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David M. Driesen
Syracuse University. College of Law

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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

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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 Act² under a constitutional doctrine not used since the end of the *Lochner*-era, the nondelegation doctrine, or to create a canon of statutory construction favoring CBA to avoid the nondelegation issue. Their argument for a cost-benefit canon portrayed regulation aiming to protect public health as irrational, because of the one-sidedness of the health protection principle.³ By asking the Court to base its ruling on its 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

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¹ 531 U.S. 457 (2001)
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, 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. Accordingly, the American Trucking Court held that enactment of section 109 did not violate the nondelegation doctrine, which prohibits Congressional delegation of legislative authority. The Court also rejected CBA proponents’ request to construe section 109 to require consideration of cost. In essence, the Court’s decision recognized that the Constitution does not prohibit one-sided legislation.

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. 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

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7 See Lead Indus. Ass’n v. EPA, 647 F.2d 1130, 1149 (D.C. Cir. 1980) (Congress deliberately decided to subordinate health and feasibility concerns to health protection goals).
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. 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. Regulatory reformers have argued that we need much more emphasis on CBA and much less on

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health protective policies, like the policy found in section 109 of the Clean Air Act.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{17} The regulator must then assign a dollar value to each death, habitat saved, illness avoided, etc.\textsuperscript{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.\textsuperscript{19} Data gaps and a lack of basic scientific

\begin{footnotesize}
\begin{enumerate}
\item 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).
\item McGarity, supra note 13, at 12 (CBA in the health and environmental context begins with quantitative risk assessment).
\item Rodgers, supra note 16, at 193 (CBA “seeks to reduce all concerns to a common denominator—the dollar”).
\end{enumerate}
\end{footnotesize}
understanding often preclude even crude estimation of the amount of death, illness, and environmental destruction a particular regulation will avoid.\textsuperscript{20} When estimation proves possible, uncertainties often lead to an enormous range of scientifically plausible benefits estimates.\textsuperscript{21} CBA advocates tend to equate all of this quantification with objectivity.\textsuperscript{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.\textsuperscript{23} CBA supporters have varying positions about what role CBA should play in the regulatory process.\textsuperscript{24} Sometimes they advocate the “indeterminate position,” which simply
maintains that regulators should consider CBA.\textsuperscript{25} This position does not tell us how precisely regulators should respond to CBA or what role it should play.\textsuperscript{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.\textsuperscript{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.\textsuperscript{28} CBA treats government regulation as a purchase of a benefit, rather than as an effort to protect people from harm.\textsuperscript{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.\textsuperscript{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)\textsuperscript{31} and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)\textsuperscript{32} as requiring application of a cost-benefit


\textsuperscript{27} See Driesen, supra note 15, at 577; William F. Baxter, People or Penguins: The Case for Optimal Pollution 12 (1974) (arguing for this approach).

\textsuperscript{28} Driesen, supra note 15, at 560 (explaining why a cost-benefit criterion allows harm to continue). Id. at 578 (economists assume that citizens would pay no more than a cost reflecting the value of the effects of the prevented pollution).

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

Nevertheless, a series of executive orders has often required CBA, even under statutes that do not embrace the technique. President Reagan’s executive order had the explicit goal of

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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.”).
simply reducing the burden of regulation, an objective in some tension with the aims of the
Congress that enacted many of the modern regulatory statutes in the 1970s. In keeping with
the Justice Department’s view that the President could not authorize agencies to “transgress
boundaries set by Congress,” the order only applies “to the extent permitted by law.” The
Office of Management and Budget (OMB), an office consisting mostly of economists, not
lawyers, administers the cost-benefit executive orders and has used that authority to give CBA
much greater primacy than environmental, health, and safety statutes call for.

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

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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).


