THE COMMON POLITICAL FOUNDATIONS OF ORIGINALISM AND COST–BENEFIT ANALYSIS

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Cost–benefit analysis (CBA) and originalism are rarely discussed together and seem to belong to different worlds of legal scholarship. The two methods are used by different institutions in different spheres of law for different purposes; what could they have in common? Nothing, or so it would seem. Yet closer inspection reveals surprising commonalities—both in terms of structure and function, on the one hand, and in historical pedigree and political economy, on the other. CBA and originalism are what we will call midlevel legal methods. Midlevel legal methods are neither normative commitments nor legal doctrines, but recurrently used methodologies that are applied to multiple substantive areas of law. What is peculiar and interesting about these two particular midlevel methods is that, despite the fact that they cover such divergent domains, they have developed similar structures to fill similar roles.

How did these two methods with such similar structural and functional characteristics arise? We argue that the answer lies with their shared political history. Both methods have been propelled forward by significant financial support from an overlapping web of business groups and intellectual support from academic supporters associated with pro-market trends in intellectual and political circles in the 1970s and 1980s. Accordingly, both methods were originally backed largely by conservatives and associated with the conservative legal movement. But even that has shifted over time, and roughly contemporaneously. Yet the story of originalism and CBA is one of dynamic instability. New political forces and new populist trends pose threats to the continued preeminence of both methods.

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INTRODUCTION

Cost–benefit analysis (CBA) and originalism are rarely discussed together and seem to belong to different worlds of legal scholarship. Cost–benefit analysis is an analytical method used by regulatory agencies to evaluate proposed regulations such as bank capital limits, automobile safety measures, and particulate matter emission standards.[1] The method is used to determine whether the monetized benefits of a regulation exceed the costs, which may be necessary for the regulation to pass muster with the White House or a court.[2] Originalism, by contrast, is a style of interpretation that requires courts to determine the meaning of the Constitution by consulting historical texts while discounting post-ratification developments in legal understandings or social values. Originalism is typically associated with social and

1. David A. Weisbach, *Distributionally Weighted Cost–Benefit Analysis: Welfare Economics Meets Organizational Design*, 7 J. LEGAL ANALYSIS 151, 179 (2015).

2. Jonathan S. Masur & Eric A. Posner, *Regulation, Unemployment, and Cost–Benefit Analysis*, 98 VA. L. REV. 579, 604 (2012).

cultural issues such as gun control, religious freedom, and reproductive rights;[3] cost–benefit analysis is associated with economic regulation. The two methods are used by different institutions in different spheres of law for different purposes; what could they have in common? Nothing, or so it would seem.

Yet closer inspection reveals surprising commonalities—both in terms of structure and function, on the one hand, and in historical pedigree and political economy, on the other. First, consider their structure and function. Both methods exist to a large degree to constrain decisionmaking. CBA was originally introduced into the administrative state as a mechanism for preventing agencies from issuing inefficient or welfare-diminishing regulations.[4] Originalism was first justified on normative grounds as a means of preventing judges from enacting their policy preferences.[5] Over the past several decades, critics have seized upon these features, arguing that the excessive rigidity of CBA and originalism compel harmful outcomes. Critics argue that CBA squelches regulations that might be valuable but whose benefits cannot be easily quantified; a different set of critics charges that originalism dictates that valuable laws or cherished rights must be struck down, no matter the cost.[6] At the same time, these same critics argue that the two methods are infinitely malleable and thus serve only to rationalize outcomes reached on other grounds. Both criticisms cannot be correct and, in fact, reveal a common feature of the methods: they are rigid to some degree but contain degrees of flexibility, which give them some of their appeal and staying power.

Both methods are also technocratic. CBA draws heavily on the expertise of economists, while originalism calls on the talents of historians, as a matter of logic and increasingly of practice, though lawyer-historians have so far played a greater role in litigation than historians trained to professional standards.[7] Both methods rely heavily on these communities of like-minded experts to police the rules of the method in order to maintain the discipline while allowing it to be updated in response to developments in

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3. *See, e.g.*, FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 14–15 (2013) (discussing the originalist reasonings used by the Court in the Second Amendment case *District of Columbia v. Heller*); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2384 (2015) (noting a correlation between originalist views and opposition to *Roe v. Wade*'s ruling).

4. Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1820–21 (2016).

5. *See id.* at 1820 (arguing that originalism promised to constrain judges through their constitutional interpretations).

6. *See infra* Part I.

7. *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 887–88 (2015) (flagging the benefit of a lawyer's legal inquiry in conjunction with a historical inquiry of originalism).

understanding. There are also debates in both literatures about the value of the method compared to alternatives, and with similar appeals to philosophical values, practicality, and social facts.

CBA and originalism are what we will call midlevel legal methods. Midlevel legal methods are neither normative commitments nor legal doctrines but recurrently used methodologies that are applied to multiple substantive areas of law.[8] Midlevel methods are distinct from legal doctrines, such as the contract doctrine of consideration or the First Amendment's content neutrality rules. Doctrines are legal rules, while midlevel methods operate on legal rules—they are meta-mechanisms for determining what the content of legal rules should be. Accordingly, they are the sorts of principles that courts are likely to draw upon when they adjust or invent legal rules. What is peculiar and interesting about these two particular midlevel methods is that, despite the fact that they cover such divergent domains, they have developed similar structures to fill similar roles.

How did these two methods with such similar structural and functional characteristics arise? One possible view is that they are both happy discoveries that took place at the same time but are otherwise unrelated. We argue otherwise, based on another, even more surprising, common feature of the two methods: their shared political history. Both methods originated roughly in the 1970s; both were controversial from the start.[9] But both methods have been propelled forward by significant financial support from an overlapping web of business groups and intellectual support from academic supporters associated with pro-market trends in intellectual and political circles in the 1970s and 1980s.[10] Accordingly, both methods were originally backed largely by conservatives and associated with the conservative legal movement. But even that has shifted over time and roughly contemporaneously. Cost–benefit analysis acquired a large number of moderate and liberal backers in government and academia sometime between the 1990s and the first decade of the 2000s. Presidents Clinton, Obama, and Biden all explicitly committed to CBA and staffed their regulatory offices with left-leaning academics who supported the method. Originalism took longer to gain begrudging support from the left, but there are now left-leaning academics[11] and

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8. Textualism is another example of a midlevel method.

9. *See* Kessler & Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, *supra* note 4, at 1820–22 (noting the rise of both methods in the 1970s and 1980s and the criticism they faced).

10. *See infra* Part II.B.

11. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM (2014) (laying out theories of framework originalism and the method of text and principle to analyze constitutional interpretation and construction).

liberal Supreme Court Justices[12] who identify themselves as originalists or employ originalist methodologies. Yet the trend is not uniformly toward greater acceptance. Both methods have come under pressure over the last few years and face an uncertain future, or so we will argue.

Cost–benefit analysis and originalism, as midlevel methods, depend on three things: institutional support from government agents who use them and are affected by them; consistency with public opinion; and the support of a critical mass of elected officials.[13] Originalism and cost–benefit analysis achieved prominence as a result of broad intellectual currents, business support, and their acceptance by many government officials, but their support by the public and Congress has been more limited and erratic.[14] Today, shifting political coalitions and changes in public opinion have revealed the limits of both methods and point to their possible erosion or even demise.[15] Originalism's institutional support in the Supreme Court is relatively strong for now but, we argue, may decline over time as originalism's capacity to achieve desired legal change wanes, and the personnel of the Court turns over. CBA's institutional support in the executive branch has been consistent until recently, but its support in the judiciary has been only moderate. Meanwhile, public opinion has gyrated in ways that are in tension with the intellectual commitments of both originalism and CBA, and populist impulses reject the technocracy that underlies both methods—posing novel dangers for both of them.[16]

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12. *See infra* Part II.A.1.

13. Our notion of the midlevel method as based on coalitions of different groups with overlapping interests owes much to Cass Sunstein's incompletely theorized agreements in legal argument. *See generally* Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995) (arguing that incompletely theorized agreements are strategies employed by legal systems to find agreement on particular outcomes in pluralistic settings). The major differences are that Sunstein is interested in outcomes or judicial decisions rather than midlevel methods, *id.* at 1739–40, and, influenced by Rawls, sees judicial decisions as emerging from overlapping moral commitments, thus advancing pluralism and social peace, *id.* at 1738. We focus on political determinants, and emphasize the role of business interests and funding in effecting changes in midlevel methods.

14. *See infra* Part II.B.

15. *See infra* Part IV.

16. Our view can be contrasted with that of Kessler & Pozen, *supra* note 4, at 1820–21. The authors argue that major legal theories—what we call midlevel methods—including originalism and cost–benefit analysis, move from pure to impure as they accommodate criticisms. *Id.* at 1820–22. While they recognize that "interests" as well as values influence the life cycles of legal theories, their account of interests is vague and episodic (e.g., "elites," lawyers, etc.). We emphasize political economy. Theories can remain pure or become impure,

Our argument proceeds as follows. Part I offers a brief primer on originalism and cost–benefit analysis. In Part II, we analyze the political forces behind the joint rise of originalism and cost–benefit analysis. In particular, we document the business groups that played central roles in promoting both midlevel methods. In Part III, we explain how originalism and cost–benefit analysis have come to share a wide range of important functional and structural features, all of which contributed to their attractiveness to business groups and their ongoing acceptance within government. Finally, in Part IV, we identify fissures in support for originalism and cost–benefit analysis as their coalitions break apart, and we speculate about the future of these methods.

I. A BRIEF PRIMER ON ORIGINALISM AND COST–BENEFIT ANALYSIS

A. Originalism

Originalism is often described as an interpretive method or theory of law;[17] we see it as a legal method or practice. The term describes the activities of judges who determine constitutional norms by consulting the original understanding (typically, "public meaning") of relevant text in the 1789 written Constitution and its amendments, and academics (mainly legal academics) who debate the methods of originalism and police the boundaries of the discipline of originalism in ways we describe below. Together, the judges and academics compose a community that maintains and advances the practice of originalism—the judges use the method to decide cases, the academics (and judges) revise and update the method in response to criticisms and to accommodate challenges. Originalism is a living practice.

Originalism contains within it many controversies. Originalists disagree about, among other things, the role of stare decisis, the weight to be given to plain meaning, and the extent to which original meaning is determinative of constitutional meaning. These disagreements have sparked criticism that originalism has not kept the promise of many proponents that it limits judicial discretion. But originalism does rule out many types of arguments. If originalism is correct, then a constitution does not incorporate evolving social norms, for example. Most originalists insist on a textual basis for constitutional arguments. It would be hard to make an originalist argument that foreign law or constitutions influence the development of U.S. constitutional law. Originalist interpretation almost always focuses on the text and historical sources.

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and can either sustain themselves or break apart, depending on the coalitions they serve and the political forces at play.

17. Sachs, *supra* note 7, at 818.

There are many defenses and criticisms of originalism. They fill volumes, and are well known, so we will very briefly mention them here.[18] Early defenders of originalism argued that the method constrained judicial discretion, preventing judges from substituting their personal or ideological preferences for those of legislatures or the people.[19] Some originalists argued that originalism was inherent in the practice of constitutional interpretation, and courts were bound to enforce the Constitution.[20] Others argued that originalism advanced liberty, democracy, or some other institutional value; these arguments asserted that the 1789 Constitution, along with its amendments, advanced these values, and that the Article V amendment process ensured their protection.[21] A recent defense of originalism argues that it is a true description of positive law, and courts are required to use originalism because they are bound to apply the law.[22]

The critics, as noted, have argued that originalism does not constrain judges because of the many ambiguities in both its methods and in the original sources.[23] They point to the failure of self-described originalist Justices to rule consistently as originalism would seem to dictate.[24] To these critics, originalism plays a merely rhetorical role: it rationalizes rather than determines judicial outcomes.[25] Critics also argue that originalism, in part because of the difficult amendment process, prevents the Constitution from being updated to reflect changing mores and institutional needs.[26] If faithfully followed, originalism would trap the polity in a severely outdated institutional

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18. For a usefully concise summary, see *id.* at 822–35.

19. *E.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

20. *See* Larry Alexander, *Simple-Minded Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 87 (Grant Huscroft & Bradley W. Miller eds., 2011) (arguing that interpreting the Constitution inherently requires seeking the original intended meanings of the authors).

21. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018) (claiming that originalism should adhere to the spirit of the Constitution and all the goals implied in its text).

22. Sachs, *supra* note 7, at 819–22; Baude, *Is Originalism Our Law?*, *supra* note 3, at 2351, 2360.

23. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 29–32 (2009).

24. *See, e.g.*, Cross, *supra* note 3; Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 NOTRE DAME L. REV. 1869 (2021).

25. *See* Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 31 (2011) (discussing the debate).

26. Berman, *Originalism is Bunk*, *supra* note 23, at 22, 30–31.

structure. And some versions of originalism would sacrifice political and constitutional stability to the vagaries of the archives and historical methods, which are always changing. Some scholars have tried to expand the method to allow for outcomes more consistent with modern progressive sensibilities,[27] but judicial opinions that are self-consciously originalist overwhelmingly reach conservative outcomes.[28]

B. Cost–Benefit Analysis

Cost–benefit analysis is a methodology for calculating the likely effects of a regulation—or law, or project, or really anything else, though it is most commonly used to evaluate federal administrative rules.[29] As the name would indicate, CBA involves determining the regulation's likely benefits and harms (costs).[30] Where those benefits or harms are not monetary, they must be translated into monetary values so as to enable comparison.[31] For instance, a regulation might save lives by reducing pollution (a benefit), but abating the pollution might also cost money and lead to unemployment. These benefits and costs are translated into dollars so that they can be compared. This process involves determining dollar values for goods, such as lives saved, that are not typically traded in markets.[32] In principle, the agency might select the regulatory option that maximizes benefits net of costs. In reality, agencies typically consider three or four regulatory options, calculate the costs and benefits of each, and then (often but not always) choose the option with the greatest net benefits.[33]

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27. *See, e.g.*, BALKIN, *supra* note 11 (arguing that the Constitution should serve as an initial framework, and interpreters should have fidelity to the original text but build out their constitutional constructions to apply to modern times).

28. *See generally* David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 137 (2011) (arguing conservatives should move away from originalism and towards precedent-based views of constitutional law); Lee Strang, *Originalism and Conservatism: An American Story*, HERITAGE FOUND. (Feb. 1, 2024), https://www.heritage.org/the-constitution/report/originalism-and-conservatism-american-story [https://perma.cc/NFW3-RNUK] (explaining the history and relationships of originalism to the conservative movement); Whittington, *supra* note 25, at 29–30 (providing context on the history and rise of originalism).

29. MAEVE P. CAREY, CONG. RSCH. SERV., IF12058, COST–BENEFIT ANALYSIS IN FEDERAL AGENCY RULEMAKING 1 (2022).

30. Masur & Posner, *Regulation, Unemployment, and Cost–Benefit Analysis*, *supra* note 2, at 603.

31. *See id.* at 603–04 (using a regulation on chemical usage to exemplify how nonmonetary costs and benefits can be translated into monetary values).

32. Jonathan S. Masur & Eric A. Posner, *Cost–Benefit Analysis and the Judicial Review Role*, 85 U. CHI. L. REV. 935, 946, 949 (2018); *see* Masur & Posner, *Regulation, Unemployment, and Cost–Benefit Analysis*, *supra* note 2, at 603–04.

33. CAREY, *supra* note 29, at 2.

Cost–benefit analysis was invented by economists, but it remains controversial even within the economics profession. Within the field of welfare economics, economists had long sought a neutral criterion for evaluating regulations and other projects. Most of them agreed that the Pareto principle—according to which a project was desirable if it made one person better off without making anyone worse off—satisfied neutrality, but the principle was too strong, as it ruled out nearly all real-world projects.[34] Various economists developed versions of the "potential Pareto" principle, also known as Kaldor-Hicks efficiency, according to which a project should be approved if the gains to the winners were great enough to overcompensate the losers.[35] This came to be known as efficiency, and cost–benefit analysis is a version of efficiency in which monetary values are used to measure gains and losses.[36] But the efficiency and cost–benefit criteria were subject to numerous objections.[37] No one could explain why potential compensation could substitute for actual compensation.[38] Another significant problem was that status quo wealth distribution influences how much people are willing to pay for gains and accept for losses.[39] Where a wealthier person and a poorer person were affected exactly the same by a project, the wealthier person would have a higher willingness to pay because she values marginal dollars less than the poorer person.[40] Thus, a project that passed a cost–benefit test did not necessarily advance welfare; indeed, cost–benefit analysis could generate paradoxes and inconsistencies because people's valuations could change as a result of the impact of regulation on their endowments. The welfarist case for CBA rests on an empirical judgment that it produces good outcomes on average relative to other methods.[41]

As with originalism, criticisms and defenses of CBA fill volumes. Some of the criticism of CBA has been internal to the procedure and has come from scholars who are largely supportive of using CBA. These critics emphasize difficulties in measurement,[42] question the methods used to determine the

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34. Matthew D. Adler & Eric A. Posner, *Rethinking Cost–Benefit Analysis*, 109 YALE L.J. 165, 170 (1999).

35. *Id.* at 190.

36. *Id.* at 171, 186.

37. *Id.* at 186.

38. Amartya Sen, *The Discipline of Cost–Benefit Analysis*, 29 J. LEGAL STUD. 931, 947 (2000).

39. Weisbach, *supra* note 1, at 151–52.

40. *Id.* at 168.

41. MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST–BENEFIT ANALYSIS 6 (2006).

42. *See, e.g.*, Lisa A. Robinson & James K. Hammitt, *Behavioral Economics and the Conduct of Benefit–Cost Analysis: Towards Principles and Standards*, 2 J. BENEFIT–COST ANALYSIS 1, 38–41

value of lives and other non-market goods,[43] and lament agency failures to quantify relevant benefits and costs.[44] Other scholars criticize CBA for failing to account for the distributional effects of regulation,[45] with some charging that this leads CBA to favor projects that benefit the wealthy.[46] External critics argue that CBA monetizes lives and other goods that are nonmonetizable,[47] or that CBA attempts to compare goods, such as lives and wealth, that are incommensurable.[48] Critics, mainly from the left, argue that cost–benefit analysis was outcome-oriented from its inception—that it was always intended to block regulation, not improve it. Indeed, as we will explain, many on the right support CBA for precisely this reason. Despite these various criticisms, CBA has only increased in popularity in the decades since it entered widespread use within the administrative state.[49]

We discuss this trend and potential explanations for it in the Part that follows.

II. THE POLITICAL ECONOMY OF ORIGINALISM AND CBA

We now turn to the question of why originalism and CBA emerged, advanced in influence, and achieved a kind of institutional dominance in the period roughly spanning 1970–2020. Our focus is thus on political economy—why these methods were adopted by government officials—rather

(2011); Lisa A. Robinson & Jonathan I. Levy, *The [R]Evolving Relationship Between Risk Assessment and Risk Management*, 31 RISK ANALYSIS 1334, 1334 (2011) (explaining that the inability to quantify health impacts is hampering research); Lisa A. Robinson, *Cost–Benefit Analysis and Well-Being Analysis?*, 62 DUKE L.J. 1717, 1717–18 (2013) (exploring criticism of Cost–Benefit Analysis (CBA) and concluding that Well-Being Analysis (WBA) would be a useful supplement to CBA).

43. *E.g.*, W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC & PRIVATE RESPONSIBILITIES FOR RISK 4, 7 (1992) (discussing tradeoffs between added safety and greater cost).

44. Jonathan S. Masur & Eric A. Posner, *Unquantified Benefits and the Problem of Regulation Under Uncertainty*, 102 CORNELL L. REV. 87, 92 (2016) [hereinafter Masur & Posner, *Unquantified Benefits*].

45. *See, e.g.*, MATTHEW ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST–BENEFIT ANALYSIS (2011).

46. *See* Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. CHI. L. REV. 649, 649–50 (2022) (leveling a form of this critique).

47. Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost–Benefit Analysis of Environmental Protection*, 150 U. PENN. L. REV. 1553, 1563 (2002).

48. David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost–Benefit Analysis*, 24 ECOLOGY L.Q. 545, 566 (1997); Amy Sinden, *Formality and Informality in Cost–Benefit Analysis*, 2015 UTAH L. REV. 93, 127.

49. Jonathan S. Gould, *Cost–Benefit Analysis in Polarized Times*, 75 ADMIN. L. REV. 695, 700 (2023).

than the merits of these methods.[50] We emphasize that we focus on a distinctive form of practice and institutionalization in both cases: both originalism and CBA come in many flavors, but one can identify a dominant version of each that has been adopted by senior officials in the U.S. government. Those are the versions that we address.

Originalism and CBA both have roots that extend far back in the legal and intellectual culture of the United States. We begin with this background to supply context, and then we directly address the question why these practices gained prominence beginning in the 1970s.

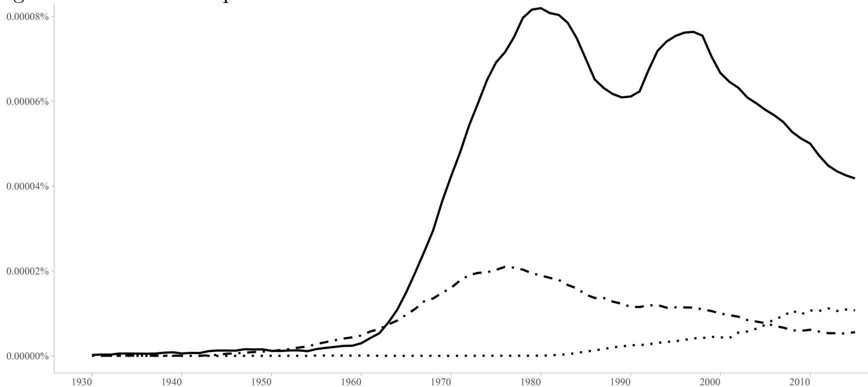
A. *The Rise of Originalism and CBA*

Both originalism and CBA have experienced a remarkable ascent in legal and public policy circles. Figure 1 shows the rise of originalism and CBA in circuit court opinions.[51] Figure 2 shows their trajectory in academic debate, where the two methods rise in parallel.[52] Figure 3 shows the Supreme Court's references to the Federalist Papers over time.[53]

50. *Cf.* Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States*, 85 ANTITRUST L.J. 441, 445 (2023).

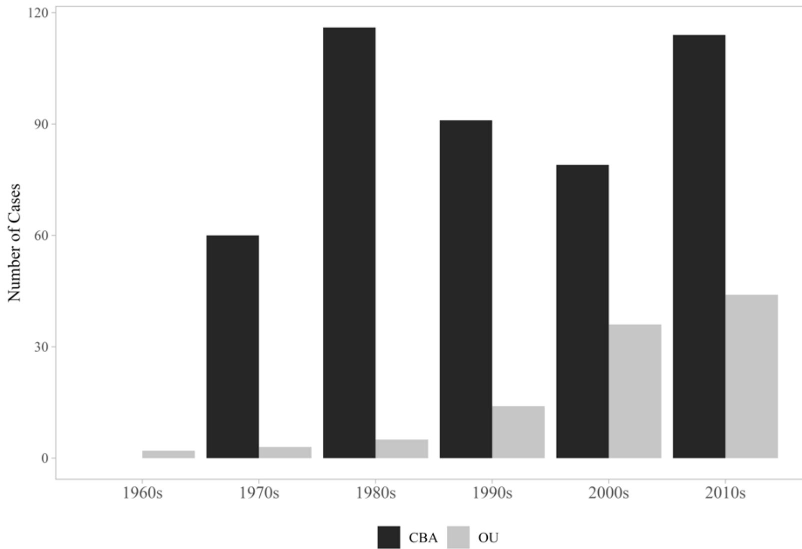
51. To construct this figure, we searched Westlaw for all court of appeals cases that used either the phrase "cost–benefit analysis" or the phrase "original understanding" by decade.

52. To construct this figure, we performed a similar search to that undertaken with respect to Figure 1, except in this case we looked at the corpus of academic articles. A Google ngram search of books provides similar results:



53. To construct this figure, we searched Westlaw for Supreme Court cases containing the phrases "The Federalist," "Federalist Papers," "James Madison," or "Alexander Hamilton."

Figure 1: Circuit Court Opinions That Refer to Cost–Benefit Analysis or Original Understanding



Note. Data is unavailable for CBA in the 1960s.

Figure 2: Law Review Articles That Refer to Cost–Benefit Analysis or Original Understanding

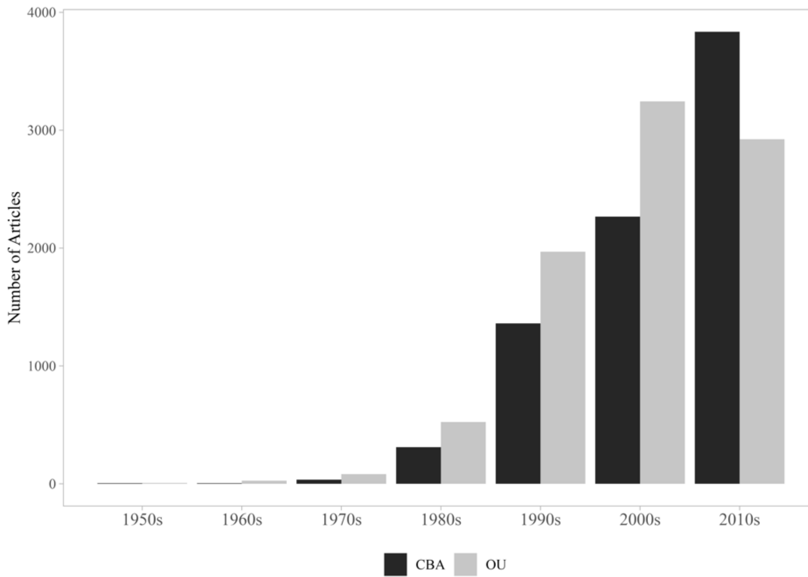
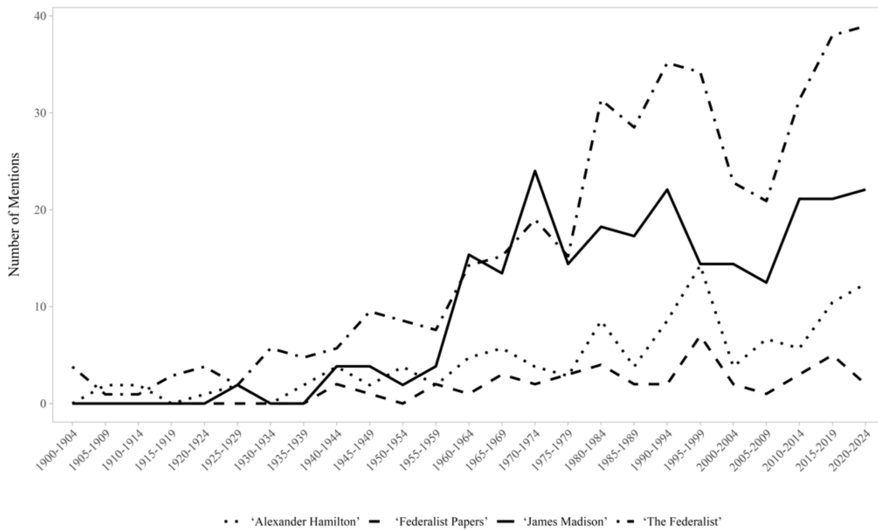


Figure 3: Supreme Court Opinions That Cite the Federalist Papers, Hamilton, or Madison



Originalism was hardly discussed at all before the 1970s. There were some notable Supreme Court cases that could broadly be described as originalist, and some Justices took the original understanding of the Constitution more seriously than others.[54] But there was not a consistent body of originalist theory used by Justices to justify their decisions or criticize the decisions of others. Similarly, regulators and policymakers considered the costs and benefits of projects before the modern advent of cost–benefit analysis, but mostly in an informal and episodic way. Cost–benefit analysis was a frequent topic of academic debate among economists. But that debate took place mostly at a theoretical level until the 1970s. It was not until then that both theories achieved footholds in law and policy.

1. Originalism

Originalism was first self-consciously propounded as a theory in the 1970s by law professors, including Raoul Berger and Robert Bork.[55] While a New Deal liberal, Berger attacked Warren Court decisions, along with many of Nixon's claims regarding presidential power, for departing from the original

54. *See, e.g.*, Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting); JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 205–09 (2005) (exploring the history of originalism).

55. BERGER, *supra* note 19; O'NEILL, *supra* note 54, at 108.

understanding.[56] Berger, Bork, and their fellow travelers condemned Warren Court Justices for making policy unmoored to the constitutional text, and for using history selectively to justify outcomes that reflected their political preferences. While the early originalists made relatively little headway with constitutional law professors, their ideas began to circulate among conservative intellectuals and in conservative organizations like the Center for Judicial Studies.[57] In the mid-1980s, Attorney General Edwin Meese forcefully defended originalism in speeches, and in 1986, Antonin Scalia, a leading originalist, was appointed to the Supreme Court. Meese also filled the Justice Department's leadership with lawyers with ties to the Federalist Society, where originalism had begun to make inroads.[58] But originalism suffered a setback with the Senate's rejection of Robert Bork's nomination in 1987. At the time, Judge Bork was the most prominent defender of originalism, and his jurisprudential commitments were held against him.[59]

At this point, only two Justices on the Supreme Court could be regarded as originalists: Scalia, an outspoken but at the same time admittedly "faint-hearted originalist," and recently elevated Chief Justice William Rehnquist, whose originalism was erratic.[60] In 1991, another originalist, Clarence Thomas, joined the Court.[61] But most Justices in that decade—O'Connor, Kennedy, Souter, Ginsburg, and Breyer—were not originalists. The appointment of further originalist or quasi-originalist judges took place during the George W. Bush and Donald Trump Administrations. Today, six of the nine Justices are either strong (Thomas, Gorsuch, Kavanaugh) or moderate (Roberts, Alito, Barrett) originalists, and even all three liberals felt compelled to issue originalist blandishments during their confirmation hearings, unlike

56. BERGER, *supra* note 19, at 463–65.

57. O'NEILL, *supra* note 54, at 129–30.

58. By 1986, all twelve Assistant Attorney Generals in the Department of Justice had ties to the Federalist Society. Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 POL. RSCH. Q. 366, 367 (2009).

59. *See, e.g.*, *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 2840 (1987) (statement of Philip B. Kurland, Professor, University of Chicago Law School) ("The fact is that 'original intent' is not a jurisprudential theory but, like Nixon's 'strict construction,' and Roosevelt's 'back to the Constitution' it is merely a slogan to excuse replacing existing Supreme Court judgments with those closer to the personal predilections of their propounders.").

60. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 12 (2006).

61. *Cf.* Joel K. Goldstein, *Calling Them as He Sees Them: The Disappearance of Originalism in Justice Thomas's Opinions on Race*, 74 MD. L. REV. 79, 79 (2014).

liberal predecessors such as Ginsburg and Breyer.[62] It has become the consensus view, even among left-leaning judges and Justices, that the original understanding is not irrelevant to law.

The appointment of originalist judges was hardly a foregone conclusion. In 2005, a coalition of Republicans and Democrats forced George W. Bush to withdraw his nomination of White House Counsel Harriet Miers.[63] Conservative senators and lawyers complained that Miers was not an originalist (she did not appear to have any judicial philosophy). However, behind the scenes, influential conservative religious leaders opposed Miers because she was not clearly opposed to abortion rights.[64] Bush subsequently nominated the conservative, and apparently originalist, judge Samuel Alito, who was confirmed.[65] Alito enjoyed the support of conservative lawyers and legal organizations, who touted his originalist credentials,[66] and he would go on to write originalist opinions on the Supreme Court.[67] If Trump had lost the close election of 2016, originalists would be a minority on the Court; instead, Trump would fill out the conservative majority with the originalist troika of Gorsuch, Kavanaugh, and Barrett.[68]

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62. We generally rely on what appears to be the conventional wisdom among law professors. But we also collected and evaluated the statements made by these Justices regarding originalism at their confirmation hearings. Those statements broadly confirm this understanding. *See* Appendix Table A1.

63. *Bush's Court Choice Ends Bid; Conservatives Attacked Miers*, N.Y. TIMES (Oct. 28, 2005), https://www.nytimes.com/2005/10/28/politics/politicsspecial1/bushs-court-choice-ends-bid-conservatives-attacked-miers.html [https://perma.cc/HXS2-494C].

64. Earl M. Maltz, *The Long Road to* Dobbs, 50 HASTINGS CONST. L.Q. 3, 44 (2023); Elisabeth Bumiller, *White House Tries to Quell a Rebellion on the Right*, N.Y. TIMES (Oct. 7, 2005), https://www.nytimes.com/2005/10/07/us/court-in-transition-strategy-white-house-tries-to-quell-a-rebellion-on.html [https://perma.cc/4B8S-WLVE]; Sheryl Gay Stolberg, *Foe of Abortion, Senator is Cool to Court Choice*, N.Y. TIMES (Oct. 7, 2005), https://www.nytimes.com/2005/10/07/politics/politicsspecial1/foe-of-abortion-senator-is-cool-to-court-choice.html [https://perma.cc/AN7K-VADG].

65. Maltz, *supra* note 64, at 44–46.

66. *Reactions to the Alito Nomination*, NPR (Oct. 31, 2005, 12:00 AM), https://www.npr.org/2005/10/31/4982460/reactions-to-the-alito-nomination [https://perma.cc/K8B6-MRMS] (highlighting a statement from Kay Daly, President of the conservative Coalition for a Fair Judiciary: "The president has made an excellent choice today which reflects his commitment to appoint judges in the mold of (Antonin) Scalia and (Clarence) Thomas. Sam Alito, a 3rd Circuit Court of Appeals judge, has consistently embraced the original intent of the Constitution.").

67. J. Joel Alicea, *The Originalist Jurisprudence of Justice Samuel Alito*, 46 HARV. J.L. & PUB. POL'Y 653, 656 (2023) (noting three of Justice Alito's originalist opinions).

68. *Supreme Court Nominations (1789–Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.html [https://perma.cc/4TNJ-Z37G] (last visited Feb. 8, 2025); *see* Appendix Table A1.

