Syracuse University
SURFACE

College of Law Faculty Scholarship | College of Law

1-1-2006

Regulatory Reform: The New Lochnerism?

David M. Driesen
Syracuse University. College of Law

Follow this and additional works at: http://surface.syr.edu/lawpub

Part of the Law Commons

Recommended Citation
Driesen, David M., "Regulatory Reform: The New Lochnerism?" (2006). *College of Law Faculty Scholarship.* Paper 47.
http://surface.syr.edu/lawpub/47

This Working Paper is brought to you for free and open access by the College of Law at SURFACE. It has been accepted for inclusion in College of Law Faculty Scholarship by an authorized administrator of SURFACE. For more information, please contact surface@syr.edu.

Regulatory Reform: The New Lochnerism?

David M. Driesen*

J.D., Yale Law School (1989)
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

Syracuse University College of Law
E.I. White Hall
Syracuse, NY 13244-1030
(315) 443-4218
ddriesen@law.syr.edu

* 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 my never-ending stream of requests.

Regulatory Reform: The New Lochnerism?

In *Whitman v. American Trucking Associations,*[1] cost-benefit analysis (CBA) proponents urged the Supreme Court to strike down section 109 of the Clean Air Act[2] under a constitutional doctrine not used since the end of the *Lochner*-era, the nondelegation doctrine, or to create a canon of statutory construction favoring CBA to avoid the nondelegation issue. Their argument for a cost-benefit canon portrayed regulation aiming to protect public health as irrational, because of the one-sidedness of the health protection principle.[3] By asking the Court to base its ruling on its views 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 substantive due process to avoid the taint emanating from the *Lochner* line of cases.[5]

---

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

[2] 42 U.S.C. § 7409 (2000).

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

[4] *See infra,* notes 237-244 and accompanying text; WILLIAM M. WIECEK, LIBERTY UNDER LAW 123-125 (1988) (explaining that *Lochner* has become an exemplar of a malfunctioning Supreme Court).

[5] GE Brief 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. Petrol. Inst., 448 U.S. 607, 674-75 (1980) (Rehnquist, J., concurring) (referring to the "general disrepute" of Lochnerism); Jack M. Balkin, "*Wrong the Day it Was Decided": Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 678 (2005) (both academics and judges until quite recently treated *Lochner* as a "central" example "of how courts should not decide constitutional cases"). *Cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1362 (2000) (suggesting that that wholesale abandonment of substantive due process review may be unfortunate, even if *Lochner* itself is problematic). The author's brief for the United States Public Interest Research Group (USPIRG) Education Fund in the *American Trucking* case addressed many of Professor Tribe's arguments for GE. This Article expresses the author's opinion, not that of the USPIRG Education Fund.

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. This provision reflects a specific value choice, favoring public health protection over competing economic considerations.[7] Accordingly, the *American Trucking* Court held that enactment of section 109 did not violate the nondelegation doctrine, which prohibits Congressional delegation of legislative authority.[8] The Court also rejected CBA proponents' request to construe section 109 to require consideration of cost.[9] In essence, the Court's decision recognized that the Constitution does not prohibit one-sided legislation.[10]

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.[11] 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 role in that period's

---

[6] 42 U.S.C. § 7409 (2000).

[7] S*ee* 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).

[8] *American 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).

[9] *Id*. at 464-71.

[10] 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 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.

[11] *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").

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.[12] 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 one provides relevant background on CBA. Part two discusses *Lochnerism*. Part three draws parallels between various aspects of *Lochnerism* and modern regulatory reform. Part four develops the implications of these parallels for the regulatory reform debate.

I. CBA: An Introduction

Calls for regulatory reform have greatly influenced government in recent years.[13] Regulatory reformers have argued that we need much more emphasis on CBA and much less on

---

[12] Cushman, *supra* note 11, at 886 ("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 (Christoph Engel & Adrienne Heritier eds. 2003) 120 (arguing that Congress does not choose values, just actions).

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

health protective policies, like the policy found in section 109 of the Clean Air Act.[14] This section defines CBA and reviews some of its history.

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.[15] 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.[16] 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.[17] The regulator must then assign a dollar value to each death, habitat saved, illness avoided, etc.[18] 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.[19] Data gaps and a lack of basic scientific

---

[14] *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).

[15] *See* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis,* 24 ECOLOGY L. Q. 545, 560-61 & n. 67 (1997) (distinguishing harm avoidance from benefit creation).

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

[17] McGarity, *supra* note 13, at 12 (CBA in the health and environmental context begins with quantitative risk assessment).

[18] Rodgers, *supra* note 16, at 193 (CBA "seeks to reduce all concerns to a common denominator-the dollar").

[19] *See* OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, PROGRESS IN REGULATORY REFORM: 2004 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 13 (2004) (many of the major rules OMB has reviewed in the last 10 years "have important non-quantified" benefits and costs). *See, e.g.,* Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations,* 28 HARV. ENVTL. L. REV. 129, 180-183 (2004); Thomas O. McGarity, *Professor Sunstein's Fuzzy*

understanding often preclude even crude estimation of the amount of death, illness, and environmental destruction a particular regulation will avoid.[20] When estimation proves possible, uncertainties often lead to an enormous range of scientifically plausible benefits estimates.[21]

CBA advocates tend to equate all of this quantification with objectivity.[22] 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.[23]

CBA supporters have varying positions about what role CBA should play in the regulatory process. [24] Sometimes they advocate the "indeterminate position," which simply

---

Math, 90 GEO. L. J. 2341, 2351-52 (2002) (discussing serious health effects associated with arsenic that EPA could not quantify).

[20] *See* Richard W. Parker, *Grading Government,* 70 U. CHI. L. REV. 1345, 1382, 1389-1400 (2003) (providing numerous examples of failure to count non-quantifiable benefits); CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 12 (2002) ("quantification will be . . . impossible in some cases.").

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

[22] *See* ACKERMAN & HEINZERLING, *supra* note 16, at 35 (". . . cost-benefit analysis presents itself as the soul of rationality, an impartial, objective standard for good decisions."). *See, e.g.*, ROBERT W. HAHN, REVIVING REGULATORY REFORM: A GLOBAL PERSPECTIVE 3-4 (2000) (selling cost-benefit analysis by referring repeatedly to "a *neutral* economist's benefit-cost test") [emphasis added].

[23] David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 72 COLO. L. REV. 336, 403-05 (2006). *See* ACKERMAN & HEINZERLING, *supra* note 16, at 61-90, 179-203 (identifying and critiquing some of the value choices made in monetization); Henry Richardson, *The Stupidity of Cost-Benefit Analysis,* 29 J. LEGAL STUD. 971, 972 (2000) (finding many of the value choices implicit in CBA "stupid"). *See, e.g.*, Parker, *supra* note 20, at 1370-75 (critiquing methodologies used to value life and uses of discount rates); Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives,* 99 COLUM. L. REV. 941 (1999) (discussing the value choices involved in discounting); Lisa Heinzerling, *Discounting Life,* 108 YALE L. J. 1911 (1999) (same) ; Lisa Heinzerling, *Discounting Our Future,* 34 LAND & WATER L. REV. 39 (1999) (same); Thomas O. McGarity, *Media-Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation,* 46 LAW & CONTEMP. PROBS. 159, 171 (1983) (arguing that "wage premiums" are not set by willingness to accept risk, but by the unemployment rate and the level of desperation of currently employed workers). *Cf.* McGarity, *supra* note 19, at 2353-54 (discussing EPA's failure to adjust death valuations to account for numerous relevant factors); Lisa Heinzerling, *The Rights of Statistical People,* 24 HARV. ENVTL. L. REV. 189 (2000); Armatya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931, 945-47 (2000) (discussing considerations that emphasis on "willingness to pay" leaves out); Sidney A. Shapiro & Thomas O. McGarity, *Not so Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L. J. 729, 734-35 (criticizing discounting and use of "wage premiums" as basis for dollar estimates of a human life's value).

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

maintains that regulators should consider CBA.[25] This position does not tell us how precisely regulators should respond to CBA or what role it should play.[26] 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.[27] This distinction between the 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.[28] CBA treats government regulation as a purchase of a benefit, rather than as an effort to protect people from harm.[29] 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.[30] 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)[31] and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[32] as requiring application of a cost-benefit

---

[25] *See* Driesen, *supra* note 23, 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) (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.").

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

[27] *See* Driesen, *supra* note 23, at 394-402 (analyzing various cost-benefit criteria). *See, e.g.*, Hahn & Sunstein, *supra* note 25, at 1498 (arguing for a presumption against regulation with costs exceeding benefits).

[28] *See* Driesen, *supra* note 15, at 577; WILLIAM F. BAXTER, PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION 12 (1974) (arguing for this approach).

[29] Driesen, *supra* note 15, at 560 (explaining why a cost-benefit criterion allows harm to continue).

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

[31] 15 U.S.C. §§ 2601-2692 (2000).

approach.[33] Most other environmental, health, and safety statutes, however, employ some combination of mandates to protect public health and safety (such as the mandate found in section 109 of the Clean Air Act)[34] and to require reductions achievable through use of appropriate technology (i.e. technology-based standards).[35] 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.[36] 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.[37] President Reagan's executive order had the explicit goal of

---

[32] 7 U.S.C. §§ 136-136y (2000).

[33] *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001) (holding that pesticide registration does not obviate need for a Clean Water Act permit because FIFRA is based on CBA); Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1257? (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 need for an environmental impact statement, because "FIFRA registration is a cost-benefit analysis"); Envtl. Def. Fund v. EPA, 548 F.2d 998, 1012-18 (D.C. Cir. 1976) (proponent of a pesticide must show that its benefits outweigh its risks). McGarity, *supra* note 19, at 2343 (identifying cost-benefit balancing as the "core regulatory concept" of TSCA and FIFRA); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 Tex. L. Rev. 525, 541-49 (1997) (critiquing the interpretation of TSCA as imposing a cost-benefit test). Congress, however, amended FIFRA in 1996 to modify the cost-benefit balancing approach for pesticides used in food. *See* Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1513 (codified in scattered section of 7 U.S.C. (2000)).