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

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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*, in which the Court struck down a statute
limiting bakers’ working hours as an unconstitutional interference with liberty of contract
violative of due process. Holmes protested that the “Constitution does not enact Mr. Herbert
Spencer’s social statistics,” a reference to nineteenth century economic theory that still enjoyed
a following at the time. He accused the Court of basing its decision “upon an economic theory
which a large part of the country does not entertain,” presumably that of laissez-faire. While
laissez-faire did not command universal support at the time, it enjoyed significant support among
many well educated lawyers and businessmen.

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

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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 14\(^{th}\) 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

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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).
58 See *Lochner*, 198 U.S. at 53.
59 *Id.* at 52.
by their Creator.” Thus, it viewed liberty of contract as having natural law origins, which it identified with the common law.

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.” 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. The Court’s attitudes toward legislation, then, often proved dispositive of *Lochner*-era cases.

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.

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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).


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


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

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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 *Lochner*ism 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,\textsuperscript{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\textsuperscript{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.\textsuperscript{72} This view melded with a belief in the neutrality of common law and natural law.\textsuperscript{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.\textsuperscript{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 \textit{Lochner}, for example, Justice Harlan’s dissent recognized that the legislature viewed the ten hour work week as protecting bakers from being

\begin{itemize}
\item \textsuperscript{70} See \textit{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).
\item \textsuperscript{71} See \textit{id.} at 471 (construing section that prohibits injunctions in employment disputes narrowly, because it creates a “special privilege” for a “particular class.”).
\item \textsuperscript{72} See Cushman, \textit{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 14\textsuperscript{th} Amendment); Note, \textit{supra}, note 57, at 511 (discussing a “principle of neutrality” governing judicial intervention in police power regulation).
\item \textsuperscript{74} See \textit{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).
\end{itemize}
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. 1. 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. TAMANAH, 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.\(^87\)

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\(^81\) 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).

3. Hyper-Rationalism

This skepticism toward legislation also manifested itself in a demanding approach to the rationales offered for government regulation. The Court often expected not just a plausible justification for a regulation, but a rather compelling case, which might be very difficult to make for any regulation involving precise line drawing. For example, the *Lochner* Court found the argument that “ten hours” of work is healthful, but ten and a half hours is not “unreasonable and entirely arbitrary.” Part 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. Hence, hyper-rationalism derived much of its content from an ideal of value-free general legislation.

D. The Gilded Age’s Cost-Benefit State

The Court frequently employed a rough cost-benefit test to distinguish arbitrary from reasonable government regulation. *Adkins v. Children’s Hospital*, the second most famous...
exemplar of Lochnerism, illustrates the Court’s embrace of CBA. The Adkins Court struck down a statute authorizing an administrative agency to establish a minimum wage for women.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

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93 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).
94 261 U.S. 525 (1923).
95 Id. at 539, 562.
96 Id. at 557.
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,

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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) (requir ing 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).
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.”

In many cases outside the rate-making context as well, a CBA-like model proved influential. 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. In doing so, it expressly recognized the necessity and legitimacy of legislative value choice.

The acceptance of legislative value choices led not only to the abandonment of substantive due process review of economic regulation, but also to the practice of generally