2. Cost–Benefit Analysis

Cost–benefit analysis can be traced back to the nineteenth century.[69] Jules Dupuit, a French engineer, developed an early version of cost–benefit analysis for evaluating public infrastructure projects.[70] In the United States, the method was used and further developed by the U.S. Army Corps of Engineers to evaluate waterway projects.[71] The Flood Control Act of 1936 required the Corps to use cost–benefit analysis to evaluate flood control projects.[72] In the 1970s, the Environmental Protection Agency (EPA) began to use cost–benefit analysis to evaluate environmental regulations.[73]

In this era, cost–benefit analysis did not stir much public controversy, but it was the topic of a lively academic debate. Economists were keenly aware of the limits of cost–benefit analysis long before philosophers and legal academics began to mount criticisms. By the 1970s, the project of justifying a neutral welfare criterion was dead.[74] But efficiency would continue to play a role in descriptive work, serving as a kind of benchmark for analyzing economic problems. And, curiously, most economists would continue to endorse cost–benefit analysis as well as efficiency criteria as pragmatic methods for evaluating projects, even while acknowledging these limitations.[75]

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69. Wei Jiang & Rainer Marggraf, *The Origin of Cost–Benefit Analysis: A Comparative View of France and the United States*, COST EFFECTIVENESS RES. ALLOCATION, Nov. 2021, at 3–5 (describing developments in early cost–benefit analysis in post-revolutionary France).

70. *See, e.g.*, *id*.

71. THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE 148–89 (1995).

72. *Id.* at 155.

73. Ralph A. Luken, *The Emerging Role of Benefit–Cost Analysis in the Regulatory Process at EPA*, 62 ENV'T HEALTH PERSPS. 373, 374 (1985). The use of formal cost–benefit analysis, which is a method developed by economists, should be distinguished from broader economic "styles" of analysis, which had made headway in the U.S. government decades earlier. For discussion, *see* ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 9 (2022); Edward P. Fuchs & James E. Anderson, *The Institutionalization of Cost–Benefit Analysis*, 10 PUB. PRODUCTIVITY REV. 25, 25–26 (1987).

74. Adler & Posner, *Rethinking Cost–Benefit Analysis*, *supra* note 34 (noting that in the mid-twentieth century, some economists had declared all of welfare economics "dead").

75. For a discussion of the debate, see ADLER & POSNER, NEW FOUNDATIONS OF COST–BENEFIT ANALYSIS, *supra* note 41, at ch. 1. For economists' endorsements, see, for example, Kenneth J. Arrow, Maureen L. Cropper, George C. Eads, Robert W. Hahn, Lester B. Lave, Roger G. Noll, et al., *Is There a Role for Benefit–Cost Analysis in Environmental, Health, and Safety Regulation?*, 272 SCI. 221 (1996); Gary S. Becker, *A Comment on the Conference on Cost–Benefit Analysis*, 29 J. LEGAL STUD. 1149 (2000).

In 1980, Congress enacted the Paperwork Reduction Act, a law that attempted to reduce paperwork burdens that regulation created for the public.[76] The law gave oversight to the newly created Office of Information and Regulatory Affairs (OIRA), which was lodged in the Office of Management and Budget. OIRA was a creature of the deregulatory impulses that prevailed even before Reagan was elected. In 1981, Reagan issued Executive Order 12,291, which required agencies to conduct cost–benefit analyses of major regulations and tasked OIRA with reviewing and approving those analyses.[77] The executive order thus centralized regulatory oversight and rationalized it by implementing cost–benefit principles.[78]

Reagan's adoption of CBA as executive-branch policy provoked many of the objections to the methodology that we have cataloged. But the agencies forged ahead, and CBA benefited from the support of a number of prominent liberal law professors who believed that it would strengthen and legitimate regulation.[79] Advances in economics could, and did, address some of CBA's measurement problems. And the methodology took hold politically and institutionally.[80] Bill Clinton and Barack Obama issued executive orders that extended Reagan's, albeit with some minor and mostly ignored modifications that authorized agencies to take into account equity and related factors.[81] In 2009, CBA played an instrumental role developing regulations for addressing climate change, cementing its appeal to a broad swath of left-leaning academics and policymakers.[82] Nearly all OIRA heads since the Reagan Administration have endorsed cost–benefit analysis during their confirmation hearings.[83]

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76. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812.

77. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,194–95 (Feb. 17, 1981).

78. *Id.*

79. Including STEPHEN BREYER, REGULATION AND ITS REFORM (1982); CASS R. SUNSTEIN, THE COST–BENEFIT REVOLUTION (2018); Richard J. Lazarus, *Justice Breyer's Friendly Legacy for Environmental Law*, 95 S. CAL. L. REV. 1395 (2022); RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST–BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 1–3 (2008). Sunstein and Revesz would later serve as heads of the Office of Information and Regulatory Affairs (OIRA).

80. *See* BERMAN, *supra* note 73, at 32 (2022) (describing the rise of cost–benefit analysis and other economics-based policy tools and their connection to Democratic politicians); Fuchs & Anderson, *supra* note 73, at 25–26 (offering a similar analysis).

81. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

82. Gould, *supra* note 49; Jonathan S. Masur & Eric A. Posner, *Climate Regulation and the Limits of Cost–Benefit Analysis*, 99 CAL. L. REV. 1557, 1560–61, 1564, 1569 (2011).

83. We collected and analyzed the statements made regarding CBA by OIRA nominees at their confirmation hearings. *See* Appendix Table A2.

B. Hypotheses

What accounts for the joint rise of originalism and CBA? First, we consider the rise of originalism and CBA from the perspective of intellectual history, specifically the rise of neoliberalism as a dominant ideology in government. Second, we evaluate the role of public opinion and the actions of Congress. We find that originalism has never been especially popular among the general public, and to our knowledge the public is blissfully unaware of CBA. Congress also has never passed significant legislation concerning either of the two. Finally, we look to explanations based on political economy and the importance of financial backing. There we find dynamics that were instrumental in the rise of originalism and CBA. A constellation of nonprofit advocacy institutions (and in some cases, academic ones), backed by significant financial support from a web of business interests, played a substantial role in advancing originalism and cost–benefit analysis. These institutions served as the lobbying arm of the pro-business movements and advocated for cost–benefit analysis and originalism. The result, over a forty-year period, was success in installing originalist judges (and particularly Justices) on the bench and entrenching cost–benefit analysis within the administrative state. More than ideas, and more than public support, it was business—and the financial backing it provided—that catalyzed the rise of originalism and CBA.

1. Neoliberalism and the Power of Ideas

The 1970s saw the ascendancy of what was then called free-market conservatism and what is now often called neoliberalism.[84] Economic stagnation and inflation threw into doubt the prevailing economic orthodoxy, which

84. See GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA 1, 5 (2022), for one of many accounts. The term "neoliberalism" is often used inconsistently and as an all-purpose term of abuse. But following recent scholarship, we use it in a purely descriptive manner. The following definition accords with our intuitions.

> Neoliberalism holds that a society's political and economic institutions should be robustly liberal and capitalist, but supplemented by a constitutionally limited democracy and a modest welfare state. Neoliberals endorse liberal rights and the free-market economy to protect freedom and promote economic prosperity. Neoliberals are broadly democratic, but stress the limitations of democracy as much as its necessity. And while neoliberals typically think government should provide social insurance and public goods, they are skeptical of the regulatory state, extensive government spending, and government-led countercyclical policy.

Kevin Vallier, *Neoliberalism*, STAN. ENCYCL. OF PHIL. (June 9, 2021), https://plato.stanford.edu/archives/win2022/entries/neoliberalism/ [https://perma.cc/Q6VX-Z7SM].

favored government management of the economy through regulation.[85] While the United States never saw the significant government ownership and control that was tried in other countries, regulation of prices (or profits) was common and affected countless sectors of the economy, from airlines to trucking.[86] Unions played a large role in setting wages, often with the support of government, as illustrated by the Treaty of Detroit of 1950.[87] Neoliberals attacked the regulatory state as inefficient, unworkable, and oppressive.[88] Drawing on theories of free-market economists, they argued that markets worked well, and government intervention was unwise except in unusual circumstances.[89]

Neoliberal ideas gained political support in the 1970s to the 1990s. They helped justify a wave of deregulatory legislation during the Carter Administration.[90] Neoliberalism was championed by Ronald Reagan, who won election in 1980 and was popular and influential; retained by his successor George H.W. Bush; and (crucially) adopted by the New Democrat Bill Clinton, who furthered deregulation and expanded international trade.[91] The anti-regulatory, anti-tax theories of the neoliberals would remain popular until the late 1990s. They crested with the 1999 Seattle WTO riots and then took a significant intellectual hit with the financial crisis of 2008.[92]

Originalism is not a natural fit for neoliberalism. The three most prominent neoliberals—Friedrich Hayek, Milton Friedman, and James Buchanan—were not originalists. Friedman did not develop a constitutional theory at all. Hayek did not discuss constitutional interpretation. Buchanan thought that courts should enforce public expectations even if they deviated from the original understanding.[93] Neoliberal-leaning scholars in the law

85. *See* Susan E. Dudley, *Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future,* 65 CASE W. RSRV. L. REV. 1027, 1033 (2015) (outlining changes in economic beliefs regarding regulation).

86. *See generally* Susan Dudley, *A Brief History of Regulation and Deregulation*, REGUL. REV. (Mar. 11, 2019), https://www.theregreview.org/2019/03/11/dudley-brief-history-regulation-deregulation/ [https://perma.cc/6NBP-DUEU] (providing an overview of regulatory actions in the United States).

87. DANIEL J. CLARK, DISRUPTION IN DETROIT: AUTOWORKERS AND THE ELUSIVE POSTWAR BOOM 35–53 (2018).

88. *See* GERSTLE, *supra* note 84, at 2–3.

89. *Id.* at 6.

90. *See* Andrew Downer Crain, *Ford, Carter, and Deregulation in the 1970s*, 5 J. TELECOMM. & HIGH TECH. L. 413 (2007).

91. GÉRARD DUMÉNIL & DOMINIQUE LÉVY, THE CRISIS OF NEOLIBERALISM (2011).

92. *Id.*

93. *See* James M. Buchanan, *Contractarian Political Economy and Constitutional Interpretation*, 78 AM. ECON. REV. 135, 138 (1988).

and economics movement who made constitutional arguments for restricting regulations relied on neoclassical economics and public choice theory rather than on the original understanding.[94] Their arguments made zero impact on courts, as far as we have found—possibly because they recalled the Supreme Court's now-discredited reliance on laissez-faire ideology to block the first wave of industrial regulation in the late nineteenth and early twentieth centuries.[95]

Perhaps more important, the libertarian bent of law and economics would not have appealed to religious and social conservatives, who formed half of the coalition that supported Republican power. Proponents of smaller government thus had to look elsewhere for constitutional arguments. In the 1970s and 1980s, originalists began to argue that state and local land-use and related regulations, federal administrative regulations, and, ultimately, elements of the administrative state violated the original understanding of the Constitution. Madison and Hamilton were hardly neoliberals, but the Constitution contained provisions protecting property rights and limiting government that could be put to neoliberal purposes. By the 2000s, some of these originalist arguments played a role in Supreme Court opinions. The Supreme Court's decisions striking down the for-cause protections for the heads of the Public Companies Accounting Oversight Board in *Free Enterprise Fund*[96] and the Consumer Financial Protection Bureau in *Seila Law*[97] drew heavily upon originalism.[98]

Today's originalists, in academia and on the Supreme Court, do not argue that the Constitution embodies a free-market economics theory. They instead argue that the Constitution deprives legislatures of the power to interfere with property and contract rights and deprives Congress of the power to delegate broad powers to agencies.[99] These arguments do the work of

94. *See, e.g.*, Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 89 (2000).

95. Lochner v. New York, 198 U.S. 45 (1905). *See generally* Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991).

96. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

97. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

98. The Court's decision in *National Federation Independent Business v. Sebelius*, 567 U.S. 519 (2012), that the Affordable Care Act exceeded Congress's power under the Commerce Clause, was also originalist. *Id.* at 554–55 ("That is not the country the Framers of our Constitution envisioned."); *id.* at 649 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("That understanding is consistent with the original meaning of 'regulate' at the time of the Constitution's ratification . . . ."). However, the Court upheld the Act under Congress's taxing power. *Id.* at 574.

99. *See, e.g.*, Richard A. Epstein, *Beyond Textualism: Why Originalist Theory Must Apply General Principles of Interpretation to Constitutional Law*, 37 HARV. J.L. & PUB. POL'Y 705, 709 (2014);

restricting regulations without committing the Court to endorsing economic theories that many people reject or believe should not be a matter for judicial determination, and that are becoming controversial even in traditional conservative and Republican circles. Originalism was spurred by hostility to the Warren court's decisions on race, criminal justice, free speech, and religion. The neoliberal turn, stimulated by economic stagnation that was blamed on policy judgment, not on judicial decisions, is not a good explanation for the rise of originalism.

Neoliberalism does have more affinity with cost–benefit analysis. But cost–benefit analysis arrived late to the neoliberal party, and the connection between the two is more fragile than it might appear. Cost–benefit analysis is a creature of the executive branch. It was designed to improve executive oversight over what were seen as out-of-control regulators. Neoliberals pushed their agenda in Congress. Neoliberals advocated deregulation (as well as low taxes, free trade, and related policies) and saw legislation as the most natural way to accomplish it. And deregulation was initially accomplished primarily through legislation during the Carter Administration.[100] It was also advanced through agency action—bank regulators had been deregulating since the 1960s.[101] But the bank deregulators did not use cost–benefit analysis; they believed that many, if not most, bank regulations were historical vestiges of populism and interest-group politics, and should be eliminated on those grounds alone.[102] Cost–benefit analysis is indeed in tension with the Hayekian basis of neoliberalism. Hayek believed that markets better aggregated information dispersed among individuals and channeled it to the social good than governments could through central planning. Cost–benefit analysis, by contrast, relies on the notion that central planning can be useful in some circumstances and facilitates that central planning. Government agencies make the rules to constrain markets, though they do rely on markets to derive valuations. The early deregulation movement was focused on creating markets where before there was government management and regulation, not on protecting people from pollution and other externalities, which its proponents often regarded as exaggerated.

When Reagan arrived in office in 1981, he faced a government composed of agencies that continued to regulate based on statutes that compelled them

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Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 CHAP. L. REV. 659 (2021).

100. Crain, *supra* note 90.

101. MATTHEW SHERMAN, CTR. FOR ECON. & POL'Y RSCH., A SHORT HISTORY OF FINANCIAL DEREGULATION IN THE UNITED STATES 9 (2009).

102. *See* Eric A. Posner, *How Do Bank Regulators Determine Capital-Adequacy Requirements?*, 82 U. CHI. L. REV. 1853, 1891–92 (2015).

to protect health, safety, the environment, and other goods. Most of these mandates survived deregulatory legislation. To gain some control over the agencies, Reagan required agencies to submit proposed regulations to OIRA for review and directed OIRA to use cost–benefit analysis.[103]

From the start, cost–benefit analysis was seen both as a purely technocratic means to ensure that regulations serve the public interest and as a stratagem for discouraging regulation by imposing bureaucratic hurdles. Only the latter purpose is distinctively neoliberal. But the intellectual case for cost–benefit analysis was based on the former theory, and its roots lay deep in economic history and theory. On this theory, regulation is unnecessary when markets are competitive but needed when markets produce externalities. Bipartisan deregulatory efforts were mainly directed at economic regulation intended to combat market power, where there was no evidence of externalities. This type of regulation had been discredited by studies that indicated that it led to underinvestment (for example, in railroad stock) and inefficient forms of competition (luxurious airplane travel in mostly empty airplanes).[104] That left the question of what to do about regulations that aimed at classic negative externalities such as pollution. Cost–benefit analysis can be seen as a compromise between liberal technocrats who welcomed public-spirited regulation and saw CBA as a shield to fend off rent-seeking interest groups, and neoliberal or conservative critics of regulation who saw CBA as a garrote for strangling new regulations in their cradle.

Reagan's Executive Order 12,291 was controversial when it was issued but received bipartisan imprimatur when President Clinton issued Executive Order 12,866 in 1993, reaffirming support for CBA. The courts also began to introduce cost–benefit tests into the law.[105] The public-interest theory for cost–benefit analysis became accepted wisdom, although dissent persisted.

In sum, neoliberals likely saw cost–benefit analysis as more compatible with their commitments than did originalists. But cost–benefit analysis could appeal to a neoliberal only at the specific historical moment when CBA could be used as a tool to slow or block regulation. It was a temporary expedient, not a pure vision of neoliberal ideology, which celebrated markets and was skeptical of regulation. In an irony that we will explore, in later decades it would be originalism, not CBA, that would lead the charge against the administrative state.

103. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

104. *See* BREYER, *supra* note 79.

105. *E.g.*, Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1222 (5th Cir. 1991).

2. *Congress, Presidents, Party Platforms, and Public Opinion*

Another theory of the rise of originalism and cost–benefit analysis is that they received democratic sanction—they were supported by the public and adopted or endorsed by elected officials after public discussion. To evaluate this theory, we examine the activities and statements of Congress, presidents, and political parties, as well as at public opinion polls.

Originalism has never received strong support from Congress. In 1987, Robert Bork—the only Supreme Court nominee who has ever provided a full-throated defense of originalism at a confirmation hearing—was voted down.[106] Since then, support for originalism in confirmation hearings has been mostly partisan: Republican senators vote for originalist judicial nominees who, heeding the legacy of Bork, have soft-pedaled their originalist commitments; Democrats normally do not. As far as we have been able to find, Congress acting as a body has never endorsed originalism or made originalist arguments in the course of defending its constitutional prerogatives.