Congress has also given CBA a limited role under the most recent Amendments to the Safe Drinking Water Act (SDWA). *See* SDWA Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (codified as amended at 42 U.S.C. §§ 300f-300j-25 (Supp. V 1999)); McGarity, *supra* note 19, at 2343-44 (analyzing the cost-benefit and risk/risk amendments); Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1393 (2002) (explaining the SDWA's hybrid test).

[34] 42 U.S.C. § 7409(b)(1) (2000). *See, e.g.* 42 U.S.C. § 7412(f)(2)(A) (2000).

[35] *See, e.g.*, 29 U.S.C. § 655(b)(5) (2000); 33 U.S.C. §§ 1311(b)(2)(A), 1316(a) (2000); 42 U.S.C. §§ 7411(a)(1), 7412(d), 7503(a)(2), 7475(a)(4).

[36] *See* Driesen, *supra* note 24, at 8-12. 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 id.* at 23-24; Ass'n of Pac. Fisheries v. EPA, 615 F.2d 794, 805 (9th Cir. 1980). *Cf.* EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64, 76-77 (1980) (noting that BTP limitations reflect an agency conclusion that the costs imposed on industry are worth the benefits). *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.").

[37] *See* Exec.Order 12,291, § 2, 3 C.F.R. § 127 (1982), *reprinted in* 5 U.S.C.A. § 601 app. at 431-34 (1982) (requiring that benefits outweigh costs "to the extent permitted by law."); Exec. Order 12,866, 3 C.F.R. 638-

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.[38] 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."[39] The Office of Management and Budget (OMB), an office consisting mostly of economists, not lawyers,[40] administers the cost-benefit executive orders and has used that authority to give CBA much greater primacy than environmental, health, and safety statutes call for.[41]

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.[42] Some judges have also expressed support for CBA.[43] And, in recent years, several very prominent academics have devoted significant

---

49 (1994), *reprinted in* 5 U.S.C.A. § 601 (West Supp. 1995). For more background on these orders, *see* Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State,* 63 U. CHI. L. REV. 1463, 1476-79 (1996).

[38] *Compare* E.O. 12,291, Preamble (seeking "to reduce the burdens of existing and future regulations. . .") *with* 33 U.S.C. § 1251(a) (2000); 42 U.S.C. § 7401(b)(1) (2000).

[39] *See* E.O. 12,291 §§ 2, 3(a), 6(a), 7(e); E.O. 12498 § 5; Robert V. Percival, *Rediscovering the Limits of the Regulatory Review Authority of the Office of Management and Budget,* 17 Envtl. L. Rep. (Envtl. L. Inst.) 10017, 10018 (1987). Furthermore E.O. 12,291 specifies that nothing in the order "shall be construed as displacing the agencies' responsibilities delegated by law." E.O. 12,291, §3(f)(3).

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

[41] *See* Bluewater Network v. EPA, 370 F.3d 1, 10 (D.C. Cir. 2004) (rejecting lax agency rule passed to satisfy OMB demands); Pub. Health Research Group v. Tyson, 796 F.2d 1479, 1507 (D.C. Cir. 1986) (reversing agency action crossing out standards at the behest of OMB); Envtl. Def. Fund v. Thomas, 627 F. Supp. 556, 570 (D.D.C. 1986) (reversing OMB's action in delaying rule issuance beyond a statutory deadline); Herz, *supra* note 40, at 219 ("OMB . . . displaced agency decision-making . . " regarding the content of the Clean Air Act's operating permit rule); Cass R. Sunstein, *Constitutionalism After the New Deal,* 101 HARV. L. REV. 421, 461 (1987) (stating that the executive orders "expressly" recognize the agency's "ultimate" regulatory authority even if this principle is "not followed in practice"); Oliver A Houck, *President X and the New (Approved) Decisionmaking,* 36 AM. U. L. REV. 535, 540 (1987) (OMB has favored deregulation rather than "faithful execution of the laws"); Eric Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking under Executive Order 12,291,* 4 VA. J. NAT. RESOURCES 1, 51 (1984) (explaining that OMB "goes beyond the terms of . . . the . . . enabling statute" in exercising its review function).

[42] Pub. L. No. 104-4, § 202(a), 109 Stat. 64 (codified at 2 U.S.C. § 1532 (2000)).

[43] *See, e.g.,* Int'l Union v. Occupational Safety and Health Admin., 938 F.2d 1310, 1319-1321, 1326-27 (D.C. Cir. 1991).

amounts of their time to defending increased use of CBA in setting environmental, health, and safety standards.[44]

II. Lochnerism

Scholars traditionally associate Lochnerism with the creation of substantive due process doctrines that recognized economic rights not literally present in the Constitution.[45] Viewed this way, the Lochner period involved subjective misreading of the Constitution.[46] 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.[47] 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

---

[44] *See, e.g.*, MATTHEW D. ADLER & ERIC POSNER, FOUNDATIONS OF COST-BENEFIT ANALYSIS (forthcoming 2006); Matthew D. Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 CHI.-KENT L. REV. 977 (2004); Matthew D. Adler, *Cost-Benefit Analysis, Static Efficiency, and the Goals of Environmental Law*, 31 B. C. ENVTL. AFF. L. REV. 591 (2004); Sunstein, *supra* note 21; Hahn & Sunstein, *supra* note 25, at 1489 (proposing a new executive order to make CBA more influential); Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 324 (2001) (supporting CBA even while disapproving of a willingness-to-pay basis for estimating benefits); Matthew D. Adler, & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences are Distorted*, 29 J. LEGAL STUD. 1105 (2000) [hereinafter Adler & Posner, *Distorted Preferences*]; Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 FLA. ST. U. L. REV. 241 (2000) [hereinafter, Adler & Posner, *Welfarist Theory*] (following up on the theory set out in the 1999 article); COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC AND PHILOSOPHICAL PERSPECTIVES (Matthew D. Adler & Eric Posner eds. 2000); Adler & Posner, *supra* note 25 (providing a philosophical rationale for CBA); Matthew D. Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371 (1998) (addressing arguments that the inability to compare unlike things makes CBA impossible or iuappropriate); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995); SUnstein, *supra* note 41, at 462 (arguing for CBA). *Cf.* Matthew D. Adler, *Risk, Death and Time: A Comment on Judge William's Defense of Cost-Benefit Analysis*, 53 ADMIN. L. REV. 271, 271 (2001) [hereinafter, Adler, *Judge Williams*] (characterizing Adler's' support for CBA as more tentative than that of Judge Williams). *See also* SUNSTEIN, *supra* note 26 (addressing an issue related to CBA); Matthew D. Adler, *Against Individual Risk: A Sympathetic Critique of Risk Assessment* 153 U. PA. L. REV. 1121 (2005) (same).

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

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

[47] *See, e.g.*, WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937 3-4 (1998) (describing the ideology dominating legal thought between 1886 and 1937 as a "classical outlook" addressing important jurisprudential questions); GILLMAN, *supra* note 45, at 10 (arguing that the Lochner period featured an effort to distinguish valid economic legislation from "invalid `class' legislation"); United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter J., dissenting) (suggesting that the Lochner-era Court used "notions of liberty and property characteristic of laissez-faire economics" as "fulcrums of judicial review").

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,*[48] in which the Court struck down a statute limiting bakers' working hours as an unconstitutional interference with liberty of contract violative of due process.[49] Holmes protested that the "Constitution does not enact Mr. Herbert Spencer's social statistics,"[50] 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.[51] While laissez-faire did not command universal support at the time, it enjoyed significant support among many well educated lawyers and businessmen.[52]

Lochnerian ideology did not invariably lead to anti-government results. While the *Lochner*-era Court struck down many statues for reasons that appear wholly indefensible to most contemporary observers, it upheld the overwhelming majority of statutes it reviewed.[53] Indeed, just a few years before the *Lochner* Court had invalidated limits on bakers' hours, the Court had

---

48 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

49 *Id*. at 52-53, 56-57 (majority opinion).

50 *Id*. at 75.

51 *Id.*

52 *ID*. at 82.

53 *See* Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 830-32 (2005) (reviewing the success rate of governments defending both federal and state statutes from constitutional attack); Charles Warren, *A Bulwark to the State Police Power-The United States Supreme Court*, 13 COLUM. L. REV. 667, 695 (1913) (finding that the Court frequently upheld state action in both the due process and commerce clause context); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294-295 (1913) (finding that the Court invalidated only 37 statutes in making 560 decisions under the Fourteenth Amendment between 1887 and 1911).

upheld similar limitations on the miners' hours in *Holden v. Hardy*.[54] Laissez-faire ideology strongly influenced the Court, but it did not invariably dictate anti-government results.[55]

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.[56]

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.[57] The *Lochner* Court declared that "[t]he general right to make a contract . . . is part of the liberty interest protected by the 14th Amendment."[58] 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.[59] 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's of Independence's words, "endowed

---

[54] 169 U.S. 366 (1897).

[55] *See* WIECEK, *supra* note 47, at 7 (claiming that the Court was ideological, but not consistently so).

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

[57] *See, e.g.*, JAMES HACKNEY, UNDER COVER OF SCIENCE 33 (2006) (forthcoming) (describing *Lochner* as "the most infamous application of the natural law worldview"); Note, *Meet Me at the (West Coast) Hotel: The Lochner Era and the Demise of Roe v. Wade*, 90 MINN. L. REV. 500, 509-510 (2005) (the *Adkins* Court rests its holding "on a particular philosophical anthropology of the human person and that theory's consonant *natural rights*") (emphasis added); David E. Bernstein, *Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights*, 92 Geo. L. J. 1, 35-39 (2003).

[58] *See Lochner*, 198 U.S. at 53.

[59] *Id*. at 52.

by their Creator."[60] Thus, it viewed liberty of contract as having natural law origins, which it identified with the common law.[61]

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."[62] Since the Court generally found that the police power embraced all "reasonable" regulation, judicial assessment of regulation's reasonableness determined the scope of legitimate police power legislation.[63] The Court's attitudes toward legislation, then, often proved dispositive of *Lochner*-era cases.[64]

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.

