility principle).} This
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 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").


static but tend to get worse over time because of the fundamental tendencies of people to multiply and increase consumption, absent some countervailing force.\textsuperscript{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.\textsuperscript{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.\textsuperscript{272} Powerful corporations play an important role today as they did during the time of \textit{Lochner}.\textsuperscript{273}

As a general matter, legislative value choice is perfectly appropriate. It is fine for a legislative body to choose between peace and war,\textsuperscript{274} between bilingual and English only education,\textsuperscript{275} between welfare and workfare,\textsuperscript{276} between a graduated income tax and a flat tax,\textsuperscript{277} between high tariffs and free trade.\textsuperscript{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.\textsuperscript{279} Congress may decide to protect some land as wilderness, while permitting logging on other lands.\textsuperscript{280}

\begin{footnotesize}
\begin{enumerate}
\item See David M. Driesen & Charles Hall, \textit{Efficiency, Economic Dynamics, and Climate Change}, 31 Dig. 1, 8–9 (2005).
\item Driesen, \textit{Cost-Benefit Analysis}, supra note 269, at 512–13; Driesen, \textit{supra} note 268, at 114 (explaining how economic dynamics tend to allow polluters to amass resources to oppose regulation).
\item See Latin, \textit{supra}, note 267, at 1270–71, 1293–96 (discussing the strategic behavior of regulated industries and environmentalists).
\item See Sinden, \textit{supra} note 14, at 1436–42 (discussing the corporate role in creating a power imbalance in the design and implementation of environmental regulation).
\item U.S. Const. art. I, § 8.
\item U.S. Const. art. I, § 8.
\item \textit{Cf.} Silber & Miller, \textit{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).
\item See, \textit{e.g.}, Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031–5042 (2000) (mandating procedures for the removal of juveniles from 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).
\end{enumerate}
\end{footnotesize}
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. Since the environment provides vital amenities and a life support system, 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. 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. 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.

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). 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. 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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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.  
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.