\[\text{105} \text{Id. at 481.}\]
\[\text{106} \text{See, e.g., R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 349 (1935) (invalidating requirement that railroad reemploying a worker who left a railroad’s service before the statute’s enactment to include that service in pension calculations, because that premium pays “for services fully compensated” under the previous contract for service); Pac. Ry. Co. v. United States, 284 U.S. 80, 97, 100 (1931) (invalidating exemption of “short line” railroads from obligation to pay fees for use of other lines’ cars, because mandating free use of property is “arbitrary and unreasonable.”); Brooks-Scanlon Co. v. R.R. Comm’n of La., 251 U.S. 396, 399 (1920) (invalidating an order requiring owner of a narrow gauge railroad to operate at a loss); Myles Salt Co. v. Bd. of Comm’rs, 239 U.S. 478, 485 (1916) (prohibiting a drainage district from taxing a property that would receive no benefits corresponding to the tax); Chicago, Rock Island, & Chicago, Milwaukee, & St. Paul R.R. Co. v. Wisconsin, 238 U.S. 491, 499 (1915) (invalidating a statute prohibiting lowering of an unoccupied upper berth in a sleeping car where a passenger has occupied a lower berth because this prohibition takes “salable space without pay.”); St. Louis, Iron Mountain, & S. R.R. Co. v. Wynne, 224 U.S. 354, 358-59 (1912) (invalidating requirement that railroad pay claims for injured livestock within thirty days of demand to avoid double damages and a fee award when it creates “extraordinary liability” for “refusing to pay” an “excessive demand,” i.e. one exceeding the value of the livestock) [emphasis added].}\]
\[\text{107} \text{See Williamson v. Lee Optical, 348 U.S. 483, 488 (1955); Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) (repudiating unreasonableness test for substantive due process, because it leads judges to ”strike down laws” thought “unwise or incompatible with some particular economic or social philosophy.”). Cf. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis J. dissenting) (warning of the danger of enacting judicial “prejudices into legal principles” through review of social and economic legislation under the “arbitrary” and “capricious” standard of substantive due process).}\]
\[\text{108} \text{Ferguson, 372 U.S. at 726 (“legislatures . . must decide upon the wisdom and utility of legislation”).}\]
accepting legislative line drawing under the equal protection clause (at least where no suspect
classification is involved). The modern Court’s substantive due process and equal protection
cases specifically repudiate the tradition of viewing “class” legislation as suspect. The modern
doctrine requires the Court to uphold any legislative distinctions (between classes or otherwise)
unless the distinctions drawn wholly lack a “rational basis”. The Court’s decisions recognize
that its prior approach to judicial review had led to the creation of legal principles based on
judges’ economic and social views, in spite of (or perhaps because of) the use of neutral
categories. The Court also recognized, at about the same time that it repudiated its Lochner-
era constitutional jurisprudence, that Congress considered the Court’s neutralist anti-trust
jurisprudence a similar abuse of power and abandoned the use of the labor injunction under anti-
trust statutes. Finally, in Erie Railroad Company v. Tompkins, the Court repudiated the
natural law tradition that partially underlay legal historicism.

III. Parallels with Regulatory Reform

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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.\textsuperscript{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.\textsuperscript{117} The Court has prohibited “grossly excessive” punitive damage awards as a matter of substantive due process.\textsuperscript{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

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\item[\textsuperscript{116}] See generally Shaman, *supra* note 61, at 490 (noting that some insist that the main problem with the *Lochner* Court was excessive activism).
\item[\textsuperscript{118}] See BMW, 517 U.S. at 568.
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element of its approach to determining excessiveness. In developing this test for judicial tort reform the Court relied upon several *Lochner*-era precedents. In the debate about what test to apply to damage awards, Justice O’Connor noted the relationship between regulatory reform and *Lochnerism*. She opined that “[J]ust as the Fourteenth Amendment does not enact Herbert Spencer’s Social Statistics, it does not require us to adopt the views of the Law and Economics school either.” Yet, when the Court for the first time in its history actually struck down a damages award under the *Lochner*-era substantive due process excessiveness test, Justice Breyer’s concurrence faulted the Alabama Supreme Court for failing to apply “any economic theory” to support its punitive damages award. Justice O’Connor signed on to the Breyer concurrence, apparently because it distinguishes judicial insistence that the Constitution embodies “some economic theory” from judicial insistence that the Constitution embodies a particular economic theory. This concurring view would, in essence, constitutionalize a central tenant of the regulatory reform movement, which generally employs an approach to regulation predicated upon economic concepts without any evident agreement about details. Justices Scalia and Thomas have rejected the excessiveness inquiry precisely because it reflects

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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).
122 TXO, 509 U.S. at 491 (Justice O’Connor, dissenting) (citing *Lochner* v. *New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)),
123 See BMW, 517 U.S. at 593 (Breyer, J., concurring).
124 See id. (drawing this distinction).
125 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.\textsuperscript{125}