---

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

[61] Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 TENN. L. REV. 455, 489 (2005) (arguing that the *Lochner* Court employed "common law categories and presumptions" to "deif[y]" markets as a "natural state of affairs"); Laurence Tribe, *Clarence Thomas and "Natural Law,"* N.Y. TIMES, July 15, 1991, at A15 (stating that the *Lochner* Court relied upon natural law); Griswold v. Connecticut, 381 U.S. 479, 515 1965) (Black J. dissenting) (claiming that *Lochner* embodies a "natural law due process philosophy"). *See* Francis J. Mootz, *Law in Flux, Philosophical Hermeneutics*, 11 YALE J. L. & HUMAN., 311, 334-335 (1999) (pointing out that Aquinas treated natural as coming from God); Philip Sofer, *Some Natural Confusions about Natural Law*, 90 MICH. L. REV. 2393, 2405, 2397 (1991-1992) (pointing out that some natural law theories suggest that "God's will can . . . be the source of moral truth); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. IN L. & SOC. 5 (1980) (describing *Lochner* as a synthesis of a "positivist science of law, natural rights constitutionalism, and Classical Economics").

[62] *See Lochner*, 198 U.S. at 53.

[63] *See* OWEN M. FISS, 7 THE OLIVER WENDELL HOMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE 1888-1910, 161-63 (1993) (Justice Peckham's *Lochner* opinion sought to preserve limits on the police power).

[64] *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.").

1. Class Legislation

Even before the *Lochner* period, the Supreme Court distinguished between "general legislation," which it usually upheld, and "class" or "special" legislation.[65] This ideal of neutral legislation may have performed the useful function of discouraging special interest legislation in a society where wealth and power were not highly concentrated.[66] 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.[67]

Professor Gillman has argued that the *Lochner*-era Court implicitly used this idea that "class legislation" lacked constitutional legitimacy to strike down regulatory legislation.[68] 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.[69] While

---

[65] *See, e.g.*, Caldwell v. Texas, 139 U.S. 137 U.S. 692, 697-98 (1891) (unanimous opinion) (laws operating "on all alike" secure due process but "special, partial, and arbitrary" legislation offend 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.").

[66] *See generally* Sunstein, *supra* note 56, at 878-79 (equating the Lochner-era requirement of a public purpose for legislation with hostility to "special-interest legislation.")

[67] *See* J. M. Balkin, *Ideology and Counter-Ideology from Lochner to Garcia*, 54 UMKC L. REV. 175, 176 n. 7 (1985-86) (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.)

[68] GILLMAN, *supra* note 45. *See also* FISS, *supra* note 63, at 160-61 (1993) (explaining that the *Lochner* Court did not regard alteration of the "distribution of power or wealth" as a legitimate end of legislation); Balkin, *supra* note 67, at 182-83 (arguing that the Lochner-era Court considered redistributive law suspect). *Cf.* Bernstein, *supra* note 57, at 12 (accusing Gillman of "greatly" exaggerating the role of class legislation concerns in Lochner-era jurisprudence); Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453, 497 (1998) (admitting that Gillman's class legislation thesis "has some plausibility" but expressing some doubts about it).

[69] *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 471 (1920) (construing section of law limiting labor injunctions narrowly as class legislation); Am. Steel Foundries v. Tri-Cities Cent. Trades Council, 257 U.S. 184, 202, 205 (1921) (picketers coercively interfere with a property right). *See also* Loewe v. Lawlor, 208 U.S. 161 (1908); In re Debs, 158 U.S. 564 (1895). *Cf.* United States v. E.C. Knight Co., 156 U.S. 1, 9, 16-18 (1895) (anti-trust laws do not regulate sugar monopoly). *See generally* GILLMAN, *supra* note 45, at 1-2 (identifying Lochnerism with the "use of the injunction against" labor); FISS, *supra* note 63, 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).

Congress intended anti-trust statutes to limit businesses' power,[70] the background constitutional principle that law should be general, and hence neutral, led the Court to use the anti-trust law as a justification for enjoining labor actions[71]. 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.

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.[72] This view melded with a belief in the neutrality of common law and natural law.[73] 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.[74]

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 week as protecting bakers from being

---

[70] *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).

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

[72] *See* Cushman, *supra* note 11, 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 57, at 511 (discussing a "principle of neutrality" governing judicial intervention in police power regulation).

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

[74] *See Lochner*, 198 U.S. at 52-53 (portraying the limitation of bakers' working hours as interfering with both the employee's and the employer's liberty to contract freely).

forced to work longer hours.[75] The majority, however, refused to credit the idea that employers might enjoy stronger bargaining power than workers, treating the statute limiting baker's hours as perversely limiting the baker's ability to voluntarily contract for long hours in order to provide for his family.[76] 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' lot.[77]

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.[78] For example, the Court distinguished activities that directly affected commerce, which Congress could regulate, from activities that indirectly affected Commerce, which Congress could not regulate.[79] *Lochner* itself illustrates this use of neutral abstract distinctions. The Court that struck down New York's limitations on bakers'

---

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

[76] The statute at issue prohibited employers from requiring workers to labor for more than 10 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.

[77] *Cf.* West Coast Hotel Co. v. Parish, 300 U.S. 379, 399 (1936) (recognizing that workers often do not have sufficient bargaining power to obtain a living wage).

[78] *See* Note, *supra*, note 57, at 510 (pointing out that the Court prior to the *Nebbia* case employed "formal categories to distinguish . . . types of economic activity"); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, AND THEORY, 77-79 (2004) (discussing legal realist critiques of "conceptual" and "rule" formalism); WIECEK, *supra* note 47, at 4-5 (describing "legal classicism" as "abstract, formal, conceptualist, categorical, and (sometimes) deductive" and noting that this "abstraction promoted neutrality"); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (presenting a legal realist critique of formalism). *Cf.* Balkin, *supra* note 67, at 180-82 (discussing a similar notion of conceptualism as typifying Lochner-era jurisprudence).

[79] *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, 605-607 (1995) (Souter J., dissenting) (suggesting that the Lochner-era Court used the direct/indirect distinction to subject economic regulation to judicial policy judgments).

hours in *Lochner* had upheld similar legislation limiting miners' hours.[80] 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.[81] It found regulation of bakers' hours arbitrary, but similar restrictions on the miners' hours reasonable.[82]

Justice Holmes' *Lochner* dissent famously expressed skepticism about neutral distinctions' capacity to lead to neutral, or even defensible, decisions. He wrote, "General propositions do not decide concrete cases."[83] And Holmes wrote that "Every opinion tends to become law,"[84] thereby suggesting that the Justices personal opinions, not the formal legal categories employed, controlled the cases. Indeed, the *Lochner* majority opined that long working hours for bakers posed no health hazard justifying regulation,[85] whilst Justice Harlan's dissent expressed a willingness to credit the legislative judgment that too much baking damages a baker's health[86]. The *Lochner*-era Court sometimes used abstract categories to mask decisions based on the decision-makers' personal opinions, as both Holmes and many modern Supreme Court Justices have pointed out.[87]

---

[80] *See* Holden v. Hardy, 169 U.S. 366, 380, 398 (1897).

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

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

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

[84] *Id.* at 76 (Holmes, J., dissenting).

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

[86] *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).

[87] *See* Coll. Sav. Bank v. Fla. Prepaid, 527 U.S. 666, 691 (1999) (characterizing *Lochner* as imposing a "particular economic ideology on the Constitution."); United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter J. dissenting) (characterizing Lochnerism as involving "exacting scrutiny" of legislative means and ends);

3. Hyper-Rationalism

This skepticism toward legislation also manifested itself in a demanding approach to the rationales offered for government regulation.[88] 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.[89] 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."[90] Part three presents more examples of this hyper-rationalism in explaining how closely it resembles modern regulatory reformers' approach. Importantly, the Court's rationality concept involved a strong tendency to view "class legislation" as arbitrary.[91] 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.[92] *Adkins v. Children's Hospital*,[93] the second most famous

---

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

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

[89] *See* TRIBE, *supra* note 5, at 1346-47 (noting that the *Lochner* Court found that long hours did harm a baker's health, in spite of "considerable evidence" that it did).

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

[91] *See* Cushman, *supra* note 11, at 886-88 (explaining how contemporary *Lochner*-era scholars equated "arbitrary" legislation with legislation favoring one group over another or redistributing resources).

[92] *See generally* Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 393 (1988) (arguing that the *Lochner* period judges "wrote into the Constitution a unique American perspective on classical economics"). The Court did, however, prohibit price regulation in industries not affected with some substantial public interest. *See* Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 535 (1923); Tyson & Brother-United Theatre Ticket Offices v. Banton, 273 U.S. 418, 431-32 (1927); Hamilton,

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.[94] In explaining why the legislation was so unreasonable as to offend due process, Justice Sutherland, writing for the *Adkins* majority, explained that the law requires the employer to pay the administratively established wage "because the employee needs it, but requires no service of equivalent value from the employee."[95] 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.[96] Accordingly, the *Adkins* Court, in explaining why it found the law arbitrary, complained that "efficiency . . . forms no part of the policy of the legislation."[97] 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.[98]

Affectation with Public Interest, 39 YALE L. J. 1089 (1930); McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759 (1930).

[93] 261 U.S. 525 (1923).

[94] *Id.* at 539, 562.

[95] *Id*. at 557.

[96] *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 92, at 431-37. Under this doctrine forced transfers between capitalists and labor would produce disasters for the laborer. *Id.* at 433. This idea found expression in the *Adkins* opinion. *See id.* at 437 (citing *Adkins*, 261 U.S. at 557). This discrepancy between neoclassical economics and the particulars of *Lochnerism* hardly harms the analogy between Lochnerism and regulatory reform, because the details of marginal cost theory have not figured prominently in regulatory reformers' case for CBA.

[97] *Adkins*, 261 U.S. at 557.

[98] *See* Cushman, *supra* note 11, at 885-88, 896 (defining class legislation as that which arbitrarily transfers property "from A to B" and showing how *Adkins*' CBA led to the conclusion that the minimum wage statute was class legislation in this sense).