Neither have presidents publicly supported originalism. Searches in presidential records archives revealed zero mentions of "originalism" or "original understanding" by any president from Carter to Biden. The Trump Administration issued a few press releases touting the originalist credentials of Kavanaugh and Barrett after they were nominated, but even these press releases merely quoted supporters, not Trump or any administration officials.[107] Democratic party platforms from 1976 to 2020 do not mention originalism.[108] Republican party platforms refer to the original understanding or intent, albeit in the context of specific policy areas (D.C. statehood, religious

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106. Nat'l Const. Ctr. Staff, *On This Day: Senate Rejects Robert Bork for the Supreme Court*, NAT'L CONST. CTR. (Oct. 23, 2023), https://constitutioncenter.org/blog/on-this-day-senate-rejects-robert-bork-for-the-supreme-court [https://perma.cc/47F7-V9QC].

107. *Advanced Search*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/advanced-search [https://perma.cc/257U-8SMH] (last visited Feb. 8, 2025); Press Release, Am. Presidency Project, WTAS: Support for President Donald J. Trump's Nomination of Judge Amy Coney Barrett to the Supreme Court (Sept. 27, 20), https://www.presidency.ucsb.edu/documents/press-release-wtas-support-for-president-donald-j-trumps-nomination-judge-amy-coney [https://perma.cc/J92P-NBLB]; Press Release, Am. Presidency Project, What They Are Saying: Support for President Donald J. Trump's Nomination of Judge Brett Kavanaugh to the Supreme Court (July 9, 2018) https://www.presidency.ucsb.edu/documents/press-release-what-they-are-saying-support-for-president-donald-j-trumps-nomination-judge [https://perma.cc/DYR8-7WPQ].

108. *Democratic Party Platforms*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/people/other/democratic-party-platforms [https://perma.cc/7RAT-UKVX] (last visited Feb. 8, 2025).

freedom), in 1992, 2000, and 2012, and in the more robust jurisprudential sense only in 2016.[109]

Finally, public support for originalism has been relatively weak, as Table 1 shows. (Unfortunately, data goes back only to 2003.)

Table 1: Public Support for Interpreting the Constitution Using Either Original Intentions or in Accord with Changing Times[110]

Survey	Original Intentions	Changing Times	Somewhere in between	Don't Know / NA
Quinnipiac (Mar. 2003)	39%	54%	NA	7%
Quinnipiac (May 2005)	42%	51%	NA	8%

109. *Republican Party Platforms*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/people/other/republican-party-platforms [https://perma.cc/F7E9-TJ5Z] (last visited Feb. 8, 2025); *Republican Party Platform of 1992*, AM. PRESIDENCY PROJECT (Aug. 17, 1992), https://www.presidency.ucsb.edu/documents/republican-party-platform-1992 [https://perma.cc/5JNN-TGAT]; *2000 Republican Party Platform*, AM. PRESIDENCY PROJECT, (July 31, 2000); https://www.presidency.ucsb.edu/documents/2000-republican-party-platform [https://perma.cc/DQ24-AMGE]; *2012 Republican Party Platform*, AM. PRESIDENCY PROJECT (Aug. 27, 2012), https://www.presidency.ucsb.edu/documents/2012-republican-party-platform [https://perma.cc/7PSA-SV8E]; *2016 Republican Party Platform*, AM. PRESIDENCY PROJECT (July 18, 2016), https://www.presidency.ucsb.edu/documents/2016-republican-party-platform [https://perma.cc/G659-U843].

110. Between 2003 and 2010, Quinnipiac University Polling Institute, the Cooperative Congressional Election Study (CCES), and the Constitutional Attitudes Survey (CAS) asked respondents: "Which comes closer to your point of view (A) In making decisions, the Supreme Court should only consider the original intentions of the authors of the Constitution or (B) In making decisions, the Supreme Court should consider changing times and current realities in applying the principles of the Constitution." Between 2011 and 2020, Pew Research Center asked a similar question: "Should the U.S. Supreme Court base its rulings on its understanding of what the U.S. Constitution . . . [m]eant as it was originally written [or as it] [m]eans in current times[?]" *See* Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 362–64 (2011); PEW RSCH. CTR., 2020 PEW RESEARCH CENTER'S AMERICAN TRENDS PANEL WAVE 71 JULY 2020: FINAL TOPLINE 3 (2020), https://www.pewresearch.org/wp-content/uploads/2020/09/SCOTUS-blog-topline.pdf [https://perma.cc/CU9L-2ZM6].

Quinnipiac (July 2005)	44%	50%	NA	6%
Quinnipiac (Aug. 2007)	43%	48%	NA	9%
Quinnipiac (July 2008)	40%	52%	NA	8%
CCES (Nov. 2008)	44%	56%	NA	NA
CAS (July 2009)	40%	58%	NA	3%
Quinnipiac (Apr. 2010)	49%	42%	NA	9%
CAS (June 2010)	37%	60%	NA	4%
Pew (Feb. 2011)	45%	50%	2%	4%
Pew (Feb. 2014)	46%	49%	2%	3%
Pew (Oct. 2016)	46%	46%	2%	7%
Pew (Mar. 2018)	41%	55%	1%	3%
Pew (July-Aug. 2020)	44%	50%	2%	5%

Congress has similarly shown little enthusiasm for cost–benefit analysis.[111] While Congress has repeatedly considered legislation that would mandate cost–benefit analysis or related methods, none of these bills have become

111. For a detailed consideration of Congressional attitudes toward CBA that finds at best mild support for CBA in the Congressional Record (but not in enacted legislation), see Caroline Cecot, *Congress and Cost–Benefit Analysis*, 73 ADMIN. L. REV. 787 (2021).

law.[112] One bill passed the House of Representatives in 2017 by a substantial margin, with all Republicans and five Democrats voting in favor.[113] However, a companion bill did not advance in the Senate despite having two Democratic senators as cosponsors.[114] No other bill has made it to a vote. The Senate has, however, repeatedly confirmed OIRA heads who expressed support for cost–benefit analysis.[115]

Most presidents have mentioned cost–benefit analysis a number of times in speeches and official documents, typically favorably. Searches reveal that all presidents except (surprisingly) Reagan (who never mentioned cost–benefit analysis) have mentioned it positively, for example, in support of bills that require cost–benefit analysis or in speeches that promise to implement it. We count relatively positive mentions in reasonably meaningful contexts as follows: Carter (1 positive mention), Reagan (0), H.W. Bush (2), Clinton (8), W. Bush (4), Obama (16), Trump (6), Biden (1).[116] The Democratic platform supported cost–benefit analysis in 1980 but no other year. Republican platforms expressed support for cost–benefit analysis in 1976, 1980, 1992, 1996, and 2000.[117] However, the cost–benefit planks of the platforms received virtually no media attention.[118]

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112. *See* Appendix Table A3. Some legislation with vague guidance was enacted, and cost–benefit requirements have appeared in some specific statutory provisions relating to some regulatory requirement.

113. Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017), Roll Call 45, https://clerk.house.gov/Votes/201745.

114. Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017) (Sens. Heitkamp and Manchin listed as co-sponsors); Arianna Skibell, *Senators Want to Put Their Mark on Cost–Benefit Mandate*, E&E NEWS (May 2, 2017), https://www.eenews.net/articles/senators-want-to-put-their-mark-on-cost-benefit-mandate/ [https://perma.cc/R8KU-UNG7].

115. *E.g.*, Press Release, S. Comm. on Homeland Sec. & Governmental Affs., Cass Sunstein Confirmed by Full Senate (Sept. 10, 2009), https://www.hsgac.senate.gov/media/dems/cass-sunstein-confirmed-by-full-senate/ [https://perma.cc/QCN4-ZHP9]; *Richard Revesz Confirmed as Head of the White House OMB's Office of Information and Regulatory Affairs*, NYU L. NEWS (Dec. 29, 2022), https://www.law.nyu.edu/news/richard-revesz-oira-confirmation [https://perma.cc/3EE8-BGRT].

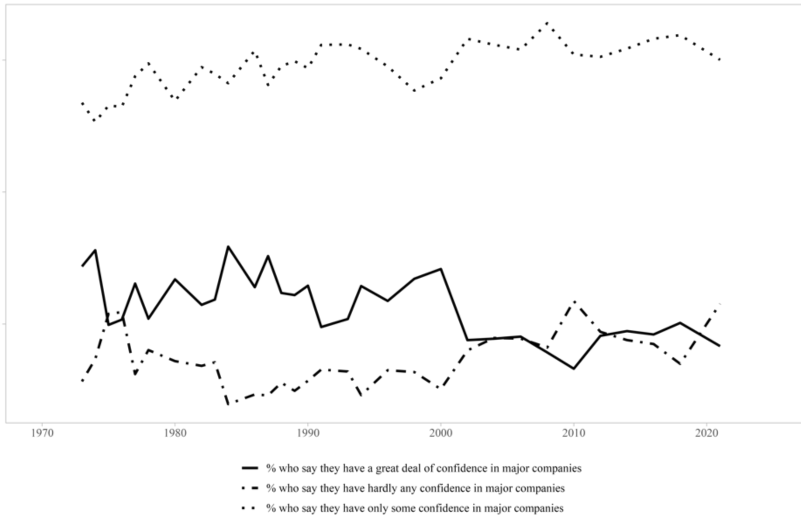
116. We performed a search query for "cost–benefit analysis" and "benefit–cost analysis" using The American Presidency Project. *Advanced Search*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/advanced-search [https://perma.cc/N5GK-NJLZ] (last visited Feb. 8, 2025).

117. We performed a search query for "cost–benefit analysis" and "benefit–cost analysis" via The American Presidency Project within *Democratic Party Platforms* and *Republican Party Platforms. Democratic Party Platforms*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/people/other/democratic-party-platforms [https://perma.cc/J42E-56BY] (last visited Feb. 8, 2025); and finally *Republican Party Platforms*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/people/other/republican-party-platforms [https://perma.cc/F3ZK-8UFM] (last visited Feb. 8, 2025).

118. According to a search of news items via Google; for a rare example, see Merrill Brown, *Thumbs Could Twiddle When Regulations Burn*, WASH. POST, Sept. 4, 1980, at D1.

We have found no polling data on cost–benefit analysis, which, unlike originalism, flies below the public's radar. A possible proxy for support for cost–benefit analysis is support for business. But confidence in business has been low for decades.

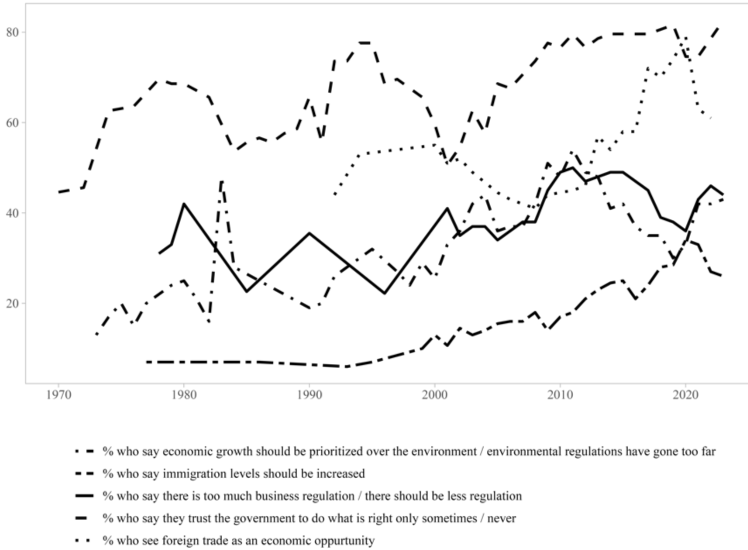
Figure 4: Support for Business Over Time[119]



On the other hand, public opinion on some major neoliberal topics has been strong and (surprisingly) rising over the long term. An argument could thus be made that regulators have tried to respect public sentiment by using cost–benefit analysis or have acted consistently with it. Yet, we do not know whether the public would regard cost–benefit analysis as the appropriate method for advancing its goals.

119. The Figure shows the percent of "respondents expressing a great deal, only some, or hardly any confidence in major companies," based on the General Social Survey. Lee Epstein & Mitu Gulati, *A Century of Business in the Supreme Court, 1920–2020*, 107 MINN. L. REV. HEADNOTES 49, 72 fig.7 (2022) (cleaned up); *see also* the discussion in Lancieri et al., *supra* note 50.

Figure 5: Public Neoliberalist-Related Beliefs Over Time[120]



In sum, Congress and the public played minimal roles in the rise of originalism and cost–benefit analysis. While public opinion may have gradually tended in the direction of economic liberalism over the decades, it did not express a view on the possible role that originalism and cost–benefit analysis play in achieving this objective. Originalism was the result of persistent executive action by Republican administrations to appoint originalist judges, who largely soft-pedaled or downplayed their originalism during the confirmation process but then, once in office, advanced originalism both in their opinions and in public debate.[121] Cost–benefit analysis was the result of

120. Data compiled from various sources, including: John M. Gillroy & Robert Y. Shapiro, *The Polls: Environmental Protection*, 50 PUB. OPIN. Q. 270 (1986); *Environment*, GALLUP, https://news.gallup.com/poll/1615/environment.aspx [https://perma.cc/6VNS-9HZW] (last visited Feb. 8, 2025); *Immigration*, GALLUP, https://news.gallup.com/poll/1660/Immigration.aspx [https://perma.cc/TH64-NEFH] (last visited Feb. 8, 2025); GALLUP POLL SOCIAL SERIES: WORLD AFFAIRS, GALLUP NEWS SERVICE (Feb. 2022), https://news.gallup.com/file/poll/390629/220315Trade.pdf [https://perma.cc/P5F7-WJFD]; Peter Bell, *Public Trust in Government: 1958–2024*, PEW RSCH. CTR. (June 24, 2024), https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/ [https://perma.cc/75EP-D9HJ].

121. Howard Kurtz & Al Kamen, *First Day of Questioning Leaves Scalia Unscathed*, WASH. POST, Aug. 6, 1986, at A6; *see* Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in*

executive action by both parties to control the bureaucracy and has received some endorsement from the courts and party platforms. Lacking strong congressional endorsement through legislative action, both midlevel methods dwell in a legal netherworld, creatures of executive and judicial action.

3. Business Influence and Political Economy

Ideas matter, but they matter more if they are funded. The usual starting point of discussions of business influence on ideological debate is the 1971 Powell memorandum, a memo sent from corporate lawyer and future Supreme Court Justice Lewis Powell to the U.S. Chamber of Commerce, a lobbying and advocacy group funded by corporations.[122] Powell lamented the growing hostility to business in universities and public debate and argued that the Chamber should fund and promote pro-business intellectuals and academics to push back. Powell also urged the Chamber to submit amicus briefs but said nothing about either originalism or cost–benefit analysis.[123]

In the wake of Powell's memorandum, business interests poured money into lobbying for deregulation and support for scholars, mainly economists and law professors, whose ideas aligned with business interests.[124] But they did not initially promote originalism, which in the 1970s was still regarded as eccentric and oriented toward cultural rather than economic issues. Business instead promoted conservative judges.[125] Eventually, however, originalism became associated with neoliberal policies—perhaps through Bork, who was both a prominent originalist and a prominent advocate for free markets through his influential antitrust work, or Richard Epstein, who attempted to link originalism and libertarian economics.[126]

Practice, 92 NOTRE DAME L. REV. 1945 (2007). Also, Justice Gorsuch. *See* Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, TIME (Sep. 6, 2019, 8:00 AM), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/ [https://perma.cc/T598-8CPN].

122. Memorandum from Lewis F. Powell, Jr. on the Attack on American Free Enterprise System to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Com. (Aug. 23, 1971) [hereinafter *The Powell Memorandum*] (on file with Washington & Lee University School of Law).

123. *Id.* at 26–27.

124. *See* John F. Henry, *The Historic Roots of the Neoliberal Program*, 44 J. ECON. ISSUES 543, 548 (2011); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 271–73 (2008); JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2016).

125. *See generally* TELES, *supra* note 124.

126. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE

By the 2000s, the conservative legal movement had become a financial and ideological juggernaut. Almost half of George W. Bush's circuit court appointees and nearly 90% of Trump's were affiliated with the Federalist Society.[127] Federalist Society leader Leonard Leo raised $15 million for television ads and related publicity to promote the Roberts and Alito nominations and $25 million for Amy Coney Barrett's.[128] Leo helped organize and fund the Judicial Crisis Network, which spent $7 million to block Obama's nomination of Merrick Garland and $10 million to advance Gorsuch's nomination.[129] It also spent millions of dollars supporting the nominations of Kavanaugh and Barrett.[130] Various other organizations, many of them funded by the Koch brothers as well as other conservative donors, have also supported originalist judges and other government officials and paid lawyers to write amicus briefs making originalist arguments. These organizations have included The

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UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014); *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2014).

127. Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Trump's Lower-Court Judges and Religion: An Initial Appraisal*, J. LEGAL STUD. (forthcoming 2025) (manuscript at 29, 31–32), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4488397 [https://perma.cc/7QPL-FLEU] (listing affiliations of non-Trump Republicans but nearly all of them were George W. Bush appointees); *see* Lawrence Baum & Neal Devins, *Federalist Court*, SLATE (Jan. 31, 2017, 10:12 AM), https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html [https://perma.cc/V9K3-RL44]; *see also* Senator Sheldon Whitehouse, Speech on the Floor of the U.S. Senate: The Third Federalist Society (Mar. 28, 2019), https://www.whitehouse.senate.gov/news/speeches/the-third-federalist-society/ [https://perma.cc/VLS3-GGLY].

128. Robert O'Harrow, Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/ [https://perma.cc/52CG-4X8R]; Marianne Levine, *Judicial Crisis Network Launches $3 Million Ad Campaign for Barrett*, POLITICO (Sept. 26, 2020, 5:08 PM), https://www.politico.com/news/2020/09/26/judicial-crisis-network-barrett-ad-campaign-422052 [https://perma.cc/64WH-A3ND].