These cases do not reflect Lochnerian attitudes toward legislation, for they are not directed toward legislation. Rather, they reflect skepticism toward juries.\textsuperscript{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.\textsuperscript{127}

Judicially created doctrines of standing and broad sovereign immunity sometimes impede environmental laws’ enforcement.\textsuperscript{128} These doctrines reflect the Court’s continuing tendency to treat common law baselines as somehow natural and to read them into the Constitution.\textsuperscript{129} Thus,
for example, while Article III’s literal language authorizing adjudication of not only cases, but also “controversies” seems to allow anybody who disagrees with an administrative decision to challenge it, the Court has required a showing of injury that reflects a common law model of a lawsuit. 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. But still, these doctrines have not materially advanced regulatory reform; they have merely complicated enforcement of some law at times.

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

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”).

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).


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.\textsuperscript{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.\textsuperscript{135} The dissenters in \textit{United States v. Lopez}\textsuperscript{136} and \textit{United States v. Morrison}\textsuperscript{137} complained that the Court has embraced a formalist distinction, between commercial and non-commercial activities, reminiscent of the \textit{Lochner}-era’s mechanical jurisprudence, and as incapable of producing principled results as the old direct/indirect affects distinction.\textsuperscript{138} But these decisions are not divorced from Constitutional text as the old substantive due process jurisprudence was.\textsuperscript{139} The Constitution clearly does contemplate a

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\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{136} 514 U.S. 549 (1995).
\item \textsuperscript{137} 529 U.S. 598 (2000).
\item \textsuperscript{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 \textit{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).
\item \textsuperscript{139} Lopez, 514 U.S. at 594 n. 9 (claiming that Lopez, unlike \textit{Lochner}, “enforces . . . the Constitution, not judicial policy judgments).
federal government of limited power. 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. So far, these decisions have not led courts to declare any environmental law
unconstitutional. 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.

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

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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
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


144 Judicial activism is difficult to define. See Robert E. Levy and Robert L. Glicksman, Judicial
(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\textsuperscript{145} and American Steel Foundries v. Tri-Cities Cent. Trades Council,\textsuperscript{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.\textsuperscript{147} They share with *Lochner* not only a disregard for textual limits, but also solicitude toward common law rights and opposition to “class” legislation.\textsuperscript{148}

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

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\textsuperscript{145} 254 U.S. 443, 471 (1920) (construing section of law limiting labor injunctions narrowly to allow judiciary to enjoin a labor action).
\textsuperscript{146} 257 U.S. 184, 202, 205 (1921) (enjoining picketers under an anti-trust law).
\textsuperscript{147} See *Duplex Printing*, 254 U.S. at 468 n. 1; *Am. Foundries*, 257 U.S. at 201-202.
\textsuperscript{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).
\textsuperscript{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”).
\textsuperscript{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
\end{footnotesize}
Still, judicial support for regulatory reform has played a role in several important cases.\textsuperscript{151} The dissenting Justices in the \textit{Benzene} case, \textit{Industrial Union Department v. American Petroleum Institute},\textsuperscript{152} associated judicial support for regulatory reform with Lochnerism.\textsuperscript{153} The dissenters claimed that the \textit{Benzene} Court struck “its own balance between the costs and benefits of occupational safety standards.”\textsuperscript{154} They suggested that the majority had misread the statute to implement its own views of proper risk management, just as the \textit{Lochner} Court had misread the Constitution in order to implement its own economic philosophy.\textsuperscript{155} The plurality opinion required a finding of significant risk before regulation of toxic substances could occur under the Occupational Safety and Health Act.\textsuperscript{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

\textsuperscript{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, \textit{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, \textit{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 & Glickman, 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.”)

\textsuperscript{152} 448 U.S. 607 (1980)

\textsuperscript{153} Id. at 723-24 (Marshall, J., dissenting).