Rough CBA also played a prominent role in the era's cases addressing regulation of prices charged by public utilities, railroads, and similar entities.[99] 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.[100] Again, this reflects a cost-benefit model, suggesting that a carrier 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.[101] And this cost-benefit test led the Court to strike down rate regulations in some thirty-nine cases between 1897 and 1937.[102]

A cost-benefit framework also played a role in decisions upholding rate regulations. For example, in *Dayton-Goose Creek Railway Co. v. United States*, the Court upheld a statute confiscating "excess" profits from heavily traveled railroad lines to subsidize service on less traveled routes.[103] Rents in excess of the benefits conferred conflict with economic models, which define efficiency in terms of arrangements equating benefits and costs.[104] Even though the statute forced, in effect, a transfer payment "from A to B," the Court unanimously upheld it,

---

[99] *See generally* Hovenkamp, *supra* note 92, at 440 (the Supreme Court of the *Lochner* period permitted "state intervention only where the classical economists . . . would have permitted it.")

[100] Smyth v. Ames, 169 U.S. 466, 526 (1898) (requiring states to establish rates that will "admit of the carrier earning such compensation as under all the circumstances is just to it and to the public."). *See* Cushman, *supra* note 11, at 909 (describing *Smith 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 class . . . to suffer loss that others may gain," justice forbids "use for the public benefit at less than its market value")

[101] *See, e.g.*, Miss. R.R. Comm'n v. Mobile & Ohio R.R., 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).

[102] Phillips, *supra* note 68, at 498.

[103] 263 U.S. 456, 476, 485 (1924) (showing that Congress provided for the distribution of excessive profits and upholding the law on that basis).

[104] *See* I HANDBOOK OF ENVIRONMENTAL ECONOMICS: ENVIRONMENTAL DEGRADATION AND INSTITUTIONAL RESPONSES, at 253-54 (2003) (defining the "social optimum" regulation or tax as one that equates marginal abatement cost to marginal damage); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 715, 725 (1996) (assuming that a rule where costs equals benefits is ideal); JOHN GOWDY & SABINE O'HARA, ECONOMIC THEORY FOR ENVIRONMENTALISTS 16 (1995).

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 . . . returns."[105]

In many cases outside the rate-making context as well, a CBA-like model proved influential.[106] Hence, a CBA-like model played a leading role in 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.[107] In doing so, it expressly recognized the necessity and legitimacy of legislative value choice.[108]

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

---

[105] *Id.* at 481.

[106] *See, e.g.*, R.R. 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 to include that service in pension calculations, because that premium pays "for services fully compensated" under the previous contract for service); Pac. Ry. Co. v. United States, 284 U.S. 80, 97, 100 (1931) (invaliding 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. R.R. Comm'n of La., 251 U.S. 396, 399 (1920) (invalidating an order requiring owner of a narrow gauge railroad to operate at a loss); Myles Salt Co. v. Bd. of Comm'rs, 239 U.S. 478, 485 (1916) (prohibiting a drainage district from taxing a property that would receive no benefits corresponding to the tax); Chicago, Rock Island, & 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 thirty 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].

[107] *See* Williamson v. Lee Optical, 348 U.S. 483, 488 (1955); 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).

[108] *Ferguson*, 372 U.S. at 726 ("legislatures . . must decide upon the wisdom and utility of legislation").

accepting legislative line drawing under the equal protection clause (at least where no suspect classification is involved).[109] The modern Court's substantive due process and equal protection cases specifically repudiate the tradition of viewing "class" legislation as suspect.[110] The modern doctrine requires the Court to uphold any legislative distinctions (between classes or otherwise) unless the distinctions drawn wholly lack a "rational basis".[111] 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.[112] The Court also recognized, at about the same time that it repudiated its Lochner-era constitutional jurisprudence, that Congress considered the Court's neutralist anti-trust jurisprudence a similar abuse of power and abandoned the use of the labor injunction under anti-trust statutes.[113] Finally, in *Erie Railroad Company v. Tompkins,*[114] the Court repudiated the natural law tradition that partially underlay legal historicism.[115]

III. Parallels with Regulatory Reform

---

[109] *See, e.g., Ferguson*, 372 U.S. at 732 (stating that the Equal Protection Clause only prevents invidious discrimination); *Williamson,* 348 U.S. at 489 (same). *See generally* Cushman, *supra* note 11, at 888-95 (explaining that during the *Lochner* period the Court often did not sharply distinguish Due Process from Equal Protection).

[110] *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. Childrens Hospital,* in *Parish. Id.* at 400.

[111] *See* United States v. Carolene Prod., 304 U.S. 144, 152 (1938) (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 12, at 118-119 (both the equal protection clause and the due process clause require a minimal rational relationship between a law and a legitimate government purpose).

[112] *See Ferguson*, 372 U.S. at 729-30; *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.")

[113] *See* Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prod., 311 U.S. 91, 102-03 (1940) (discussing Congressional findings of "abuses of judicial power" and misinterpretation of anti-trust law)

[114] 304 U.S. 64 (1938)

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

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.[116] 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.[117] The Court has prohibited "grossly excessive" punitive damage awards as a matter of substantive due process.[118] The Court employs a rough cost-benefit test, an evaluation of the ratio of the punitive damages to the actual harm inflicted upon the plaintiff, as a significant

---

[116] *See generally* Shaman, *supra* note 61, at 490 (noting that some insist that the main problem with the *Lochner* Court was excessive activism).

[117] *See* BMW of N. Am. v. Gore, 517 U.S. 559, 561 n. * (1996) (listing business groups and Washington Legal Foundation, a conservative think tank, as supporting constitutional limits on punitive damage awards); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 445 n. * (1993) (same); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 8 n. 4 (1990) (listing business groups appearing as amici seeking substantive due process limits on punitive damage awards). *See generally,* Mark Geistfeld, *Constitutional Tort Reform,* 38 LOY. L.A. L. REV. 1093 (2005).

[118] *See BMW*, 517 U.S. at 568.

element of its approach to determining excessiveness.[119] In developing this test for judicial tort reform the Court relied upon several *Lochner*-era precedents.[120] 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."[121] 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.[122] 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.[123] This concurring view would, in essence, constitutionalize a central tenant of the regulatory reform movement, which generally employs an approach to regulation predicated upon economic concepts without any evident agreement about details.[124] Justices Scalia and Thomas have rejected the excessiveness inquiry precisely because it reflects

---

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

[120] *See TXO*, 509 U.S. at 453-54 (plurality opinion) (stating that the Fourteenth Amendment imposes substantive limit upon penalties) (citing Seaboard Air Lines R. Co. v. Seegers, 207 U.S. 73, 78 (1907); St. Louis, I.M. & S.R. Co. v. Williams, 224 U.S. 270, 286 (1919); and Standard Oil Co. of Ind. v. Missouri, 224 U.S. 270, 286 (1912)); *Gore*, 517 U.S. at 568 (citing *TXO* 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 relied upon. *TXO*, 509 U.S. at 455 (plurality opinion for three Justices), 479-80 (dissenting opinion for three Justices) (agreeing with the plurality's adherence to these precedents).

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

[122] *See BMW*, 517 U.S. at 593 (Breyer, J., concurring).

[123] *See id.* (drawing this distinction).

[124] *See generally*, Sen, *supra* note 22, at 932-33 (noting that proponents of CBA do not agree about what precisely it means).

the Lochnerian error of finding unenumerated substantive rights in the Fourteenth Amendment.[125]

These cases do not reflect Lochnerian attitudes toward legislation, for they are not directed toward legislation. Rather, they reflect skepticism toward juries.[126] Furthermore, this use of Lochnerism in the service of tort 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.[127]

Judicially created doctrines of standing and broad sovereign immunity sometimes impede environmental laws' enforcement.[128] These doctrines reflect the Court's continuing tendency to treat common law baselines as somehow natural and to read them into the Constitution.[129] Thus,

---

[125] *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 due process right at issue" in dicta).

[126] *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) (juries hearing about the wealth of a wrongdoer may act based on "prejudice against large corporations"); 467 (Kennedy J. concurring) (suggesting that substantive due process review of jury verdicts should guard against punitive damage awards reflecting jury "bias, passion, or prejudice"); 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 "multimillion dollar losses" upon defendants "on a whim").

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

[128] *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 (2nd Cir. 1999) (dismissing, on sovereign immunity grounds, a citizen suit against a state under several environmental statutes).

[129] *See* Sunstein, *supra* note 56, at 878-79 (explaining that the Court tended to view departures from common law baselines defining neutrality as class legislation serving special interests). *See also* Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-2004 Term*, 42 HOUS. L. REV. 565, 605-

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,[130] the Court has required a showing of injury that reflects a common law model of a lawsuit.[131] Similarly, the Court has stretched sovereign immunity's scope far beyond what the 11th Amendment's text authorizes, relying on the proposition that the framers intended to preserve common law sovereign immunity.[132] But still, these doctrines have not materially advanced regulatory reform; they have merely complicated enforcement of some law at times.[133]

---

619 (2005) (explaining how the Court has used common law causation concepts to narrow the scope of environmental statutes).

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

[131] *See* Driesen, *supra* note 130, at 835-36 (describing a private law model that undergirds the Court's standing jurisprudence); Sunstein, *supra* note 56, at 893-94 (explaining how modern standing doctrine incorporates common law understandings). *See generally* Owen M. Fiss, *The Supreme Court 1978 Term Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 17 (describing a private law model of adjudication as dispute resolution).

[132] *See* Driesen, *supra* note 130, 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 extended state immunity to suits from their own citizens even though "by its terms" the 11th Amendment only applies to suits by citizens from another State); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 72-73 (2000) (affirming that the Eleventh Amendment "stands not so much for what it says, but for the presupposition which it confirms") (citation omitted); Alden v. Maine, 527 U.S. 706, 715-16 (1999) (invoking common law sovereign immunity to justify prohibiting Maine governmental employees from suing their state government for violation of the Fair Labor Standards Act); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 700 (1999) (Breyer, J. dissenting) (noting that sovereign immunity is a common law doctrine); Seminole Tribe v. Fla., 517 U.S. 44, 102-03 (1996) (Souter, J., dissenting) (discussing sovereign immunity's common law origins). *Cf.* Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) (holding that Congress had constitutionally abrogated sovereign immunity under the 14th Amendment in Title II of the Americans with Disabilities Act); Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 724-25 (2003) (upholding a waiver of sovereign immunity to allow for private enforcement of The Family and Medical Leave Act of 1993); *Seminole Tribe*, 517 U.S. at 69 (majority opinion) (suggesting that sovereign immunity was not only a product of English common law, but part of the "fundamental jurisprudence in all civilized nations") [citation and internal quotation omitted]. *See generally* Symposium: *State Sovereign Immunity*, 75 NOTRE DAME L. REV. 817 (2000); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1, 9-13 (1988) (exploring the 11th Amendment and its interpretation prior to the recent change in jurisprudence).