129. Press Release, Jud. Crisis Network, Judicial Crisis Network Launches $10 Million Campaign to Preserve Justice Scalia's Legacy, Support President-Elect Trump Nominee (Jan. 9, 2017), https://web.archive.org/web/20170705003230/https:/judicialnetwork.com/judicial-crisis-network-launches-10-million-campaign-preserve-justice-scalias-legacy-support-president-elect-trump-nominee/ [https://perma.cc/5MKR-U6WT].

130. *See* Richard Lardner, *Pro-Kavanaugh Group Received Millions from Anonymous Donors*, ASSOCIATED PRESS (Nov. 27, 2018, 6:24 PM), https://apnews.com/u-s-supreme-court-91c58df540884d698ceb35a529c34b08 [https://perma.cc/S5BZ-RYLL]; Press Release, Jud. Crisis Network, Judge Amy Coney Barrett Confirmed (Oct. 2020), https://judicialnetwork.com/in-the-news/judge-amy-coney-barrett-confirmed/ [https://perma.cc/TM9T-JVRN].

Wellspring Committee, the Marble Freedom Trust, The 85 Fund, Americans for Prosperity, and DonorsTrust.[131]

While business interests like the Kochs supported both originalism (through the Federalist Society and related organizations) and cost–benefit analysis (as we will discuss), business support for originalism is not as clear as it is for cost–benefit analysis. The U.S. Chamber of Commerce has not, as far as we have found, issued statements advocating originalism. While it has supported originalist Supreme Court nominees like Barrett[132] and Gorsuch,[133] it has also supported non-originalists who it believed would advance its interests, including Breyer (a proponent of cost–benefit analysis), Ginsburg, and Roberts.[134] Indeed, business's exceptional success in the Supreme

131. *See, e.g.*, Anna Massoglia, *An Influential 'Dark Money' Group Turns Off the Lights for the Last Time*, OPENSECRETS (May 23, 2019, 11:39 AM), https://www.opensecrets.org/news/2019/05/an-influential-dark-money-group-turns-off-the-lights-for-the-last-time/ [https://perma.cc/35D3-QGC3] (discussing the disbandment of the Wellspring Committee); Andrew Perez, Andy Kroll & Justin Elliott, *How a Secretive Billionaire Handed His Fortune to the Architect of the Right-Wing Takeover of the Courts*, PROPUBLICA (Aug. 22, 2022, 2:45 PM), https://www.propublica.org/article/dark-money-leonard-leo-barre-seid [https://perma.cc/6QNA-RA9C] (discussing the largest ever political advocacy group donation of $1.6 billion to the Marble Freedom Trust); Brian Schwartz, *Trump Ally's Fund Received Over $20 Million Last Year, Then Funneled Cash to Other Right-leaning Groups*, CNBC (Nov. 18, 2021, 2:12 PM), https://www.cnbc.com/2021/11/18/trump-ally-leonard-leo-85-fund-received-20-million-in-2020.html [https://perma.cc/B6N6-LDGC] (discussing The 85 Fund); Press Release, Am. For Prosperity, AFP Commits Seven Figures to Judge Kavanaugh's Confirmation, Urges a Swift Action in Senate (July 9, 2018), https://americansforprosperity.org/afp-applauds-the-trump-administration-on-the-nomination-of-judge-kavanaugh-and-urges-a-swift-confirmation/ [https://perma.cc/JL8E-DHVF]; Bill Allison, *Alito Benefactor Leonard Leo Sees Funding Drop From Donor Fund*, BLOOMBERG (Nov. 14, 2023, 6:07 PM), https://www.bloomberg.com/news/articles/2023-11-14/conservative-donor-fund-donorstrust-cuts-support-for-legal-activist-leonard-leo [https://perma.cc/J2JL-QKTC].

132. Steven Lehotsky, *Why Amy Coney Barrett's Fairness, Distinguished Credentials Make Her an Excellent Supreme Court Nominee*, U.S. CHAMBER OF COM. (Oct. 22, 2020), https://www.uschamber.com/lawsuits/why-amy-coney-barrett-s-fairness-distinguished-credentials-make-her-excellent [https://perma.cc/PBX9-YMP4].

133. Thomas J. Donohue, *Key Vote Letter: Confirm Neil Gorsuch*, U.S. CHAMBER OF COM. (Apr. 4, 2017), https://www.uschamber.com/improving-government/confirmgorsuch [https://perma.cc/M96B-8525].

134. Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG. (Mar. 16, 2008), https://www.nytimes.com/2008/03/16/magazine/16supreme-t.html [https://perma.cc/3BWC-V3PX] ("[T]he chamber endorsed Ruth Bader Ginsburg . . . ."); John McClenahen, *Roberts Receives Endorsement of U.S. Chamber*, INDUSTRYWEEK (Aug. 25, 2005), https://www.industryweek.com/the-economy/regulations/article/21948453/roberts-receives-endorsement-of-us-chamber [https://perma.cc/4X47-MA6T].

Court dates back to the 1980s—when the court had only one or two originalists on it—though it accelerated in the 2000s after Roberts was appointed.[135] On the other hand, Don McGahn, Trump's White House Counsel, was laser-focused on appointing Supreme Court Justices who would relieve business of regulatory burdens.[136] Gorsuch's opposition to the *Chevron* doctrine appealed to McGahn, and Gorsuch's opposition was based on an originalist theory.[137] And in Epstein and Gulati's list of most pro-business Justices, the top six are originalists, as are seven of the top ten.[138]

CBA has benefited from more direct business support. Business groups began lobbying for cost–benefit analysis in the early 1970s. The U.S. Chamber of Commerce, to which Powell addressed his memorandum, took the lead.[139] It arranged conferences on cost–benefit analysis, issued policy statements and research reports promoting cost–benefit analysis, sent comments to agencies criticizing their failure to use cost–benefit analysis properly, and lobbied for bills requiring agencies to use cost–benefit analysis.[140] In 1977, the Chamber established the National Chamber Litigation Center, which challenged numerous regulations on cost–benefit grounds over the next

135. Epstein & Gulati, *supra* note 119, at 54.

136. RUTH MARCUS, SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER 63–65 (2019).

137. *Id.*; Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153–54 (10th Cir. 2016); De Niz Robles v. Lynch, 803 F.3d 1165, 1171, 1173 (10th Cir. 2015).

138. Epstein & Gulati, *supra* note 119, at 64–66 (Table 2).

139. *The Powell Memorandum*, *supra* note 122.

140. *See Client Profile: US Chamber of Commerce*, OPENSECRETS (last visited Feb. 8, 2025), https://www.opensecrets.org/federal-lobbying/clients/bills?cycle=2023&id=D000019798 [https://perma.cc/U75E-2U6H]. The OpenSecrets lobbying database extends back to 1998, though our search did not reveal any bills related to cost–benefit analysis that the Chamber had lobbied on prior to 2007. *See generally* Adam D. Orford, *Nation's Business and the Environment: The U.S. Chamber's Changing Relationships with DDT, "Ecologists," Regulations, and Renewable Energy*, 12 J. ENV'T STUD. & SCI. 100 (2021) (describing the Chamber's "strategy of weakening government institutions, and challenging the regulatory implementation of laws" during the 1970s); PAUL ROSE & CHRISTOPHER J. WALKER, CTR. FOR CAP. MKTS. COMPETITIVENESS, THE IMPORTANCE OF COST–BENEFIT ANALYSIS IN FINANCIAL REGULATION 36–37 (2013), https://www.uschamber.com/assets/archived/images/documents/files/CBA-Report-3.10.13_0.pdf [https://perma.cc/BDZ9-Q4L5]; IKE BRANNON, CTR. FOR CAP. MKTS. COMPETITIVENESS, THE EGREGIOUS COSTS OF THE SEC'S PAY-RATIO DISCLOSURE REGULATION (2014), https://www.uschamber.com/assets/archived/images/documents/files/Egregious-Cost-of-Pay-Ratio-5.14.pdf [https://perma.cc/C2XJ-99BL] (recommending the use of CBA in evaluating Securities and Exchange Commission (SEC) regulations); CTR. FOR CAP. MKTS. COMPETITIVENESS, STRUCTURAL REFORM TO FINANCIAL REGULATORS, https://www.uschamber.com/finance/growth-engine/structural-reform-to-financial-regulators [https://perma.cc/PB73-LUGX] (last visited Feb. 8, 2025).

several decades. Examples include its challenges to financial regulations,[141] labor and employment regulations,[142] and environmental regulations.[143] The U.S. Chamber of Commerce filed an amicus brief in *Michigan v. EPA*,[144] the first case in which the Supreme Court struck down a regulation on the basis of a cost–benefit analysis.[145] Other litigation shops were organized by business interests; these included the Competitive Enterprise Institute,[146] the Washington Legal Foundation,[147] the Pacific Legal Foundation,[148] the Cause of Action Institute,[149] and Americans for Prosperity.[150]

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141. *See* U.S. Chamber of Com. v. SEC, 412 F.3d 133, 136 (D.C. Cir. 2005); U.S. Chamber of Com. v. SEC, 443 F.3d 890, 893 (D.C. Cir. 2006); U.S. Chamber of Com. v. SEC, 85 F.4th 760, 766 (5th Cir. 2023).

142. *See* Brief for the Nat'l Chamber Litig. Ctr. et al. as Amicus Curiae, *In re* AFL-CIO, No. 07-1001, 2007 WL 4545877 (D.C. Cir. Dec. 18, 2007) (challenging the Occupational Safety and Heath Administration's (OSHA's) personal protective rule); Brief for the Nat'l Chamber Litig. Ctr. et al., Nat'l Assoc. of Home Builders of the U.S. v. Acosta, No. 5:17-cv-00009-M, 2017 U.S. Dist. LEXIS 233977 (W.D. Okla. June 26, 2017) (challenging OSHA's recordkeeping and anti-retaliation rules).

143. *See* Brief for the Nat'l Chamber Litig. Ctr. et al. as Amici Curiae, Michigan v. Env't Prot. Agency (EPA), 576 U.S. 743 (2015) (No. 14-46) (challenging EPA's utility Maximum Achievable Control Technology (MACT) rule); Brief for the Nat'l Chamber Litig. Ctr. et al. as Amicus Curiae, PSEG Fossil LLC v. Riverkeeper, Inc., 552 U.S. 1309 (2008) (challenging EPA's Phase II rule).

144. Michigan v. EPA, 576 U.S. 743 (2015).

145. Brief for the Nat'l Chamber Litig. Ctr. et al., *supra* note 143; *see* Michigan v. EPA, 576 U.S. 743, 759–60 (2015); *see also* Michigan v. Environmental Protection Agency, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/michigan-v-environmental-protection-agency/ [https://perma.cc/9C4S-JUKB] (last visited Feb. 8, 2025) (noting that the Chamber of Commerce filed an amicus brief in support of the challengers).

146. *Competitive Enterprise Institute*, DESMOG, https://www.desmog.com/competitive-enterprise-institute/ [https://perma.cc/6UCZ-Y3AK] (last visited Feb. 8, 2025).

147. *Washington Legal Foundation*, DESMOG, https://www.desmog.com/washington-legal-foundation/ [https://perma.cc/J5SB-H8QQ] (last visited Feb. 8, 2025).

148. *Pacific Legal Foundation*, SOURCEWATCH, https://www.sourcewatch.org/index.php/Pacific_Legal_Foundation [https://perma.cc/5YNW-MB32] (last visited Feb. 8, 2025).

149. *Cause of Action Institute*, SOURCEWATCH, https://www.sourcewatch.org/index.php/Cause_of_Action [https://perma.cc/6YHG-CGXZ] (last visited Feb. 8, 2025).

150. *Americans for Prosperity*, DESMOG, https://www.desmog.com/americans-for-prosperity/ [https://perma.cc/JCJ7-2YKZ] (last visited Feb. 8, 2025).

Other pro-business organizations pushed the government to use cost–benefit analysis. The conservative Heritage Foundation backed cost–benefit analysis in its 1981 report, Mandate for Leadership.[151] That report was widely read in the Reagan Administration, which appointed several of its authors to positions in the executive branch. The Heritage Foundation has continued to advocate for cost–benefit analysis, while conducting its own cost–benefit analyses to oppose regulations in various administrations.[152] The Mercatus Center at George Mason University has also been involved in promoting cost–benefit analysis; it is a beneficiary of significant funding from the Koch network.[153] Other pro-business (and business-funded) organizations that promoted cost–benefit analysis include the Cato Institute, the American Enterprise Institute (both independently and in joint work with the left-leaning Brookings Institution from 1998 to 2008),[154] and the Competitive Enterprise Institute.[155] These organizations have used cost–benefit analysis to oppose regulations in public debate, reports and comments submitted to regulatory agencies and Congress, and litigation. Business Roundtable, a lobbying group that represents the interests of corporate CEOs, challenged a number of financial regulations issued by the SEC and the CFTC and secured opinions striking down regulations on cost–benefit

151. CHARLES L. HEATHERLY, MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 1082 (1981).

152. *See, e.g.*, Daren Bakst, *Common Sense Finally Coming to EPA With Cost–Benefit Analysis*, HERITAGE FOUND. (June 12, 2019), https://www.heritage.org/environment/commentary/common-sense-finally-coming-epa-cost-benefit-analysis [https://perma.cc/59GT-UTT5].

153. Erica L. Green & Stephanie Saul, *What Charles Koch and Other Donors to George Mason University Got for Their Money*, N.Y. TIMES (May 5, 2018), https://www.nytimes.com/2018/05/05/us/koch-donors-george-mason.html [https://perma.cc/SLG8-JLEM].

154. *The AEI-Brookings Joint Center for Regulatory Studies*, AM. ENTER. INST. (Nov. 1, 1998), https://www.aei.org/articles/the-aei-brookings-joint-center-for-regulatory-studies/ [https://perma.cc/ZWY4-3HAA].

155. Jonathan H. Adler, *A Progressive Defense of Cost–Benefit Analysis*, CATO INST. (2022), https://www.cato.org/regulation/summer-2022/progressive-defense-cost-benefit-analysis [https://perma.cc/8MFT-VKRM]; *see* Wayne Crews & Ryan Young, *Free to Prosper: Regulatory Reform and Government Efficiency*, Competitive Enter. Inst. (Jan. 14, 2025), https://cei.org/publication/free-to-prosper-119-regulatory-reform/ [https://perma.cc/C5BR-378Z]; James V. DeLong, Robert M. Solow, Gerard Butters, John E. Calfee, Pauline Ippolito & Robert A. Nisbet, *Defending Cost–Benefit Analysis: Replies to Steven Kelman*, AM. ENTER. INST. (Apr. 11, 1981), https://www.aei.org/articles/defending-cost-benefit-analysis-replies-to-steven-kelman/ [https://perma.cc/LET3-9P3D].

grounds.[156] Business groups, including the U.S. Chamber of Commerce, pushed for CBA in the run-up to Clinton's Executive Order 12,866.[157]

At the center of the joint rise of originalism and CBA is the Koch network. The list of organizations funded by the Koch network that have promoted originalism and cost–benefit analysis includes the Judicial Crisis Network (originalism),[158] the Wellspring Committee (originalism),[159] the Marble Freedom Trust (originalism),[160] The 85 Fund (originalism),[161] Americans for Prosperity (originalism),[162] DonorsTrust (originalism),[163] the Pacific Legal Foundation (CBA),[164] the Mercatus Center (CBA),[165] the American Enterprise Institute (CBA),[166] the Cause of Action Institute (both),[167] Americans for

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156. *See, e.g.*, Press Release, Bus. Roundtable, America's Business Leaders Call for Greater Use of Cost–Benefit Analysis (Feb. 6, 2021), https://www.businessroundtable.org/archive/media/news-releases/americas-business-leaders-call-greater-use-cost-benefit-analysis [https://perma.cc/99HL-SEVG].

157. Sally Katzen, *Tracing Executive Order 12866's Longevity to its Roots*, REGUL. STUDIES CTR. (Oct. 2, 2018), https://regulatorystudies.columbian.gwu.edu/tracing-executive-order-12866s-longevity-its-roots [https://perma.cc/PN2E-76Z6].

158. Kenneth P. Vogel, *Leonard Leo's Network Is Increasingly Powerful. But It Is Not Easy to Define*, N.Y. TIMES (Oct. 12, 2022), https://www.nytimes.com/2022/10/12/us/politics/leonard-leo-network.html [https://perma.cc/3RM6-EHB4].

159. Jay Michaelson, *Billionaires Try to Buy the Supreme Court*, DAILY BEAST (Mar. 29, 2016, 1:00 AM), https://www.thedailybeast.com/billionaires-try-to-buy-the-supreme-court [https://perma.cc/FN5T-PEMX].

160. Vogel, *supra* note 158.

161. *Id.*

162. Kate Aronoff, *This Supreme Court Was Designed to Kill Climate Policies*, NEW REPUBLIC (Oct. 14, 2020), https://newrepublic.com/article/159766/supreme-court-designed-kill-climate-policies [https://perma.cc/6X3Z-UNMC].

163. Shawn Musgrave, *Leonard Leo Built the Conservative Court. Now He's Funneling Dark Money into Law Schools*, INTERCEPT (May 29, 2024, 6:00 AM), https://theintercept.com/2024/05/29/leonard-leo-donor-law-schools/ [https://perma.cc/ANQ3-MPKD].