\textsuperscript{154} Id.

\textsuperscript{155} Id. In context the dissenter’s reference to the majority’s “own balance,” stands in contrast to the balance struck by Congress. \textit{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 \textit{Lochner} majority’s use of laissez-faire philosophy. \textit{See id.} at 723-24 (citing Holme’s suggestion that the \textit{Lochner} majority made Herbert Spencer’s Social Statistics into a governing legal principle).

\textsuperscript{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."

Only Justice Powell, however, read the Occupational Safety and Health Act as requiring CBA. And the Supreme Court squarely rejected that view in the subsequent Cotton Dust case. 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. 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. The Court thus substantially advanced regulatory reform, and it did so with very little statutory support.

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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).
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).
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

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\(^{164}\) 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).


\(^{167}\) *See Corrosion Proof Fittings*, 947 F.2d at 1217.

must choose the least burdensome requirement. It must also consider the economic consequences of any rule it promulgates. The requirement to choose the least burdensome measure adequately protecting the public implies that EPA must compare the costs of adequately protective regulatory options to each other. Nothing in the statute, however, states that EPA must compare a single regulatory option’s costs to its benefits. Indeed, in a case where only one regulatory option protected the public adequately, section six plainly would require adoption of that option, even if the costs far exceeded the benefits. 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 . . .” 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.

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.
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. 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)*, the D.C. Circuit held that OSHA must narrowly construe statutory provisions governing non-toxic workplace hazards to avoid a nondelegation difficulty. 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. Still, the court did not require CBA and approved an agency interpretation that did not rely upon CBA in a subsequent decision.

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. But, as we have seen, the Supreme Court unanimously reversed this decision.

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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).

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

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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.”).


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.\textsuperscript{184}

To be sure, neither the \textit{Lochner} Court nor many contemporary regulatory reformers directly acknowledge natural law’s influence upon their views.\textsuperscript{185} But the \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{189} CBA appears natural to many

\textsuperscript{184} See \textit{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, \textit{supra} note 61, at 2394 (natural law literature emphasizes an “analogy between discovering moral laws by reasoning and discovering the natural laws of science.”). \textit{See generally} HACKNEY, \textit{supra} note 57, at 25 (explaining how Blackstone’s natural law philosophy embraced laissez-faire and anticipated Adam Smith); \textit{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).

\textsuperscript{185} \textit{Cf.} GILLMAN, \textit{supra} note 45, at 158-59 (characterizing an “unnatural” economic advantage as one that is “non-market-based”).

\textsuperscript{186} \textit{See} Larry A. DiMatteo, \textit{The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law}, 60 U. \textit{PITT. L. REV.} 839, 882-83 (1999) (describing \textit{Lochner} as the “symbolic high point of Smithian freedom of contract”).

\textsuperscript{187} \textit{See} Driesen, \textit{supra} note 15, at 577; BAXTER, \textit{supra} note 28, at 10-12.

\textsuperscript{188} \textit{See} Driesen, \textit{supra} note 15, at 577; GOWDY & O’HARA, \textit{supra} note 104, at 104-108.

\textsuperscript{189} \textit{Cf.} DiMatteo, \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{192} Nevertheless, they all conclude that CBA is justified.\textsuperscript{193}

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\textsuperscript{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).

\textsuperscript{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”).

\textsuperscript{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 P A. 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).
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Natural law remains at least as influential as it was during the Lochner period, but its influence in the courtroom has waned significantly.\textsuperscript{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.\textsuperscript{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.\textsuperscript{196}

C. Attitudes Toward Legislation

\textsuperscript{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.”).