[133] *See generally, Florida Prepaid*, 527 U.S. at 701-704 (charging that sovereign immunity, like *Lochner*, threatens to "deprive Congress of necessary legislative flexibility," in part by limiting its ability to rely on

Increased judicial willingness to limit Congressional power over Commerce could threaten environmental law.[134] 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.[135] The dissenters in *United States v. Lopez*[136] and *United States v. Morrison*[137] 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.[138] But these decisions are not divorced from Constitutional text as the old substantive due process jurisprudence was.[139] The Constitution clearly does contemplate a

---

"a decentralized system of individual private remedies"); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 655-660 (1999) (explaining why immunizing states from private suits for patent infringement may leave patent holders with inadequate remedies)..

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

[135] *See* William F. Pedersen, *Contracting with the Regulated for Better Reglation,* 53 ADMIN. L. REV. 1067, 1074 (2001) (identifying "a regulatory reform contract approach" with "devolution" of responsibility to the states and to regulated entities); Daniel C. Esty, *Toward Optimal Environmental Governance,* 74 N.Y.U.L. REV. 1495, 1496 (1999) (explaining that much of the regulatory reform debate focuses on the question of what level of government should have authority to address environmental problems); Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform,* 81 MINN. L. REV. 97, 99 (1996) (identifying devolution of authority to state and local government as a central tenet of conservative reform efforts); McGarity, *supra* note 37, at 1497, 1506, 1511 (explaining that most schools of regulatory reform favor decentralized decision-making); NEWT GINGRICH, TO RENEW AMERICA 9 (1995) (arguing for devolution of power to state and local governments). *See also* Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique,* 50 VAND. L. REV. 1137 (1997) (analyzing the Unfunded Mandates concept, which played a key role in the Unfunded Mandates Act, a reform bill advancing both CBA and devolution).

[136] 514 U.S. 549 (1995).

[137] 529 U.S. 598 (2000).

[138] *Lopez,* 514 U.S. at 606-608 (Souter, J., dissenting) (analogizing the direct/indirect distinction to the majority's commercial/non-commercial distinction), 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).

[139] *Lopez,* 514 U.S. at 594 n. 9 (claiming that *Lopez,* unlike *Lochner,* "enforces . . . the Constitution, not judicial policy judgments).

federal government of limited power.[140] 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.[141] So far, these decisions have not led courts to declare any environmental law unconstitutional.[142] But the Supreme Court has just granted certiorari in three cases that offer it an opportunity to use its Commerce Clause jurisprudence to restrict federal regulation protecting wetlands.[143]

The more important realm for judicial activism in the service of regulatory reform has involved statutory interpretation, not constitutional law.[144] Thus, statutory cases like *Duplex*

---

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

[141] *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).

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

[143] *See* Summary of Orders, 74 U.S.L.W. 3219, 3219-20 (Oct. 11, 2005).

[144] Judicial activism is difficult to define. *See* Robert E. Levy and 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 working definition of statutory judicial activism would consider a decision activist when conventional techniques of statutory interpretation do not provide at least a reasonably good justification for the result and judicial views about appropriate policy seem to play a large role.

Printing Press Co. v. Deering[145] and *American Steel Foundries v. Tri-Cities Cent. Trades Council,*[146] furnish the most salient Lochnerian analogue to contemporary judicial activism, not *Lochner* itself. 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 in the teeth of a statutory provision forbidding the use of injunctions in labor disputes.[147] They share with *Lochner* not only a disregard for textual limits, but also solicitude toward common law rights and opposition to "class" legislation.[148]

Cass Sunstein, a prolific CBA supporter, has argued for a cost-benefit canon of construction.[149] 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.[150] This suggests that the modern Supreme Court, at least, has not gone as far as the *Lochner* Court in "erecting its prejudices into law."

---

[145] 254 U.S. 443, 471 (1920) (construing section of law limiting labor injunctions narrowly to allow judiciary to enjoin a labor action).

[146] 257 U.S. 184, 202, 205 (1921) (enjoining picketers under an anti-trust law).

[147] *See Duplex Printing*, 254 U.S. at 468 n. 1; *Am. Foundries*, 257 U.S. at 201-202.

[148] The *Duplex Printing* Court construed the prohibition on labor injunctions of the Clayton Act narrowly because it restricted the "general" operation of anti-trust laws by granting a "special privilege to a particular class." 254 U.S. at 271. Both cases also treat labor actions as coercive interference with a property right. *See id.* at 465-66, 478-79 (boycott coercively interferes with a property right); *Am. Foundries*, 257 U.S. at 202, 205 (picketers coercively interfere with a property right).

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

[150] *Cf.* Michigan v. EPA, 213 F.3d 663, 678-79 (D.C. Cir. 2000) (requiring consideration of cost when the statute does not clearly preclude it); George E. Warren Corp. v. EPA, 159 F.3d 616, 622-24 (D.C. Cir. 1998) (requiring EPA to consider a proposed rule's effect on gasoline price and supply under a statutory provision

Still, judicial support for regulatory reform has played a role in several important cases.[151] The dissenting Justices in the *Benzene* case, *Industrial Union Department v. American Petroleum Institute*,[152] associated judicial support for regulatory reform with Lochnerism.[153] The dissenters claimed that the *Benzene* Court struck "its own balance between the costs and benefits of occupational safety standards."[154] 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.[155] The plurality opinion required a finding of significant risk before regulation of toxic substances could occur under the Occupational Safety and Health Act.[156] 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

---

not mentioning costs); Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 475 (D.C. Cir. 1998) (authorizing the Federal Aviation Administration to consider costs to the air tourism industry in deciding how to devise a plan for "substantial restoration of natural quiet" in the Grand Canyon area).

[151] *See* Levy & Glicksman, *supra* note 144, at 421 (concluding that "the Supreme Court has 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 129, at 565 (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, 708-736 (1999) (reviewing the voting records of individual Justices in environmental cases); Daniel A. Farber, *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 144, 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.")

[152] 448 U.S. 607 (1980)

[153] *Id.* at 723-24 (Marshall, J., dissenting).

[154] *Id.*

[155] *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 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 Holme's suggestion that the *Lochner* majority made Herbert Spencer's Social Statistics into a governing legal principle).

[156] *Id*. at 639-40 (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).

enormous costs that might produce little, if any, discernible benefit."[157] Only Justice Powell, however, read the Occupational Safety and Health Act as requiring CBA.[158] And the Supreme Court squarely rejected that view in the subsequent *Cotton Dust* case.[159] The *Benzene* decision, however, pushed government agencies toward greater reliance on quantitative risk assessment, which, as we have seen, serves as a critical element of CBA.[160] 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.[161] The Court thus substantially advanced regulatory reform, and it did so with very little statutory support.[162]

---

[157] *Id.* at 645.

[158] *Id.* at 776 (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, *see id.* at 723-24 (dissenting opinion), not just the plurality, *cf.* 708-13 (addressing itself to the "plurality") (dissenting opinion).

[159] Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 507-523 (1981) (rejecting argument that costs of implementing OSHA toxic standards must bear a reasonable relationship to benefits).

[160] *See Benzene*, 448 U.S. at 652-58 (putting a burden of proof upon the agency that would be difficult or impossible to meet without quantifying risk). While the opinion is unclear about whether it in fact requires quantitative risk assessment, *see id.* at 654-55 (disclaiming any intent to impose a "mathematical straightjacket" while relying exclusively on examples of how to meet the Court's requirements of demonstrating significant risk that quantified the probability of harm), the federal agencies have found it difficult to satisfy the opinion's strictures without it. *See* Thomas O. McGarity, *The Story of the Benzene Case: Judicially Imposed Regulatory Reform through Risk Assessment*, *in* ENVIRONMENTAL LAW STORIES 165-68 (Richard J. Lazarus and Oliver A. Houck eds. 2005) (explaining how the Court's decision helped destroyed generic cancer policy and led to reliance on case-by-case quantitative risk assessment). *Cf.* Farber, *supra* note 151, at 552-53 (stating that the Court did not offer "clear leadership" on the issue of whether regulation is warranted based on unquantifiable evidence).

[161] McGarity, *supra* note 160, at 165-66.

[162] *Accord* Sunstein, *supra* note 14, at 360 n. 266 (noting that "no statutory source" supported the *Benzene* plurality's significant risk requirement); Farber, *supra* note 151, at 553 n. 27 (noting that "the plurality opinion is quite difficult to square" with the statute's "plain language"); Levy and Glicksman, *supra* note 144, at 380 (finding "the plurality efforts to explain the result in terms of statutory language and legislative history 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 . . . suffer material" health impairment. *See Benzene*, 448 U.S. at 612 (quoting 29 U.S.C. § 655(b)(5)(2000)).

The Court also advanced regulatory reform substantially in *Chevron v. Natural Resources Defense Council,*[163] when it upheld an expansion of EPA's "bubble" policy allowing polluters to trade emissions between sources with 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.[164]

Lower court judges, however, have sometimes actively advocated regulatory reform. For example, in *Corrosion Proof Fittings v. EPA,*[165] the United States Court of Appeals for the Fifth Circuit interpreted section six of the Toxic Substances Control Act[166] (TSCA) as requiring CBA of each regulatory alternative considered.[167] Section six requires EPA to regulate "to the extent necessary to protect adequately against . . . risk using the least burdensome requirements."[168] 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

---

[163] 467 U.S. 837 (1984).