164. Hiroko Tabuchi, *A Potentially Huge Supreme Court Case Has a Hidden Conservative Backer*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/01/16/climate/koch-chevron-deference-supreme-court.html [https://perma.cc/67LV-4S73].

165. Ricardo Alonso-Zaldivar, *Study: 'Medicare for All' Projected to Cost $32.6 Trillion*, ASSOCIATED PRESS (July 30, 2018, 1:11 PM), https://apnews.com/article/09e06d686a1a481fa76e3fd91f3fcbc2 [https://perma.cc/7FD3-T3U6].

166. *American Enterprise Institute,* SOURCEWATCH, https://www.sourcewatch.org/index.php/American_Enterprise_Institute#Ties_to_the_Koch_Brothers [https://perma.cc/PW6U-ASX3] (last visited Feb. 8, 2025).

167. Ed Pilkington & Nick Surgey, *'Get the Right Cases to the Supreme Court': Inside Charles Koch's Network*, GUARDIAN (Oct. 26, 2023, 6:00 AM), https://www.theguardian.com/us-

Prosperity (both),[168] and others too numerous to mention. As this web of connections should make clear, business's role in promoting cost–benefit analysis *and* originalism is unmistakable.

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We can now put the pieces together. Originalism and CBA, starting in the 1970s, drew on ideas that had a long pedigree—theories of legal interpretation and normative economic theory—but had never achieved consensus within legal or policy circles.[169] The economic stagnation of the 1970s and business's attacks on managerial economic policy helped persuade political leaders to implement neoliberal policies, including deregulation and tax reform.[170] Seeking intellectual allies in their fight against regulation, business organizations provided funds to proponents of originalism and CBA, and further extended their influence through the development of networks and organizations in universities, think tanks, and the legal system.[171] Both originalism and cost–benefit analysis were used to counter remaining pressures to regulate business—originalism by restricting the power of Congress and agencies, and cost–benefit by forcing agencies to provide rigorous and empirically grounded evidence for regulation.

Neither originalism nor cost–benefit analysis ever enjoyed deep public support. Congress never showed much enthusiasm for either method. Cracks also appeared in public and political support for neoliberalism as the perception developed that neoliberal policy harmed large numbers of people exposed to foreign trade[172] and caused other forms of economic disruption, interfered with valued social arrangements,[173] and accelerated inequality.[174] Neoliberalism was also blamed for the financial crisis of 2008 and social

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news/2023/oct/26/charles-koch-us-government-rightwing-supreme-court [https://perma.cc/8L5H-HJ5P].

168. Alexander Hertel-Fernandez, Caroline Tervo & Theda Skocpol, *How the Koch Brothers Built the Most Powerful Rightwing Group You've Never Heard of*, GUARDIAN (Sept. 26, 2018, 3:01 AM), https://www.theguardian.com/us-news/2018/sep/26/koch-brothers-americans-for-prosperity-rightwing-political-group [https://perma.cc/6YK7-QQ88].

169. *See infra* pp. 10–12.

170. *See* Dudley, *A Brief History of Regulation and Deregulation*, *supra* note 86, at 1033.

171. *See infra* Part 11.B.3.

172. *See* David H. Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205 (2016).

173. Julia C. Becker, Lea Hartwich & S. Alexander Haslam, *Neoliberalism Can Reduce Well-Being by Promoting a Sense of Social Disconnection, Competition, and Loneliness*, 60 BRIT. J. SOC. PSYCH. 947 (2021).

174. *See, e.g.*, Tim Koechlin, *The Rich Get Richer: Neoliberalism and Soaring Inequality in the United States*, 56 CHALLENGE 5, 25 (Mar.–Apr. 2013).

malaise exemplified by the opioid crisis.[175] But by this point, originalism and cost–benefit analysis had acquired their own momentum and achieved a degree of institutional entrenchment. The methods served as bulwarks within courts and agencies against a return to interventionist economic policy and liberal cultural norms. Originalism and CBA benefited from the advance of technocracy and power in the courts and agencies, and the accumulation of power of the courts and agencies at the expense of Congress, which was increasingly polarized and overwhelmed by the challenges of governing a large, complex, and diverse country.

III. STRUCTURAL AND FUNCTIONAL COMMONALITIES

As we explained in the prior Part, originalism and cost–benefit analysis were born at similar times to similar parents. Nonetheless, they have always existed in different legal spheres. Originalism is employed almost exclusively by judges to interpret a broad, ambiguous founding national document; cost–benefit analysis is employed almost exclusively by administrative agencies and their overseer, OIRA, to evaluate competing health and safety policy proposals. One might well expect them to have few, if any, common structural or functional traits.

And yet, like twins separated at birth, they bear a striking conceptual resemblance. They both function primarily to constrain the options available to their practitioners. At the same time, they offer some amount of internal and external flexibility and discretion, though only along certain dimensions. Both claim, or aspire to be, empirical methodologies that rest on the discovery of facts in the world. Perhaps because of this, both valorize and empower a community of experts who have the capacity to override the preferences of other governmental actors. And yet both serve as devices for building coalitions among groups with different agendas or ideologies—business interests, social conservatives, and (in the case of CBA) neoliberals. This Part canvasses those structural commonalities.

A. Rigidity and Constraint

Both originalism and cost–benefit analysis exist to perform a constraining function. Each methodology imposes upon lawmakers an obligation to consider some factors to the exclusion of others. For original public meaning

175. SHAHRZAD SHAMS, DEEPAK BHARGAVA & HARRY W. HANBURY, THE CULTURAL CONTRADICTIONS OF NEOLIBERALISM: THE LONGING FOR AN ALTERNATIVE ORDER AND THE FUTURE OF MULTIRACIAL DEMOCRACY IN AN AGE OF AUTHORITARIANISM 17, 21 (2024), https://rooseveltinstitute.org/wp-content/uploads/2024/04/RI_Cultural-Contradictions-of-Neoliberalism_Report_042024.pdf [https://perma.cc/M732-E2Q8].

originalists, the original public meaning is what matters. Constitutional purpose, consequentialist considerations, political preferences of all types, and trends in law and society are out of bounds.[176] (How to accommodate precedent is a hotly contested question.) Some critics of originalism have charged that it is sufficiently malleable that an originalist can always reach any result he or she desires.[177] But there are at least some examples of originalist judges dissenting on originalist grounds from decisions that would seem to fit their political views, which we describe below.[178] And, of course, originalism's defenders have argued that it is highly binding, even if it does leave some room for reasonable disagreement.[179]

Cost–benefit analysis plays a similar role in agency regulation, though in the opposite direction. CBA is explicitly and exclusively welfarist: the only thing that matters is whether a given policy or regulation will increase or decrease social welfare. As an initial matter, this means that the agency must consider *both* the costs and benefits of a proposed regulation, as opposed to focusing on one to the exclusion of the other. CBA also largely excludes non-welfarist values such as fairness or autonomy, except to the extent that they implicate welfare. It is also meant to exclude any other type of political consideration that might divert an agency from enacting a welfare-enhancing policy, such as the preferences of regulated parties or other stakeholders, or the desire for a politically expedient solution.

Perhaps the most prominent example of the constraint imposed by CBA is the effect it had on Donald Trump's efforts to undo a swath of Obama-era regulation. Trump took office promising to undo much of Obama's environmental regulation, and during his four years in office the, Trump EPA announced new regulations that effectively repealed the Clean Power Plan (Obama's major climate change initiative), automobile fuel economy standards, mercury emissions regulations, and a number of other programs.[180] If cost–benefit analysis were highly malleable, one might have expected EPA to produce CBAs showing that these regulations were good policy.[181] No agency has ever had more of an incentive to produce a CBA that reached a

176. *See, e.g.*, Mark E. Brandon, *Originalism and Purpose: A Précis*, 16 U. PA. J. CONST. L. 413 (2013).

177. Berman, *Originalism is Bunk*, *supra* note 23.

178. *See infra* notes 233–236 and accompanying text.

179. Scalia, *supra* note 19.

180. Jonathan S. Masur & Eric A. Posner, *Chevronizing Around Cost–Benefit Analysis*, 70 DUKE L.J. 1109, 1114 (2021) [hereinafter Masur & Posner, *Chevronizing Around*].

181. *See* Kessler & Pozen, *supra* note 4, at 1837. Kessler and Pozen argue that mature theories—including CBA—will come to accommodate competing values to such a degree that they will cease to produce results that their backers do not support. *See id.* at 1841. Contrary to this prediction, this has not (yet) turned out to be the case for CBA.

particular result than Trump's EPA did with respect to demonstrating that the Clean Power Plan failed CBA and should be repealed. But this is not, in fact, what occurred. Time after time, the Trump Administration's cost–benefit analyses reaffirmed that Obama's regulations were good policy.[182] This forced the Trump Administration into a series of dubious legal maneuvers in an effort to repeal Obama's regulations, which in turn led to some high-profile losses in court.[183]

The constraining power of originalism and CBA provides a vehicle through which courts—predominantly anti-democratic institutions—can overrule the actions of the democratic branches. This is well-understood with respect to originalism.[184] While CBA is typically understood as internal to the executive branch, in recent years courts have begun to police the use of CBA in rulemaking as well.[185] The number of cases in which courts have struck down regulations for inadequate CBAs (or for failure to conduct a CBA) is still relatively small but growing.[186]

B. Flexibility and Discretion

At the same time, both originalism and CBA accommodate some competing values and provide some degree of flexibility and discretion to their practitioners—again, giving rise to criticism from opponents who say that the methods are malleable to the point of imposing little to no constraint on their adherents.[187]

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182. *See, e.g.*, OFF. OF AIR QUALITY PLAN. & STANDARDS, ENV'T PROT. AGENCY, EPA-452/R-18-006, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS; REVISIONS TO EMISSION GUIDELINE IMPLEMENTING REGULATIONS; REVISIONS TO NEW SOURCE REVIEW PROGRAM ES-12 (2018), https://www.epa.gov/sites/default/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf [https://perma.cc/F62J-BZY7].

183. Masur & Posner, *Chevronizing Around*, *supra* note 180, at 1113.

184. *E.g.*, District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (gun laws); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022) (same); Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020) (structure of the CFPB); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010) (campaign finance law).

185. Jonathan S. Masur & Eric A. Posner, *Cost–Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 935 (2018) [hereinafter Masur & Posner, *Judicial Role*]; Michigan v. EPA., 576 U.S. 743, 760 (2015); U.S. Chamber of Com. v. SEC, 85 F.4th 760, 780 (5th Cir. 2023); Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1229 (5th Cir. 1991); Bus. Roundtable v. SEC, 905 F.2d 406, 417 (D.C. Cir. 1990).

186. Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit–Cost Analysis*, 22 GEO. MASON L. REV. 575, 592 (2015) (cataloging cases).

187. *See, e.g.*, Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 656 (2021) (arguing

In this debate between critics who charge absolute constraint and those who allege absolute flexibility, the truth lies in the middle. With respect to both methods, there is flexibility, both internal and external, to the methodology. For originalism, one important source of internal flexibility derives from the choice of the level of generality with which to explore a question. For instance, an originalist evaluating a Second Amendment case could ask whether a particular type of firearm regulation—a ban on concealed carry, for instance—was permitted at the founding. Or she could ask whether *similar types* of firearms regulation—judged at a higher level of generality—were permissible. There is also internal flexibility related to the sources employed (the choice of dictionary, for instance) and the precise question to be investigated (original public meaning vs. original intent vs. original law). Most originalists believe that the Supreme Court should respect stare decisis.[188] Given the vast body of non-originalist precedent on the books, this provides judges with substantial flexibility with respect to a wide variety of issues.

Cost–benefit analysis incorporates similar dimensions of discretion. As an internal matter, there is widespread disagreement regarding how to value benefits and costs.[189] Different agencies use different numbers and approaches when valuing mortality risk.[190] There is a debate regarding whether agencies should assess only costs and benefits experienced by Americans, or whether they should be evaluating worldwide costs and benefits.[191] Agencies can also promulgate regulations with costs that appear greater than benefits under various ill-defined circumstances.[192] This issue can arise when agencies are unable to quantify costs and benefits fully, often because the agency finds it difficult to place a monetary value on intangible goods such as dignity.[193]

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that both CBA and originalism contain enough play in the joints to permit their adherents to reach any outcome they like).

188. *See, e.g.*, William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 319 (2020) (describing the importance of stare decisis within originalism).

189. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4: REGULATORY ANALYSIS (2023) [hereinafter REVISED 2023 CIRCULAR A-4], https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf [https://perma.cc/6C38-XWVC] (providing an example of general government guidance on cost–benefit analysis).

190. *Id.* at 67.

191. *See, e.g.*, Masur & Posner, *Unquantified Benefits*, *supra* note 44, at 112.

192. *Id.* at 91–92.

193. Kessler and Pozen focus on CBA's incorporation of qualitative values such as dignity in their argument that CBA has become impure and malleable over time. Kessler & Pozen, *supra* note 4, at 1867. But, in the grand scheme of things, this is a relatively small

Both midlevel methods have had to be updated, cleansed, and revised so that they can serve the interests of the coalitions that support them and gain support from the public and elected officials. Originalism could make little headway as long as its proponents criticized *Brown v. Board of Education*.[194] Bork was hammered at his confirmation hearing for his criticisms of *Bolling v. Sharpe*.[195] Through a mix of revisionism and theorizing, originalists were able to update originalism to a more palatable form.[196] The rougher edges of cost–benefit analysis also had to be sanded off. The methodology implies, for example, the valuations used for mortality risk should be higher for wealthier people than for poorer people, and possibly lower for older people than for younger people.[197] These implications are politically unacceptable and so have been ignored.[198]

These accommodations reflect compromises among members of the coalitions that support the two midlevel principles. CBA and originalism would lose support among members of the coalitions if they dictated unpopular or harsh outcomes in salient cases. Hence, some play in the joints is necessary to avoid outcomes that would fragment the coalitions undergirding them.

C. *Technocracy and Empiricism*

The preceding discussion of constraints and exceptions relates to another commonality between CBA and originalism: their technocratic foundations. Both methodologies rely on a community of experts with specialized training.[199] In both cases, these experts receive substantial deference. And in

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matter. The invocation of values such as dignity is a species within the broader genus of agencies arguing that a regulation is cost–benefit justified due to benefits that it cannot quantify, and it is this broader genus that agencies much more commonly invoke.

194. 347 U.S. 486 (1954).

195. 347 U.S. 497 (1954); Edward Walsh & Al Kamen, *Senators Question Bork's Consistency*, WASH. POST (Sept. 17, 1987, 1:00 AM), https://www.washingtonpost.com/archive/politics/1987/09/17/senators-question-borks-consistency/219c93e5-a0bd-4ba1-ae6c-d0fbd2a27b54/ [https://perma.cc/SCG6-LFJY].

196. Michael McConnell's originalist defense of *Brown v. Board of Education* was surely a milestone in this development. *See* Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 457, 457 (1996).

197. *See, e.g.*, Cass R. Sunstein, *Lives, Life-Years, and Willingness to Pay*, 104 COLUM. L. REV. 205 (2004); Hemel, *supra* note 46, at 659.

198. CBA also is simply ignored in some cases. *See* Gould, *supra* note 49, at 716.

199. We think that in both the cases of cost–benefit analysis and originalism, the methods are less susceptible to adulteration than Kessler and Pozen think. *See* Kessler and Pozen, *supra* note 2, at 1820–21, 1845–47. Cost–benefit analysis is closely tied to economics, and economists use various disciplinary devices (peer-review, textbooks, etc.) to maintain a common

both cases the experts form an important constituency, in the bureaucracy and outside it, that helps perpetuate the method.

For CBA, the primary experts are the economists charged with monetizing and calculating the costs and benefits of a given rule. Most administrative agencies now employ many economists, who hold substantial sway within the organization; this is particularly true at the agencies such as EPA and the Department of Energy that are known for performing the most detailed and thorough CBAs.[200] These economists draw upon the work of environmental scientists, medical researchers, and others who assess the effects of a regulation—in health and safety terms—before turning that data over to the economists.[201]

For originalism, the primary experts are the originalist lawyers, scholars, and judges who employ the method. As two leading originalists put it, their role is to act as "lawyers of the past": they are charged with determining how the people in the period when the legal provision was enacted would have understood that provision.[202] This might seem like it is the same legal exercise in which all lawyers are engaged, merely transposed to another period of time. But that transposition converts it from the standard work of all contemporaneous lawyers into something else entirely. Understanding the law of another period—particularly the Founding period, more than 200 years in the past—requires a different set of skills and expertise than standard legal practice. The originalist must be familiar with entirely different sets of sources, such as dictionaries and treatises from that period and other types of writings such as the Federalist Papers; she must be skilled at reading and interpreting cases and statutes that are not written in a modern style or according to modern conventions; she must understand the basic structural rules of how law operated at the time, which might be quite different than how law operates today.[203]

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position on cost–benefit analysis even while adjusting it over time. Originalism also has produced its own community though its contours are hazier.

200. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036–38, 1051, 1080–81 (2011).

201. *Id.* at 1036–37.

202. William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 811–13 (2019). Again, there are differences of opinion among originalists as to who the relevant people are. Original public meaning originalists care about how the people who enacted the provision would have understood it as a matter of ordinary language; original intent originalists care about the subjective intentions of the people who enacted the provision; and original law originalists care about how the people charged with implementing the law—the lawyers, judges, executive-branch officials, and others—would have understood it. But the underlying concern for the law of the past is consistent across flavors of originalism.