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\(^\text{197}\) takes resources from A (the polluter) and gives them to B (the breather) in the form of health protection.\(^\text{198}\) 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


\(^{198}\) 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.
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

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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’n, 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.\textsuperscript{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.\textsuperscript{205} He also argues that CBA improves priority setting, thereby suggesting that it does not so much weaken environmental protection as refocus it.\textsuperscript{206} In spite of industry’s consistent support of CBA, Professor Sunstein, along with others, argues that CBA reduces special interest influence over legislation.\textsuperscript{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 \textit{Lochner} period.\textsuperscript{208} Thus, both contemporary regulatory reformers and the Lochner-era Justices view neutral general legislation as an antidote to special interest influence.

\textsuperscript{204} See Sinden, \textit{supra} note 13, at 1416 (economists have touted CBA as a “politically `neutral’ means” of resolving policy disputes).

\textsuperscript{205} SUNSTEIN, \textit{supra} note 20, at 137 (arguing that cost-benefit analysis is for everyone); Sunstein, \textit{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, \textit{supra} note 199, at 26-27 (citing examples of CBA causing “more rapid and stringent regulation.”).

\textsuperscript{206} See Cass R. Sunstein, \textit{Cognition and Cost-Benefit Analysis}, 29 J. LEGAL STUD. 1059, 1060 (2000) (portraying CBA as a way of improving priority setting); Sunstein, \textit{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 \textit{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, \textit{supra} note 199, at 10-23 (arguing that risk regulation suffers from poor priority setting). \textit{Cf.} McGarity, \textit{supra} note 13, at 34 (questioning that notion that relaxing regulatory stringency helps fund more important health priorities); Driesen, \textit{supra} at 10017-18 (questioning the link between uneven dollars per life saved, CBA, and priority setting).


\textsuperscript{208} See GILLMAN, \textit{supra} note 45, at 10 (describing the standards guiding \textit{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.\textsuperscript{209} Mathew Adler and Eric Posner likewise convey support for something akin to general legislation when they argue that CBA improves “overall well-being.”\textsuperscript{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.\textsuperscript{211} The legislator need not choose between protecting the public health and the environment and protecting industry from regulations’ burdens.\textsuperscript{212} Instead, their concept suggests that an abstract state exists that provides an objectively better outcome.\textsuperscript{213}

\textsuperscript{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).

\textsuperscript{210} See Adler & Posner, supra note 25, at 194-95.

\textsuperscript{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.”)

\textsuperscript{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.”).

\textsuperscript{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.  

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, 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. This approach suggests that statutes should assure that agencies write regulations that are neither too strict nor too lenient. 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.

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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 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).

216 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 intelligible. 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. 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. 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. 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. This holding suggested, especially when read in conjunction with the earlier ruling in Lockout/Tagout, which it discussed, that CBA could

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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).


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. 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. 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

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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.


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health, but 10 and a half hours does “entirely arbitrary”.225 And in Adkins v. Children’s Hospital226 the Court found it impossible to understand how a board charged with defining a minimum wage adequate to provide for women’s welfare could use such a general criterion to come up with a precise number, and therefore assumed that the board must have “brought 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.
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

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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.\textsuperscript{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.\textsuperscript{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 \textit{Lochner} period jurisprudence still has a poor reputation with most scholars and with the sitting Justices, some academics have defended it.\textsuperscript{237} The existence of some parallels between modern regulatory reform and \textit{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-

\textsuperscript{235} See \textit{generally} Shaman, \textit{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.”).


rationalism. 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? Finally, does CBA advance rationality or does it hide its limits in poorly reasoned decisions about cost-benefit methodology? 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, 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.

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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.\textsuperscript{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.\textsuperscript{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. \textit{American Trucking} suggests that CBA can be incompatible with the principle that administrative agencies accept Congressional value choices. The \textit{American Trucking} Court rejected the consideration of cost in section 109, because Congress directed EPA to protect public health.\textsuperscript{244} If EPA were to decline to protect

\begin{itemize}
\item \textsuperscript{242} See \textit{id.}
\item \textsuperscript{243} See \textit{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).
\item \textsuperscript{244} \textit{Id.}
\end{itemize}
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.\textsuperscript{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.\textsuperscript{246} In \textit{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.\textsuperscript{247} But the governing statute required the agency to route highways around parks if feasible.\textsuperscript{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.\textsuperscript{249}

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

\textsuperscript{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 \textit{American Trucking} that the health protection directive in section 109 offers no guidance at all, \textit{Am. Trucking Ass'ns v. EPA}, 175 F.3d 1027, 1036-37 (D.C. Cir. 1999), \textit{overruled}, \textit{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. \textit{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.