[164] 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.* 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 statute charging a larger tipping fee for waste brought from out-of-state than is charged for waste generated within Oregon); Chemical Waste Management v. Hunt, 504 U.S. 334 (1992) (invalidating a surcharge on hazardous waste generated outside of Alabama). *See also* Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353 (1992) (invalidating ordinance allowing counties to refuse waste from outside of county).

These cases do not appear especially activist in a Lochnerian sense, because the tradition of striking down discriminatory regulation has such a long lineage. They do reflect, however, the exercise of discretion in determining the limits of the anti-discrimination principle in a way that favors regulatory reform.

[165] 947 F.2d 1201 (5th Cir. 1991).

[166] 15 U.S.C. §§ 2601-2692 (2000).

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

[168] 15 U.S.C. § 1605(a) (2000).

must choose the least burdensome requirement. It must also consider the economic consequences of any rule it promulgates.[169] 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 six plainly would require adoption of that option, even if the costs far exceeded the benefits.[170] For section six explicitly requires adoption of an option that adequately protects the public. Yet, the *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 two of TSCA that it intended that EPA "shall consider the . . . economic . . . impact of any action" that it "takes or proposes . . ."[171] 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 two with the operative language in section six. Even so, it's 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 court could easily have harmonized section two with section six by requiring cost effectiveness comparisons between adequate regulatory alternatives, without requiring any quantification of benefits.

---

[169] 15 U.S.C. § 2605(c) (2000).

[170] 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.

[171] 15 U.S.C. § 2601(c) (2000).

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 six, apparently because quantification of benefits proved so daunting.

Judges on the United States Court of Appeals for the District of Columbia Circuit have been more overtly ideological and willing to use the Constitution to advance their ideology.[172] 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 the *Lockout/Tagout* opinion, *International Union v. Occupational Safety and Health Administration (OSHA)*[173], the D.C. Circuit held that OSHA must narrowly construe statutory provisions governing non-toxic workplace hazards to avoid a nondelegation difficulty.[174] 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.[175] Still, the court did not require CBA[176] and approved an agency interpretation that did not rely upon CBA in a subsequent decision.[177]

The most far reaching attempt to use the Constitution as a regulatory reform engine came in *American Trucking Ass'ns v. EPA,* when the District of Columbia Circuit held that Clean Air Act section 109's health protection requirement ran afoul of the nondelegation doctrine.[178] But, as we have seen, the Supreme Court unanimously reversed this decision.

---

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

[173] 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

[174] *Id.* at 1316, 1321.

[175] *Id.* at 1319-1321 (majority opinion), 1326-27 (Williams, J., concurring).

[176] *Id.* at 1321 (we hold only that CBA is a *permissible* interpretation of § 3(8)) [emphasis in the original].

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

[178] 175 F.3d 1027, 1038 (D.C. Cir. 1999) (*per curiam*), *rev'd sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

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.[179]

B. *Ideology and Natural Law Origins*

Both CBA and the Lochner-era embrace of liberty of contract share a common natural law origin.[180] 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.[181] This same natural law of the invisible hand also supported decentralization of economic power through liberty of contract.[182] Smith himself referred to the "right of trafficking" as a "natural" right.[183] Thus, liberty of contract and CBA

---

[179] *See generally* Phillips, *supra* note 68, at 491 (noting that "most critics of *Lochner* era substantive due process agree that the doctrine assisted business while disadvantaging workers.").

[180] *See* Laurence H. Tribe, *The 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 . . . .").

[181] SUNSTEIN, *supra* note 26, 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. MONTES, *supra*, 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).

[182] *See* Balkin, *supra* note 67, at 179; WIECEK, *supra* note 47, 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 capital and labor"); Fiss, *supra* note 63, at 47 (Graham Sumner, an influential American proponent of social Darwinism, drew upon the work of Herbert Spencer and Adam Smith); Hovenkamp, *supra* note 92 at 402-407 (tracing Lochnerian views about property and contract back to Adam Smith).

[183] ADAM SMITH LECTURES ON JURISPRUDENCE 8 (R.L. Meek, D.D. Raphael, and 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.

come from a natural law tradition, in the sense of a law having a basis in fundamental understandings of human nature.[184]

To be sure, neither the *Lochner* Court nor many contemporary regulatory reformers directly acknowledge natural law's influence upon their views.[185] 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 voluntarily exchange.[186] 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.[187] 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.[188] And many observers have read Smith as teaching that such contracts, reflecting rational choices of consumers pursuing their own ends, end up benefiting society.[189] CBA appears natural to many

---

[184] *See* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 10390, 10393 (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 61, 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 57, 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).

[185] *Cf.* GILLMAN, *supra* note 45, at 158-59 (characterizing an "unnatural" economic advantage as one that is "non-market-based").

[186] *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").

[187] *See* Driesen, *supra* note 15, at 577; BAXTER, *supra* note 28, at 10-12.

[188] *See* Driesen, *supra* note 15, at 577; GOWDY & O'HARA, *supra* note 104, at 104-108.

[189] *Cf.* DiMatteo, *supra* note 186, at 877-882 (arguing that Smith's notion of free contract was not limited to the economic efficiency model and included a concept of just contracting).

of its advocates, because it reflects the same sort of logic found in the natural order represented by contract.[190]

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.[191] 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.[192] Nevertheless, they all conclude that CBA is justified.[193]

---

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

[191] *See* McGarity, *supra* note 37, at 1484-1498 (discussing the commitment of various regulatory reform groups to less government and linking the "radical anti-interventionists'" views to Adam Smith).

[192] *See* Frank & Sunstein, *supra* note 44, at 324 (supporting CBA but disapproving a willingness-to-pay approach to estimating benefits); Adler & Posner, *supra* note 25, at 196 (rejecting reliance on "unrestricted preferences" as the basis for valuing costs and benefits); Sunstein, *supra* note 13, 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 13, at 10 (1998) (identifying Professor Sunstein as a proponent of a "softer" variety of CBA that that offered by "free marketers").

[193] *See* SUNSTEIN, *supra* note 20, 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 44, at 289-302 (linking individual welfare to overall well being that Alder identifies with CBA); Adler & Posner, *supra* note 25, at 194-95 (arguing that CBA tends to advance overall well-being). Professor Adler's support for CBA is subtle and sometimes equivocal. *See* Matthew D. Alder, *The Positive Political Theory of Cost-Benefit Analysis: A Comment on Johnston*, 150 U PA. L. REV. 1429, 1429 (2002) (recognizing that CBA may reduce overall well being); Adler, *Judge Williams*, *supra* note 44, at 271 (supporting CBA but characterizing his support for CBA as "more tentative" than that of Judge Williams). *Cf.* Driesen, *supra* note 24, at 69-75 (questioning whether Adler and Posner's "overall well being" theory adequately supports a choice for CBA).

Natural law remains at least as influential as it was during the *Lochner* period, but its influence in the courtroom has waned significantly.[194] Natural law today 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.[195] 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.[196]

C. *Attitudes Toward Legislation*

---

[194] *See* Mootz, *supra* note 61, at 311 (referring to natural law as "a curiosity outside the mainstream"); Soper, *supra* note 61, at 2403-04 (describing the unacceptability to society of having a Supreme Court Justice "branded" as a "believer in natural law.").

[195] *See generally* HACKNEY, *supra* note 57, at 25 (identifying allegiance to natural law governing economic relations with the view that "any attempt to intervene. . . was necessarily doomed to failure."); Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763, 1793 (2002) ("Risk tradeoff analysis began as a tool of deregulation."); Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533 (1996); RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT (John D. Graham and Jonathan Baert Wiener eds. 1995); W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITY FOR RISK (1992); Ralph L. Keeney, *Mortality Risks Induced by Economic Expenditures*, 10 RISK ANAL. 147 (1990); AARON WILDAVSKY, SEARCHING FOR SAFETY (Social Philosophy and Policy Center 1988); Aaron Wildavsky , *Richer is Safer*, 60 PUB. INT. 23 (1980)

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

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.

Modern regulatory reformers echo this opposition to "class legislation" when they decry the one-sidedness of legislation favoring protection of the public's health over the interests of polluters. While they do not explicitly frame their opposition in "class legislation" terms, a provision like section 109 of the Clean Air Act[197] takes resources from A (the polluter) and gives them to B (the breather) in the form of health protection.[198] 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 case

---

[197] 42 U.S.C. § 7409 (2000).

[198] Section 109 requires EPA to establish standards for ambient air quality sufficient to protect public health. *See* 42 U.S.C. § 7409 (2000). Once it does this, states must devise plans, which include binding emission control obligations for polluters, to meet these standards. *See* 42 U.S.C. § 7410 (2000); 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.

(such as protection of endangered species).[199] 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 baker's hours were unreasonable, the *Lochner* Court speculated that such limits might prove counterproductive in terms of their own objectives. Specifically, the Court claimed that limits on work hours "might seriously cripple the ability of the laborer to support his family."[200] 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.[201] Even though Professor McGarity, a leading environmental scholar, has sharply questioned the richer is safer argument against stringent regulation,[202] the Supreme Court characterized the argument as "unquestionably true" in *American Trucking*.[203]

---

[199] CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT 213-14 (2002) (suggesting that a rights based approach might properly apply to the Endangered Species Act); Sunstein, *supra* note 195, at 1534 (contrasting balancing with absolutism); Cass R. Sunstein, *From Consumer Sovereignty to Cost-Benefit Analysis: An Incompletely Theorized Agreement*, 23 HARV. J. L. & PUB POL'Y 203, 209 (1999) (claiming that the absolutism characterizing 1970s legislation "makes no sense); Sunstein, *supra* note 13, at 300 (characterizing many current statutes as calling for "absolutism"). *See also* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 742 (1999) (arguing that public hysteria unduly influences regulation); STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 35-36 (1993) (same).

[200] Lochner, 198 U.S. at 59. *See generally* Balkin, *supra* note 67, at 196 (referring to the argument that economic regulation will hurt the very people they are designed to protect as "a standard individualist argument.")

[201] *See* SUNSTEIN, *supra* note 20, 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 195; Graham & Wiener, *supra* note 195; BREYER, *supra* note 199, 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 195; Keeney, *supra* note 195; WILDAVSKY, supra note 195.