203. *See, e.g.*, Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527, 532–34 (2019) (discussing the use of "general law" in earlier historical periods prior to the Supreme Court's elimination of it in *Erie Railroad Co. v. Tompkins*).

The empirical nature of CBA and originalism relates to several of the other structural commonalities we have discussed above. It is one source of the constraint that each of these methods imposes upon their adherents. Decisionmakers employing CBA and originalism cannot simply arrive at whatever decision they find most normatively amenable; they must hew (at least to some degree) to available facts and evidence.

This empiricism holds both advantages and disadvantages for CBA and originalism. On the one hand, the empirical and technocratic nature of the methodologies insulates them from some degree of criticism. Only insiders to the methods—most of whom are supporters—or critics who have invested the necessary time and energy to understand them well are capable of offering effective critiques. Originalism and CBA thus create their own self-referential communities of predominantly like-minded experts who police the rules of the methods and create barriers to entry for nonadherents.

Moreover, both CBA and originalism acquire some degree of power and authority from the appearance (or reality) of scientific rigor. Critics of CBA have long bemoaned what they believe to be the unjustified deference CBA commands because it involves science and quantitative reasoning.[204] Similarly, originalists have commonly skewered non-originalists with the claim that originalism requires the discovery of actual knowledge, as opposed to mere reliance on intuition or ideology. The institutional entrenchment of both methods means that only insiders can muster the authority to make criticisms and advocate reforms.

IV. THE TWILIGHT OF ORIGINALISM AND COST–BENEFIT ANALYSIS?

CBA and originalism have achieved institutional authority that their founders could only have dreamed of. Yet cracks have appeared in their foundations. Both methods have begun to lose adherents in government and have undergone strains as they have tried to adjust to a political and ideological environment that is radically different from the conditions under which the methods evolved.

A. CBA in Decline?

In the 1970s and early 1980s, center-left and center-right policymakers had agreed that regulation went too far—that it was too often inefficient.[205] Cost–benefit analysis thus restrained regulation (pleasing the right along with business interests) but held out the promise for better regulation (pleasing the

204. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

205. BERMAN, *supra* note 73, at 19.

left). But by the Obama era, cost–benefit analysis was finally being used to justify ambitious environmental, health, and safety regulations, including climate regulation.[206] This, business could not tolerate.

To understand these developments, one should distinguish modifications of cost–benefit analysis that are internal to it and modifications that are external to it. Internal modifications accept the basic framework of cost–benefit analysis while attempting to improve it. For example, controversies over discount rates and valuations of non-market amenities are internal: in principle, they can be resolved through empirical analysis. By contrast, external modifications reject the basic framework and attempt to turn cost–benefit analysis into something else.

During its rapid rise in government into the 2010s, cost–benefit analysis underwent few real changes, and those that occurred were internal. Tedious debates about the appropriate discount factor to use and the viability of contingent valuation methods did not disturb the equilibrium. Democratic administrations declared that cost–benefit analysis should account for equity and dignity, which are external to cost–benefit analysis, but did not try to implement these commands, and the agencies mostly ignored them.[207]

All of this changed in the late teens. In the years before Trump's election in 2016, businesses had complained of growing regulatory burdens stemming from the Dodd-Frank Act, the Affordable Care Act, and other Obama-era legislation and initiatives.[208] As a candidate, Trump vowed to deregulate. While Trump appointed Neomi Rao, a strong supporter of CBA, to head OIRA, his administration evaded cost–benefit analysis in several ways.[209] Trump issued an executive order requiring agencies to withdraw two regulations for every new one they issued and directing them to ignore regulatory benefits and focus only on regulatory costs.[210] He directed his regulators to

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206. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4: REGUL. ANALYSIS (2003) [hereinafter ORIGINAL 2003 CIRCULAR A-4], https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf [https://perma.cc/Q267-TZ6N].

207. Rachel Bayefsky, Note, *Dignity as a Value in Agency Cost–Benefit Analysis*, 123 YALE L.J. 1732, 1735, 1738 (2014). Such was the consensus on CBA, "President [George W.] Bush's OMB director instructed the agencies to scrupulously adhere to the principles and procedures of Executive Order 12866 and its implementing guidelines." Sally Katzen, *On Amending Executive Order 12866: Good Governance or Regulatory Usurpation*, 49 L. QUADRANGLE 91, 93 (2007).

208. Masur & Posner, *Chevronizing Around*, *supra* note 180, at 1112.

209. *See infra* Appendix Table A2.

210. Jonathan S. Masur, *The Deep Incoherence of Trump's Executive Order on Regulation*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 7, 2017), https://www.yalejreg.com/nc/the-deep-incoherence-of-trumps-executive-order-on-regulation-by-jonathan-s-masur/ [https://perma.cc/4A2X-GVGS].

eliminate as many regulations as possible.[211] But the agencies faced an obstacle in cost–benefit analysis. The agencies could not offer plausible cost–benefit analyses that justified elimination of earlier regulations that had passed cost–benefit analyses. Eventually, they developed a legal strategy of using the (now-defunct) *Chevron* doctrine to evade cost–benefit analysis. Under this legal strategy, the government relied on *Chevron* to argue that when a statute authorized an agency to regulate in one domain (say, traffic safety), that agency could not count benefits outside that domain (say, pollution reduction) when evaluating the costs and benefits of the regulation.[212] Interestingly, the Trump Administration did not eliminate cost–benefit analysis altogether, possibly because it would have encountered bureaucratic resistance, judicial pushback,[213] or even objections from the business community, which may have worried that elimination of cost–benefit analysis would have left it defenseless in a future Democratic administration.[214]

After Trump left office, the Biden Administration, too, retained cost–benefit analysis. Biden appointed Richard Revesz, a leading academic advocate of cost–benefit analysis, to lead OIRA.[215] But Biden was the first president to put some meat on the bones of the earlier commitment to equity in cost–benefit analysis. In a dramatic revision to OMB Circular A-4, OIRA announced that it would weight the valuations used in cost–benefit analysis to reflect the relative wealth of affected people.[216] The form of cost–benefit analysis was retained, as Circular A-4 continues to require agencies to tote up costs and benefits and regulate only if the benefits exceed the costs.[217] But

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211. *See* Keith B. Belton & John D. Graham, *Deregulation Under Trump*, 43 CATO INST.: REGUL. 14 (2020), https://www.cato.org/regulation/summer-2020/deregulation-under-trump [https://perma.cc/ND9G-97TR].

212. Masur & Posner, *Chevronizing Around*, *supra* note 180, at 1117–20.

213. Masur & Posner, *Judicial Role*, *supra* note 185, at 946–47.

214. U.S. CHAMBER OF COM., REGULATORY ACCOUNTABILITY ACT, https://www.uschamber.com/assets/archived/images/regulatory_accountability_act_one_pager.pdf [https://perma.cc/TD8T-BWC8] (last visited Feb. 8, 2025) (statement in support of the Regulatory Accountability Act of 2017). In a sign that the usual coalitions were in place as of 2017, this law was opposed by the traditional opponents of CBA on the left. NAT. RES. DEF. COUNCIL, OPPOSE THE "REGULATORY ACCOUNTABILITY ACT," WHICH WOULD MAKE INDUSTRY LESS ACCOUNTABLE TO THE PUBLIC, https://www.nrdc.org/sites/default/files/media-uploads/raa_fs.pdf [https://perma.cc/6QAS-ZQMU] (last visited Feb. 8, 2025); *Regulatory Accountability Act*, STATE ENERGY & ENV'T IMPACT CTR., https://stateimpactcenter.org/issues/federal-regulatory-policy/regulatory-accountability-act [https://perma.cc/LSA2-LASC] (last visited Feb. 8, 2025).

215. *See infra* Appendix Table A2.

216. REVISED 2023 CIRCULAR A-4, *supra* note 182, at 63–64.

217. *Id.* at 2–4.

while cost–benefit analysis uses real or estimated market valuations, Circular A-4 requires agencies to submit estimates of welfare impacts.[218] The effect should be to permit regulations that fail standard cost–benefit analysis but improve the well-being of lower-income people.[219] Whatever its merits, the new method is not really CBA; it is a form of welfarist analysis.[220]

These external changes to CBA produced fissures in the once-stable coalition supporting it.[221] The revised Circular A-4 was opposed by the previous thirteen presidents of the Society for Benefit–Cost Analysis because it departed from accepted methods.[222] The letter observes that there is no consensus among economists on whether or how to use distributional weights in cost–benefit analysis.[223] The letter also argues that revised Circular A-4 uses a lower discount rate than is justified by the economic literature.[224] Business groups howled in protest in numerous submissions opposing the revision to Circular A-4.[225]

The earlier tension between the views that cost–benefit analysis blocks regulation and that cost–benefit improves regulation has finally burst into the open. While CBA is anti-regulation when regulation is excessive, it is pro-

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218. *Id.* at 46.

219. We note that we are expressing no normative view on this change. One of us has written in support of a different sort of welfare analysis in the past. *See* John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost–Benefit Analysis*, 62 DUKE L.J. 1603, 1603 (2013).

220. For the distinction, see ADLER & POSNER, *supra* note 41, at 5–6.

221. It is worth noting that these fissures arose not because CBA became indeterminate or "impure" in the sense intended by Kessler and Pozen, but because it remained substantially "pure" and began to generate results that various members of its coalition did not like. *See* Kessler & Pozen, *supra* note 4, at 1837.

222. Letter from Susan E. Dudley, Joseph J. Cordes, Arnold Harberger, Richard Zerbe, Glenn Jenkins, David Weimer, et al. to Richard L. Revesz, Adm'r, Off. of Info. & Regul. Affs. (Aug. 28, 2023), https://regulatorystudies.columbian.gwu.edu/letter-oira-administrator-circular-a4 [https://perma.cc/K5SZ-YZFS].

223. *Id.* at 3–4.

224. *Id.* at 4. *But see* Daniel J. Hemel & Jonathan S. Masur, Valuing Future Lives (2023) (unpublished manuscript on file with authors) (arguing that the new discount rate is appropriate).

225. A search of comments revealed negative responses (particularly relating to distributional weights) from U.S. Chamber of Commerce, Business Roundtable, Americans for Prosperity, National Association of Manufacturers, National Federation of Independent Businesses, and American Petroleum Institute. *See Circular A-4 Modernization Updates*, REGULATIONS.GOV, https://www.regulations.gov/docket/OMB-2022-0014/comments?Filter=distributional%20weight [https://perma.cc/2HWL-4U3H] (last accessed Feb. 9, 2024).

regulation when regulation is inadequately supplied.[226] Business groups care more about deregulation than efficiency; the Trump Administration tried to accommodate their interests by working around cost–benefit analysis. Democrats have emphasized equity over efficiency as worries about economic inequality have surfaced, and so they have pushed cost–benefit analysis in that direction. These trends cast doubt on the long-term stability of CBA.[227] The bipartisan consensus that supported it has evaporated.

B. Have We Reached Peak Originalism?

A similar but less pronounced trend has occurred in constitutional interpretation. After Trump won the election and appointed Gorsuch, Kavanaugh, and Barrett, each of whom is an avowed originalist,[228] the balance of power on the Court swung in an originalist direction.[229] As we noted, this was accompanied by a newfound curiosity regarding originalism among left-leaning judges and academics looking for a mechanism for reining in a powerful conservative majority, just as originalism first came into vogue among conservatives as a means of reining in liberal judges.

It is possible that this trend will continue or even accelerate and that two decades from now, all of constitutional jurisprudence will take the form of battles between right- and left-leaning originalists over how to construe the original understanding in 1789 and 1868. But it is also possible that originalism will decline in importance in the coming years. If originalism's constraining function was a virtue when business-friendly conservatives were a minority on the Court, it may have become a vice now that they have assumed a majority.

One indication of this trend is a number of instances in which originalist Justices have dissented from a pro-business majority opinion—in so doing,

226. Masur & Posner, *Chevronizing Around*, *supra* note 180, at 1112; Jonathan S. Masur, *Regulatory Oscillation*, 39 YALE J. ON REGUL. 744, 759 (2022).

227. For similar speculation, see Gould, *supra* note 49, at 697–98, 700.

228. Neil M. Gorsuch, *Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/ [https://perma.cc/EJ8Z-NJHD]; Brian Naylor, *Barrett, an Originalist, Says Meaning of Constitution 'Doesn't Change Over Time,'* NPR (Oct. 13, 2020, 10:08 AM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time [https://perma.cc/S4RT-99U3].

229. *See* Donald A. Daugherty, *Originalism Carries On*, 24 FEDERALIST SOC'Y REV. 77 (2023), https://fedsoc.org/fedsoc-review/originalism-carries-on [https://perma.cc/JG9G-6S7R].

voted against the Chamber of Commerce—on originalist grounds.[230] In *TransUnion v. Ramirez*,[231] for instance, the Court held that consumers did not have standing to sue a credit reporting agency for violations of the Fair Credit Reporting Act if the agency had not provided their credit records to any business.[232] Justice Thomas dissented on originalist grounds, arguing that the fact that Congress had created a cause of action was enough to confer standing on the plaintiffs.[233] In *PennEast Pipeline Co. v. New Jersey*,[234] the Court held that private parties could exercise delegated eminent domain power, even over land in which the state held an interest protected by state sovereign immunity.[235] Justice Barrett dissented in an opinion joined by Justices Gorsuch, Thomas, and Kagan, in which she argued that the original understanding of the Commerce Clause did not give Congress the authority to override state sovereign immunity in this manner.[236]

And in at least one case, originalists in the majority ruled against business interests. In *Mallory v. Norfolk Southern Railway Co.*,[237] the Court ruled that jurisdiction based on registration was constitutional, enabling a tort victim to sue an out-of-state company that did business in Pennsylvania.[238] While the Justices disagreed about the original understanding, a jurisprudence that puts business interests at the mercy of eighteenth-century law would put at risk favorable rulings in countless areas—not just takings, regulation, and commercial speech, but procedural victories for business.[239]

In response, one might argue that the conservatives on the Court have long been reluctant to rule against businesses on originalist (or any)

230. Elizabeth W. Wydra & Brian R. Frazelle, *Quick Take: The Chamber of Commerce at the Supreme Court: 2020-2021*, CONST. ACCOUNTABILITY CTR. (July 1, 2021), https://www.theusconstitution.org/blog/quick-take-the-chamber-of-commerce-at-the-supreme-court-2020-2021/ [https://perma.cc/T7PA-QPJA].

231. 141 S. Ct. 2190 (2021).

232. *Id.* at 2200.

233. *Id.* at 2214, 2218 (Thomas, J., dissenting) ("The principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding . . . .").

234. 141 S. Ct. 2244 (2021).

235. *Id.* at 2251, 2263.

236. *Id.* at 2265–66 (Barrett, J., dissenting) ("We will not conclude that States relinquished their sovereign immunity absent 'compelling evidence that the Founders thought such a surrender inherent in the constitutional compact.'").

237. 143 S. Ct. 2028 (2023).

238. *Id.* at 2046–47.

239. Including *Celotex* and other summary judgment precedents; *Twombly* and *Iqbal*, which strengthened pleading standards; and a range of cases on diversity jurisdiction. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

grounds.[240] This tendency has persisted even as originalists have achieved a supermajority.[241] The contrast between originalist doctrine in non-business opinions and its absence in business opinions is difficult to dismiss as transitional or reflecting the lingering influence of stare decisis. In the 2021 case of *Cedar Point Nursery v. Hassid*,[242] for example, the Court expanded the reach of the regulatory takings doctrine—long a cause célèbre among business conservatives—without referring to the original meaning of the Takings Clause.[243] In *West Virginia v. EPA*,[244] the Court struck down the Obama Administration's Clean Power Plan and created the anti-regulatory Major Questions Doctrine without reference to original meaning.[245] The same point can be made about the Court's First Amendment doctrine. In *Federal Election Commission v. Cruz*,[246] the Court struck down a piece of campaign reform law without any discussion of the original meaning of the First Amendment.[247] These cases succeed a line of non-originalist First Amendment cases authored by originalist Justices that struck down restrictions on advertising and, in *Citizens United v. Federal Election Commission*,[248] campaign funding limits that affected businesses.[249] But all this is to say that originalism is not as fully institutionalized as it seems.

Perhaps this type of inconsistent originalism—originalism when it benefits the business community, but not when it harms it—will be the route to originalism's continued prominence. That depends on the Justices—whether they try to push originalism toward its logical extreme or prefer to rely on it when it advances their ideological views. If they do push originalism forward, it is easy to imagine the business community turning against

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240. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010).

241. For empirical evidence that the originalist commitments of Justices are not correlated with votes, see FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 190 (2013).

242. 141 S. Ct. 2063 (2021).

243. *Id.* at 2079. This followed on a long line of non-originalist takings opinions that can be traced back to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and beyond.

244. 142 S. Ct. 2587 (2022).

245. *Id.* at 2615–16. Justice Gorsuch's concurring opinion (joined only by Justice Alito) does contain some brief mentions of originalism, but all of the originalist Justices joined Chief Justice Roberts' non-originalist majority opinion.

246. 142 S. Ct. 1638 (2022).

247. *Id.* at 1656–57.

248. 558 U.S. 310 (2010).

249. *Id.* This was yet another case in which the Chamber of Commerce filed a brief supporting the pro-business—and thus anti-campaign finance reform—side.

originalism.[250] If they do not, then originalism has reached its limits—a method for overturning liberal precedents but no more than that. Also ominous for originalism are the beginnings of discontent among academics who argue that it blocks conservative or religious case outcomes.[251] If politically powerful religious organizations take heed, originalism may lose both members of the coalition on which it relies.