\textsuperscript{246} \textit{See Department of Transportation v. Citizens for Overton Park}, 401 U.S. 402 (1971).

\textsuperscript{247} \textit{Id.} at 411-12.

\textsuperscript{248} \textit{Id.} at 411.

\textsuperscript{249} \textit{See id.} at 413, 415-416, 420 (prohibiting wide ranging balancing and requiring agency decisions to be based on “relevant factors.”). \textit{See also Am. Textile Ass’n v. Donovan}, 452 U.S. 490, 509 (1981) (stating that CBA is not required when feasibility analysis is); \textit{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).


\textsuperscript{251} \textit{See Donovan}, 452 U.S. at 509 (CBA is not required when feasibility analysis is).
maximize feasible reductions. If EPA gave up a feasible reduction, presumably one that the
regulated companies could produce without closing down, because it thought that the costs of
maximum feasible reductions outweighed the benefits, it may have violated a statute that
embodies such a mandate.

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

In general, Overton Park suggests that agencies should conduct directly targeted analysis,
\textit{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.

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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 \textit{See} Donovan, 452 U.S. at 509 (CBA is not required when maximum feasible protection from
material health impairment is required).

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. \textit{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. \textit{See Ass’n of Pac.
Fisheries v. EPA}, 615 F.2d 794, 805 (9th Cir. 1980). \textit{See also} Driesen, \textit{supra} note 24, at 23-24 (reviewing the case
law).

255 \textit{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

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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”).
little concern with economic efficiency. 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. In the environmental
area, a prevalent economic dynamic makes remedial legislation especially appropriate. 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. 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. This tendency means that environmental law probably should not be
neutral; rather it should countervail environmentally destructive tendencies in unregulated

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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
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-
markets. And it must be designed to function well under substantial monied pressure to become ineffective.\textsuperscript{265} Powerful corporations play an important role today as they did during the time of \emph{Lochner}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{268} Congress may decide to protect some land as wilderness, but permit limited logging on other lands.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{265} See Latin, supra, note 260, at 1270-71, 1293-96 (discussing the strategic behavior of regulated industries and environmentalists).
\item \textsuperscript{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).
\item \textsuperscript{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”).
\item \textsuperscript{268} See, e.g., Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (2000) (mandating procedures for the removal of juveniles from the ordinary criminal process in order to avoid the stigma of prior criminal conviction and to encourage treatment and rehabilitation); Jones v. United States, 463 U.S. 354, 368 (1983) (an individual may be acquitted of criminal charges because of insanity and may be committed to a mental institution to protect him and society from potential dangerousness).
\end{itemize}
Since the environment provides vital amenities and a life support system, giving primacy to protecting the environment itself also is defensible. Yet, in their details many environmental statutes embody some Congressional balancing of competing considerations. I have argued elsewhere, for example, that the feasibility principle, which animates numerous statutory provisions, reflects a Congressional decision to give primacy to protecting health and the environment, except where doing so is likely to lead to widespread plant closures producing significant unemployment. This principle may reflect a judgment that firms should not subject people to involuntarily incurred health risks, except when plant closures may create comparable risks of potentially debilitating unemployment. This judgment offers a nuanced approach that requires an agency to balance competing concerns, but does not pretend that quantification can avoid the need for a value judgment.

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

Legislatures may choose economic efficiency as a value for legislation (if one believes that efficiency is a value). Such a value choice would appropriately lead to CBA. But

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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.

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.