[202] *See* McGarity, *supra* note 13, at 42-49 (refuting the richer is safer idea).

[203] *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,

Scholars supporting CBA have portrayed it as a neutral reform, and made claims about its neutrality central to their case for it.[204] 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.[205] He also argues that CBA improves priority setting, thereby suggesting that it does not so much weaken environmental protection as refocus it.[206] In spite of industry's consistent support of CBA, Professor Sunstein, along with others, argues that CBA reduces special interest influence over legislation.[207] 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.[208] Thus, both contemporary regulatory reformers and the Lochner-era Justices view neutral general legislation as an antidote to special interest influence.

---

826 (7th Cir. 1993) (costs of rule for medical establishment will raise costs and reduce demand for medical services, which may kill people); Int'l Union, UAW v. OSHA, 938 F.2d 1310, 1326-27 (D.C. Cir. 1991) (Williams J. concurring) (arguing that costly regulation can kill more people than it saves by reducing wealth). *Cf.* Bennett v. Spear, 520 U.S. 154, 176-77 (1997) (characterizing the Endangered Species Act's goal as avoiding "needless economic dislocation produced by agency officials zealously but unintelligently pursing their environmental objectives.").

[204] *See* Sinden, *supra* note 13, at 1416 (economists have touted CBA as a "politically `neutral' means" of resolving policy disputes).

[205] SUNSTEIN, *supra* note 20, at 137 (arguing that cost-benefit analysis 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 rapid and stringent regulation"); SUNSTEIN, *supra* note 199, at 26-27 (citing examples of CBA causing "more rapid and stringent regulation.").

[206] *See* Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1060 (2000) (portraying CBA as a way of improving priority setting); Sunstein, *supra* note 13, at 257-260 (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. (Envtl. L. Inst.) 10001, 10011 (2001) (explaining that the regulatory reformers' emphasis on improved priority setting conveys a false sense of neutrality); BREYER, *supra* note 199, at 10-23 (arguing that risk regulation suffers from poor priority setting). *Cf.* McGarity, *supra* note 13, at 34 (questioning that notion that relaxing regulatory stringency helps fund more important health priorities); Driesen, *supra* at 10017-18 (questioning the link between uneven dollars per life saved, CBA, and priority setting).

[207] SUNSTEIN, *supra* note 199, at 107; Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis*, 68 U. CHI. L. REV. 1137, 1174 (2001) (providing a theory explaining why CBA might discourage special interest influence).

[208] *See* GILLMAN, *supra* note 45, at 10 (describing the standards guiding *Lochner*-era jurisprudence as hostile to legislation advancing "the special or partial interests of particular groups or classes.")

The regulatory reformers' neutrality ideal includes an ideal of general legislation, since they view CBA as a broadly applicable reform.[209] Mathew Adler and Eric Posner likewise convey support for something akin to general legislation when they argue that CBA improves "overall well-being."[210] 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.[211] The legislator need not choose between protecting the public health and the environment and protecting industry from regulations' burdens.[212] Instead, their concept suggests that an abstract state exists that provides an objectively better outcome.[213] Properly

---

[209] *See* Sunstein, *supra* note 13, at 270 (discussing proposals to impose CBA on agency rulemaking under all regulatory statutes); William W. Buzbee, *Regulatory Reform or Statutory Muddle: The "Legislative Mirage" of Single Statute Regulatory Reform*, 5 N.Y.U. ENVTL. L. J. 298 (1996) (same).

[210] *See* Adler & Posner, *supra* note 25, at 194-95.

[211] Indeed, Professor Adler has gone so far as to argue that "Congress doesn't choose values, it chooses actions." *See* Adler, *supra* note 12, at 120. This suggestion is, however, quite questionable. For example, the Congressional directive that EPA set air quality standards protecting public health, 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 versus Rules 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.")

[212] *See* SUNSTEIN, *supra* note 199, at 113 (CBA should be contentious because it "does not take a stand on highly controversial questions of what government ought to do.").

[213] Professors Adler and Posner, however, have earned a reputation as two of the most thoughtful proponents of CBA because they do address issues of value, albeit in an abstract way suggestive of neutrality. *See* Adler, *supra* note 12, at 144 (describing "overall welfare" as a "particular value"); Matthew D. Adler, *Cost-Benefit Analysis, Static Efficiency, and the Goals of Environmental Law*, 31 B. C. ENVTL. AFF. L. REV. 591, 592-94 (2004) (explaining that the overall well-being theory involves comparison of objective values advanced or hindered by government regulation and that CBA's link to overall well-being is contingent). On the other hand, Professor Adler has recently rejected the idea that deontological choices could trump the consequentialism undergirding CBA, which might imply more rejection of legislative value choice than his first earlier articulation of his views. *Compare* Adler, *supra*, at 600-601 (rejecting the idea of deontological considerations) *with* Adler & Posner, *Distorted Preferences*, *supra* note 44, at 1111 (recognizing that deontological or egalitarian considerations might justify rejecting welfare improving projects); Adler & Posner, *supra* note 25, at 196 (recognizing that deontological and distributional considerations may be more important the overall well-being).

conducted CBA, in their view, offers, in all likelihood, a neutral method for achieving an objectively desirable end.[214]

Some judicial support likewise exists for the idea of CBA as a kind of desirable general legislation, as opposed to class legislation empowering "special interests." In the previously discussed *Lockout/Tagout Decision*,[215] 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 appropriately guide agency decisions.[216] This approach suggests that statutes should assure that agencies write regulations that are neither too strict nor too lenient.[217] The *Lockout/Tagout* court clearly indicated that CBA's use saves the statute from any 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.[218] The

---

[214] A key part of Adler and Posner's theory involves a distinctive view of what constitutes properly conducted CBA. *See* Adler & Posner, *supra* note 25, at 196-99 (explaining that valuation should be based on consumer desires rather than "unrestricted" preferences). *Cf.* Driesen, *supra* note 24, at 69-73 (questioning whether their concept of desire based measurement logically leads to a preference for CBA).

[215] 29 U.S.C. § 652(8) (1988).

[216] *See* International Union, UAW v. OSHA (Lockdown/Tagout I), 938 F.2d 1310, 1317 (D.C. Cir. 1991) (finding that the agency's construction providing a ceiling did not suffice because it did not create a floor).

[217] Regulatory reform proponent Cass Sunstein endorses the floors and ceilings approach to the nondelegation doctrine. *See* Sunstein, *supra* note 14, at 359 (stating that the question of whether the Act sets "floors or ceilings" "must be answered in order to decide" upon the Clean Air Act's constitutionality). This shows how important neutrality is to regulatory reform proponents, because the notion that the nondelegation doctrine demands floors and ceilings is clearly wrong. All it demands is an intelligible principle. *See* Mistretta v. United States, 488 U.S. 361, 371-379 (1998) (discussing the liberality of the intelligible principle requirement and applying it to uphold sentencing guidelines). The Court, even before *American Trucking*, repeatedly held that general policy guidance containing no definable floor or ceiling satisfies the doctrine. *See id.* at 373-74 (citing cases that upheld statutes directing agencies to regulate as "public interest" requires or set rates that are "reasonable"). The suggestion that legislation must have both floors and ceilings, 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 vica versa) would be one-sided, but clearly intellibigle. It's hard to imagine what, other than unconscious devotion to neutrality, would induce a knowledgeable administrative and constitutional law scholar like Professor Sunstein to echo, rather than correct, this gross error in the D.C. Circuit case law.

[218] *Lockout/Tagout I*, 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).

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. Hyperrationality

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.[219] 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.*[220] 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.[221] 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.[222] This holding suggested, especially when read in conjunction with the earlier ruling in *Lockout/Tagout*, which it discussed, that CBA could

---

[219] *See* Adler, *supra* note 12; Hahn & Sunstein, *supra* note 25, at 1528 (arguing that an agency has a duty to "provide a well-reasoned analytical justification for the decision reached."); SUNSTEIN, *supra* note 199, at 107 (agencies must explain how the benefits of regulation justify the cost or why the regulation is justified if they do not); Cass R. Sunstein, *Regulating Risks After ATA,* 2001 SUP. CT. REV. 1, 40-42 (suggesting that the courts should invalidate national ambient air quality standards when the agency fails to provide a quantitative justification for the regulation); Sunstein, *supra* note 14, 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 41, 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 14, 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).

[220] 175 F.3d 1027 (D.C. Cir. 1999), *rev'd sub. nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

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

[222] *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).

provide this determinate principle, if allowed by Congress.[223] Thus, the image of CBA providing a neutral algorithm for determining standards informed the court's judgment that the Clean Air Act violated the nondelegation doctrine for want of a determinate principle.

The reasoning that the *Lochner*-era Court used to strike down economic legislation as unreasonable under the due process clause closely resembles the reasoning CBA advocates use to urge their favorite reform upon the polity. This similarity was strikingly evident in Professor Tribe's *American Trucking* brief. Professor Tribe argued that administrative decision-making without consideration of cost was unreasonable in order to support a request for a presumption that Congress intends to mandate the consideration of cost, absent a clear contrary statement in the statute.[224] Industry and scholars supporting its 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 regulation's rationality. Thus, as we have seen, the *Lochner* Court called the conclusion that 10 hours of work does not endanger

---

[223] In *American Trucking*, the court remanded to EPA to allow that agency to construct an intelligible principle saving the statute from being struck down. *Id.* at 1038 (remanding to offer EPA "an opportunity to extract a determinate standard on its own."). It then stated that it had mentioned cost-benefit analysis as a possible intelligible principal in *Lockout/Tagout I. Id.* Since *American Trucking* equates an intelligible principle with a "determinate standard," *id.* (remanding to write a "determinate standard"), this effectively means that the court has mentioned CBA as a means of establishing a "determinate standard." In fact, however, the court did more than just mention CBA in *Lockout/Tagout I.* It devoted several pages to arguing that the OSH Act permitted CBA and that CBA was desirable. International Union, UAW v. OSHA (Lockout/Tagout I*)*, 938 F.2d 1310, 1317-21 (D.C. Cir. 1991). It then clearly indicated that CBA would cure the nondelegation difficulty it found. *Id.* at 1321. Reading the two cases together strongly suggests that the court believes that CBA provides a determinate principle satisfying even its version of the nondelegation doctrine. *Accord* Schroeder, *supra* note 10, at 330.

The *American Trucking* Court, while willing to endorse CBA as a general cure for problem of an indeterminate principle, had to rule CBA out as a means of solving the nondelegation problem it saw in section 109. For it recognized that its prior decisions had read section 109 as "barring EPA from considering" costs. *American Trucking*, 175 F.2d at 1038.

[224] *See* Brief of General Electric as Amicus Curiae in Support of Cross-Petitioners at 22, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (No. 99-1426) (hereinafter GE Brief) (agencies must consider costs in order for their decisions to "qualify as 'reasoned'").

health, but 10 and a half hours does "entirely arbitrary".[225] And in *Adkins v. Children's Hospital*[226] the Court found it impossible to understand how a board charged with defining a minimum wage adequate to provide for womens' welfare could use such a general criterion to come up with a precise number, and therefore assumed that the board must have "brought different factors into the problem" than those mentioned in the governing statute.[227] Professor Tribe's General Electric Brief similarly claimed that implementing a directive to protect public health is impossible because scientific information cannot "definitively determine" a precise numerical air quality standard.[228] EPA therefore must have considered a statutorily extraneous factor, namely cost, argued General Electric.[229] 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.[230] CBA advocates' arguments challenging the rationality of 1970s environmental legislation because of its alleged failure to consider cost echoes the

---

[225] *Lochner*, 198 U.S. at 62.

[226] 261 U.S. 525 (1923), *overruled*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937)

[227] *Id*. at 556-57.

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

[229] GE Brief at 18 (EPA considers factors "such as costs" in an "unreviewable back-door fashion")

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

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.[231]

D. *CBA: Then and Now*

We have seen that the Lochner-era Court, like modern regulatory reformers, relied heavily on CBA. Justice Holmes' 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.[232] 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.[233]

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 regulation of businesses where externalities exist.[234] 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

---

[231] *See* GE Brief at 22 (suggesting that decisions reached without consideration of cost are generally unreasoned); Adler, *supra* note 12, at111 (assuming that a requirement that all government bodies be rational "might in some contexts reduce to a CBA requirement"); CASS R. SUNSTEIN, *supra* note 199, at 207 (equating CBA with "sense and rationality"). *Cf.* Int'l Union, UAW v. OSHA, 938 F.2d 1310, 1319 (D.C. Cir. 1991) (associating CBA with "reasonableness").

[232] *See* McGarity, *supra* note 37, at 1492-95, 1505 (explaining that both "free marketers" and "modern mugwumps" favor CBA).

[233] *See* Driesen, *supra* note 15, at 553 (explaining the externality-based rationale for regulation).

[234] *See* Hovenkamp, *supra* note 92, at 440-446 (explaining how the classical economic concept of externalities explains seeming anomalies in the case law).

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.[235] 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.[236] And those attitudes might tend to influence legal practice and thinking. The next section explores this similarity's significance for modern regulatory reform.

IV. 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.[237] 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-

---

[235] *See generally* Shaman, *supra* note 61, 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.").

[236] *See id.* at 502-506 (explaining how some adherents of the law and economics movement have endorsed Lochnerism in one form or another). S*ee, 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).

[237] *See* RICHARD A. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); BERNARD SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 274-282 (1980) (defending protection of economic rights from government regulation).

rationalism.[238] We need 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?[239] Finally, does CBA advance rationality or does it hide its limits in poorly reasoned decisions about cost-benefit methodology?[240] 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,[241] 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.

---

[238] *See generally* Thomas O. McGarity, Rethinking Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy (1991); Charles E. Lindblom, *The Science of "Muddling Through,"* 19 Pub. Admin. Rev. 78 (1959).

[239] Driesen, *supra* note 24, at 89-91 (arguing that no reasoning supporting a numerical standard can be precise); Hahn & Sunstein, *supra* note 25, at 1497, 1537 (2002) (proposing limited judicial review of CBA).

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

[241] *See* Driesen, *supra* note 15, at 596-599 (explaining how CBA requirements can lead to demanding judicial review).

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 subsection 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.[242] 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.[243] CBA's 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.[244] If EPA were to decline to protect

---

[242] *See id.*

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

[244] *Id.*

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.[245]

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.[246] In *Department of Transportation v. Citizens for 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.[247] But the governing statute required the agency to route highways around parks if feasible.[248] The Supreme Court held that broad consideration of CBA involved a failure to follow the Congressional policy, and therefore constituted arbitrary and capricious rulemaking.[249]

Similarly, Congressional directives to realize the maximum feasible reductions of pollution, which are found in numerous statutory provisions,[250] contemplate the consideration of cost, but they do not authorize CBA.[251] Such provisions arguably require that the agency

---

[245] Determining what ambient air quality standard adequately protects public health does present line drawing problems, of course. But the D.C. Circuit's suggestion in *American Trucking* that the health protection directive in section 109 offers no guidance at all, *Am*. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1036-37 (D.C. Cir. 1999), *overruled*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001), conflicts with the teaching of that court's own precedent. The D.C. Circuit has held that EPA acted arbitrarily when it allowed level pollution 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) (remanding 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.

[246] *See Department of Transportation v. Citizens for Overton Park*, 401 U.S. 402 (1971).

[247] *Id*. at 411-12.

[248] *Id*. at 411.

[249] *See id.* at 413, 415-416, 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, 256-265 (1976) (agency may not consider cost and feasibility when the statute does not mention these considerations as relevant factors).

[250] *See, e.g.* 16 U.S.C. § 1455b(g)(5) (2000); 33 U.S.C. §§ 1311(b)(2)(A), 1316(a) (2000); 42 U.S.C. §§ 7411(a)(1), 7412(d), 7475(a)(4), 7503(a)(2) (2000). *See generally* Driesen, *supra* note 24, at 20-21 (giving examples of provisions generally conforming to the feasibility principle).

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

maximize feasible reductions.[252] 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.[253]

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).[254] 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.[255]

---

[252] Driesen, *supra* note 24, at 20-22. *See, e.g.*, Ala. 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).

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

[254] *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 24, at 23-24 (reviewing the case law).

[255] *See id.* at 48-54 (explaining why CBA is more complicated than feasibility analysis).

The argument that agencies should "consider" CBA in some indeterminate matter, 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.[256] This would place them in the company of progressive opponents of Lochnerism.[257] 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."[258] 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?[259]

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

---

[256] *See, e.g.*, Breyer, *supra* note 199, at 67 (arguing for expert rulemaking insulated from political pressures).

[257] I am grateful to David Bernstein for pointing this out.

[258] *See* McGarity, *supra*, note 37, at 1498-1500 (characterizing Cass Sunstein and other moderate regulatory reformers as "modern mugwumps").

[259] *See generally* Dan M. Kahan *et al.*, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071 (2006).

little concern with economic efficiency.[260] 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.[261] In the environmental area, a prevalent economic dynamic makes remedial legislation especially appropriate. [262] Environmental problems do not remain static, but tend to get worse over time, because of the fundamental tendencies of people to multiply and increase consumption, absent some countervailing force.[263] 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.[264] This tendency means that environmental law probably should not be neutral; rather it should countervail environmentally destructive tendencies in unregulated

---

[260] *See* Sinden, *supra* note 13, at 1418 (describing lawmakers of the 1960s and 1970s as "highly skeptical of CBA"); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 363-64 (4th ed. 2003) (describing the "climate" in 1970s Washington as "inhospitable" to CBA); Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning Regulatory Reforms,* 37 STAN. L. REV. 1267, 1283-84 (1985) (Congress emphasized "prompt injury prevention over the need for an optimal balance between regulatory benefits and costs.").

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

[262] *See* DAVID M. DRIESEN, THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW (2003). *See also* Symposium: Economic Dynamics of Environmental Law and Static Efficiency, 31 B. C. ENVTL. AFF. L. REV. 501-616 (2004).

[263] *See* David M. Driesen & Charles Hall, *Efficiency, Economic Dynamics, and Climate Change,* 31 DIGEST 1, 8-9 (2005).

[264] David M. Driesen, *The Economic Dynamics of Environmental Law,* 31 B. C. ENVTL. AFF. L. REV. 501, 512-13 (2004).

markets. And it must be designed to function well under substantial monied pressure to become ineffective.[265] Powerful corporations play an important role today as they did during the time of *Lochner*.[266]

As a general matter, legislative value choice is perfectly appropriate. It is fine for a legislative body to choose between peace and war, between bilingual and English only education, between welfare and workfare, between a graduated income tax and a flat tax, between high tariffs and free trade.[267] 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. It 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.[268] Congress may decide to protect some land as wilderness, but permit limited logging on other lands.[269]

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

---

[265] *See* Latin, *supra*, note 260, at 1270-71, 1293-96 (discussing the strategic behavior of regulated industries and environmentalists).

[266] *See* Sinden, *supra* note 13, at 1436-1442 (discussing the corporate role in creating a power imbalance in the design and implementation of environmental regulation).

[267] *Cf.* Silber & Miller, *supra* note 261, 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").

[268] *See*, e.g., Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (2000) (mandating procedures for the removal of juveniles form the ordinary criminal process in order to avoid the stigma of prior criminal conviction and to encourage treatment and rehabilitation); Jones v. United States, 463 U.S. 354, 368 (1983) (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).

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

defensible value choice.[270] Since the environment provides vital amenities and a life support system,[271] 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.[272] 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.[273] 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.[274]

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).[275] Such a value choice would appropriately lead to CBA. But

---

[270] *See* Driesen, *supra* note 24, at 38-39 (explaining how injury to health can devastate individuals); Mark Geistfeld, *Reconciling Cost-Benefit Analysis and the Principle that Safety Matters More than Money*, 76 N.Y.U. L. REV. 114, 177 (2001) (emphasizing the normative significance of the disruptive impact of injury upon individuals).

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

[272] Driesen, *supra* note 24, at 9.

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

[274] *Id.* at 34-41.

[275] *See generally* Ronald Dworkin, *Is Wealth a Value*?, 9 J. LEGAL STUD. 191 (1980).

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 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.

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.