CONCLUSION

Our argument has emphasized the role of business in the ascendance of originalism and cost–benefit analysis. But we must return now to the role of ideas. Thinkers invented originalism and cost–benefit analysis. And they reinvented or refined these methods as often as necessary to ensure acceptance by those with political power.

Midlevel methods, because they are not derived from any specific legal source or overriding broadly shared normative commitment, are by their nature unstable. They depend upon the maintenance of often fractious coalitions. Originalism may lose its influence if originalist decisions stop serving the interests of business or religion, for example, or if the doctrine is manipulated or expanded so as to produce politically convenient results. Similarly, business may stop supporting CBA if cost–benefit analysis justifies regulation rather than deregulation, as has already happened with climate regulation.[252] Or the methods can be threatened if the broader national zeitgeist moves against them.

250. *23rd Annual Federalist Society Faculty Conference, Panel: Originalism & Its Discontents*, FEDERALIST SOC'Y (Jan. 8, 2021), https://fedsoc.org/conferences/23rd-annual-federalist-society-faculty-conference#agenda-item-panel-3-1 [https://perma.cc/PL9K-C4E6].

251. *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022); LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019).

252. *See* Masur & Posner, *Climate Regulation and the Limits of Cost–Benefit Analysis*, *supra* note 82; Jonathan S. Masur, *Cost–Benefit Analysis Under Trump: A Comment on Dan Farber's Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 665 (2019); *see also* Press Release, Env't Prot. Agency, EPA Rescinds Unnecessary Benefit–Cost Rule (June 21, 2024), https://www.epa.gov/newsreleases/epa-rescinds-unnecessary-benefit-cost-rule [https://perma.cc/58NF-FWXJ].

APPENDIX

Table A1: Supreme Court Justices' Support of Originalism

Justice	Appointing President	In Office	Support for Originalism in Office	Support for Originalism at Confirmation	Quote from Confirmation Hearing
Sandra Day O'Connor	Reagan	1981–2006	No	Somewhat Supportive 6.947[253]	"I do not believe that it is the function of the judiciary to step in and change the law because the times have changed or the social mores have changed."
Antonin Scalia	Reagan	1986–2016	Strong	Very Supportive 5.684	"I am clear on the fact that the original meaning is the starting point and the beginning of wisdom."
Anthony Kennedy	Reagan	1988–2018	No	Somewhat Supportive 4.237	"[T]he doctrine of original intent is not necessarily helpful as a way to proceed in evaluat-ing a case; but that really it is one of the things that we

253. Numbers in this column are taken from a study in which statements of support for originalism at confirmation hearings for Supreme Court nominees were coded from 1 (least) to 9 (most) by student coders. Jason J. Czarnezki, William K. Ford & Lori A. Ringhand, *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 134–37, 141–42 (2007). Coding was performed only for Rehnquist Court Justices. The qualitative judgments are ours and are not always consistent with the judgments of the student coders. The text in the last column is illustrative and does not comprise the entire discussion of originalism.

					want to know. . . . If we know what the framers intended in the broad sense that I have described, then we have a key to the meaning of the document."
David Souter	Bush (H.W.)	1990–2009	No	Not Supportive 4.211	"[W]hen I speak of original intent, or the intentionalist school, I am talking particularly about that view that the meaning of the provision or the application of the provision should somehow be confined to those specific instances or problems which were in the minds of those who adopted and ratified the provision, and that the provision should be applied only to those instances or problems. I do not accept that view."
Ruth Bader Ginsburg	Clinton	1993–2020	No	Not Supportive 2.447	"There is nothing a judge would like better than to be able to look at a text and say this

					text is clear and certain, I do not have to go beyond it to comprehend its meaning. But often that is not the case, and then a judge must do more than just read the specific words."
Stephen G. Breyer	Clinton	1994–2022	No	Not Supportive 5.842	"You go back into history, and you look at what the Framers are likely to have intended. And often—or sometimes, anyway—that will not answer the question, because they may have intended the meaning to encapsulate certain important values, which values may stay the same, but the conditions in which they are applied may have changed."
Clarence Thomas	Bush (H.W.)	1991–Present	Very Supportive	Very Supportive 5.395	"But to understand what the Framers meant and what they were trying to do, it is important to go back and attempt to understand what they believed . . . ."

John Roberts	Bush (W.)	2005–Present	Somewhat Supportive	Not Supportive	"There are some areas where a very strict textualist approach makes the most sense . . . . You stick to the language. In other areas, the Court's precedents dictate the approach . . . . So the approaches do vary, and I don't have an overarching view."
Samuel Alito	Bush (W.)	2006–Present	Somewhat Supportive	Very Supportive	"I think we should look to the text of the Constitution and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption."
Sonia Sotomayor	Obama	2009–Present	No	Somewhat Supportive	"The Constitution is a document that is immutable to the sense that it's lasted 200 years. The Constitution has not changed, except by amendment. It is a process—an amendment process that is set forth in the document. It doesn't live,

					other than to be timeless by the expression of what it says. What changes, is society. What changes, is what facts a judge may get presented."
Elena Kagan	Obama	2010–Present	No	Somewhat Supportive	"I think that there are some circumstances in which looking to the original intent is the determinative thing in a case, and other circumstances in which it is likely not to be. And I think in general judges should look to a variety of sources when they interpret the Constitution, and which take precedence in a particular case is really a kind of case-by-case thing."
Neil Gorsuch	Trump	2017–Present	Very Supportive	Very Supportive	"I do believe the original understanding of a text is very important to a judge, and I do believe any good judge wants to know that information, and I do."

Brett Kavanaugh	Trump	2018–Present	Very Supportive	Very Supportive	"I pay attention to the text, the original public meaning. But informed, I always want to make sure I say precedent."
Amy Coney Barrett	Trump	2020–Present	Moderately Supportive	Very Supportive	"I interpret the Constitution as a law, that I interpret its text as text, and I understand it to have the meaning that it had at the time people ratified it . . . . So that meaning does not change over time, and it is not up to me to update it or infuse my own policy views into it."
Ketanji Brown Jackson	Biden	2022–Present	No	Not Supportive	"[L]ooking at [the Constitution's] words are not enough to tell you what they actually mean. You look at them in the context of history, you look at the structure of the Constitution, you look at the circumstances that you are dealing with in comparison to what those words meant at the time that

					they were adopted, and you look at precedents that are related to this topic."

Table A2: Office of Information and Regulatory Affairs (OIRA) Administrators' Support of Cost–Benefit Analysis

Administrator	**Appointing President**	**Term**	**Support for CBA at Confirmation Hearing**	**Quote from Confirmation Hearing**
James C. Miller III	Reagan	1981	Very Supportive	"[B]enefit–cost analysis, subject to judicial review, would mean a significant improvement in the performance of the regulatory agencies. It would increase the benefits to society of the things that they do, and it would reduce the costs."[254]
Christopher C. DeMuth	Reagan	1981–1984	Somewhat Supportive	"To the extent the faith is justified, the result [of cost–benefit analysis] will be to minimize the net costs of regulation, for net costs are zero when costs and benefits are equilibrated at the margin. But if the faith is not justified—if, for example, cost/benefit analysis is simply used as another weapon in the battle of competing

254. JOHN CHARLES DALY, MARK J. GREEN, HOWARD M. METZENBAUM, JAMES C. MILLER III & ALAN K. SIMPSON, AM. ENTER. INST., HEALTH, SAFETY, AND ENVIRONMENTAL REGULATION: HOW EFFECTIVE? 1, 11 (1980), https://www.aei.org/wp-content/uploads/2016/03/AEIForums43.pdf [https://perma.cc/X8RX-E53E].

				private interests—the result could be to delay the regulatory process even further and introduce additional uncertainty over the ultimate resolution of individual cases, thus increasing the true economic burden of regulation."[255]
Douglas H. Ginsburg	Reagan	1984–1985	Very Supportive	Released papers pointing to the costs imposed by agency regulations.[256]
Wendy Lee Gramm	Reagan	1985–1988	Unknown[257]	
S. Jay Plager	Reagan	1988–1989	Very Supportive	"Ideally, agencies' regulatory decisions should be based on a careful assessment of all of the potential costs and benefits of alternative courses of action . . . . OIRA's role in reviewing agency assessments is in large measure to assure that no significant aspects of either benefits or costs have been overlooked . . . ."
Sally Katzen	Clinton	1993–1997	Supportive	"I do not think there is much dispute, as has been said, of the appropriateness of applying some [cost–benefit]

255. Christopher C. DeMuth, Presentation at Harvard University: Domestic Regulation and International Competitiveness (May 1980), https://ccdemuth.com//wp-content/uploads/2015/03/Domestic-Regulation-and-International-Competitiveness.pdf [https://perma.cc/DTA2-2795].

256. *See generally* Douglas H. Ginsburg, *Making Automobile Regulation Work: Policy Options and a Proposal*, 2 HARV. J.L. & PUB. POL'Y 73 (1979); Douglas H. Ginsburg, *Antitrust, Uncertainty, and Technological Innovation*, 24 ANTITRUST BULL. 635 (1979).

257. We found no information on Wendy Lee Gramm's views of cost–benefit analysis prior to her confirmation.

				analysis to regulations. Here, as elsewhere, the devil is in the details, what costs, what benefits, how do you quantify them, and those are questions that may lead to some disagreement. But I believe there is a very broad consensus in support of analyzing regulations to see, generally speaking, the costs that they impose and, generally speaking, the benefits that they convey."
John T. Spotila	Clinton	1999–2000	Supportive	"Conceptually, I am a great believer that agencies need to do a systematic analysis. They need to understand to the extent possible the consequences of what they propose . . . ."
John D. Graham	Bush (W.)	2001–2006	Very Supportive	"I see the purpose of these analytic tools, like risk analysis and cost/benefit analysis, not necessarily to create fewer regulations or more regulations, but to create a smarter regulatory system, one that can save more lives and protect the environment more effectively but at lower cost than we are currently doing now."
Susan E. Dudley	Bush (W.)	2007–2009	Least Supportive	"So there are a lot of different issues that need to be factored in, and cost/benefit analysis is not something that I would think is the—it certainly would not be a deciding factor."

Cass R. Sunstein	Obama	2009–2012	Supportive	"My own approach to cost–benefit analysis is inclusive and humanized, I would say . . . . what I have emphasized in my academic writing is that cost–benefit analysis should not put regulation in an arithmetic strait jacket; that there are values and morals, distributional, aesthetic, and otherwise, that have to play a part in the overall judgment about what is to be done."
Howard Shelanski	Obama	2013–2017	Very Supportive	"I think cost–benefit analysis is an extremely important, valuable tool that could be used by any entity that is engaged in regulation."
Neomi Rao	Trump	2017–2019	Very Supportive	"[A]gencies will identify regulations to eliminate, and those regulations might be ineffective ones, or excessively burdensome, and those regulations will have to meet a cost–benefit analysis for deregulation before they are going to impose any new regulatory burdens."
Paul J. Ray	Trump	2020–2021	Very Supportive	"One [principal objective] is to ensure that OIRA's long tradition of cost–benefit analysis and other analytic tools remains incredibly robust and, indeed, to built upon and ensure there is a strong continuation of that practice."

Richard Revesz	Biden	2022–2025	Very Supportive	"In all of my work I have stressed the importance that cost–benefit analysis should play in the regulatory process, except where prohibited by statute. The reason is that regulations should evaluate all consequences, positive and negative, on the American people."

Table A3: Key Congressional Bills Supporting Cost–Benefit Analysis (1970–Present)

Bill	Introduction Date	Enactment Date
S.3384–Consumer Protection Act	05/05/1976	Died in Congress
H.R.13936–Regulatory Reform Act	05/20/1976	Died in Congress
H.R.2586–Regulatory Reform Act	01/27/1977	Died in Congress
H.R.4802–Regulatory Reform Act	03/10/1977	Died in Congress
H.R.4947–Regulatory Reform Act	03/14/1977	Died in Congress
S.54/H.R.75–Regulatory Cost Reduction Act of 1979	S: 01/15/1979 H: 01/15/1979	Died in Congress
S.401/H.R.700–Regulatory Cost Reduction Act of 1981	S: 02/05/1981 H: 01/06/1981	Died in Congress
S.405/H.R.3339–Regulatory Reform Act of 1981	S: 02/05/1981 H: 04/30/1981	Died in Congress
H.R.2327–Regulatory Reform Act of 1983	03/24/1983	Died in Congress
S.1080/H.R.3319–Regulatory Reform Act	S: 04/19/1983 H: 06/15/1983	Died in Congress
H.R.1351–Regulatory Reform Act	02/28/1985	Died in Congress

S.496/H.R.4699–Computer Matching and Privacy Protection Act of 1988	S: 02/05/1987 H: 05/26/1988	10/18/1988
H.R.3005–Federal Regulation Reduction, Reform, and Budget Act of 1993	08/06/1993	Died in Congress
H.R.4771–Federal Mandate Accountability and Reform Act of 1994	07/14/1994	Died in Congress
S.1/H.R.5–Unfunded Mandates Reform Act of 1995	S: 01/04/1995 H: 01/04/1995	03/22/1995
S.219/H.R.450–Regulatory Transition Act of 1995	S: 01/12/1995 H: 01/09/1995	Died in Congress
H.R.690–Risk Assessment and Cost–Benefit Analysis Act of 1995	01/25/1995	Died in Congress
S.291–Regulatory Reform Act of 1995	01/27/1995	Died in Congress
S.343–Comprehensive Regulatory Reform Act of 1995	02/02/1995	Died in Congress
S.348–Regulatory Oversight Act of 1995	02/02/1995	Died in Congress
H.R.821–Middle Class Regulatory Relief Act of 1995	02/03/1995	Died in Congress
S.942/ H.R.3136–Contract with America Advancement Act of 1996	S: 06/16/1995 H: 03/21/1996	03/29/1996
S.1001–Regulatory Procedures Reform Act of 1995	06/29/1995	Died in Congress
H.R.2990–Significant Regulation Oversight Act of 1996	02/28/1996	Died in Congress
S.981–Regulatory Improvement Act of 1998	06/27/1997	Died in Congress

H.R.4085–Significant Regulation Oversight Act of 1998	06/18/1998	Died in Congress
H.R.4863–Government Regulatory Improvement and Performance Act of 1998	10/20/1998	Died in Congress
S.746–Regulatory Improvement Act of 1999	03/25/1999	Died in Congress
H.R.3311–Regulatory Improvement Act of 2000	11/10/1999	Died in congress
H.R.5123–Major Regulation Cost Review Act of 2004	09/22/2004	Died in Congress
H.R.3143–Major Regulation Cost Review Act of 2005	06/30/2005	Died in Congress
S.1519–Small Business Economic Impact Analysis Act of 2005	07/27/2005	Died in Congress
H.R.6512–Major Regulation Cost Review Act of 2008	07/16/2008	Died in Congress
H.R.6223–Congressional Office of Regulatory Analysis Creation and Sunset and Review Act of 2010	09/28/2010	Died in Congress
H.R.166–Internet Investment, Innovation, and Competition Preservation Act	01/05/2011	Died in Congress
H.R.10–Regulations From the Executive in Need of Scrutiny Act of 2011	01/20/2011	Died in Congress
H.R.2175–Regulatory Balance Act	06/14/2011	Died in Congress
S.1606/H.R.3010–Regulatory Accountability Act of 2011	S: 09/22/2011 H: 09/22/2011	Died in Congress
S.1965–Startup Act of 2011	12/08/2011	Died in Congress

S.3217/H.R.5893–Startup Act 2.0	S: 05/22/2012 H: 06/05/2012	Died in Congress
S.3468–Independent Agency Regulatory Analysis Act of 2012	08/01/2012	Died in Congress
H.R.367–Regulations From the Executive in Need of Scrutiny Act of 2013	01/23/2013	Died in Congress
S.310/H.R.714–Startup Act 3.0	S: 02/13/2013 H: 02/14/2013	Died in Congress
S.1029/H.R.2122–Regulatory Accountability Act of 2013	S: 05/23/2013 H: 05/23/2013	Died in Congress
S.1173–Independent Agency Regulatory Analysis Act of 2013	06/18/2013	Died in Congress
H.R.2572–Regulatory Relief for Credit Unions Act of 2013	06/28/2013	Died in Congress
H.R.2804–Achieving Less Excess in Regulation and Requiring Transparency Act of 2014	07/24/2013	Died in Congress
H.R.3863–Sound Regulation Act of 2014	01/14/2014	Died in Congress
H.R.4304–Jumpstarting Opportunities with Bold Solutions Act	03/26/2014	Died in Congress
S.2988–Regulatory Cost Assessment Act of 2014	12/08/2014	Died in Congress
S.181/H.R.962–Startup Act	S: 01/16/2015 H: 02/13/2015	Died in Congress
S.226/H.R.427–Regulations from the Executive in Need of Scrutiny Act of 2015	S: 01/21/2015 H: 01/21/2015	Died in Congress

H.R.1155–Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2016 (SCRUB) Act of 2016	02/27/2015	Died in Congress
S.1607–Independent Agency Regulatory Analysis Act of 2015	06/18/2015	Died in Congress
S.2006/H.R.185–Regulatory Accountability Act of 2015	S: 08/06/2015 H: 01/07/2015	Died in Congress
S.21/H.R.26–Regulations from the Executive in Need of Scrutiny Act of 2017	S: 01/04/2017 H: 01/03/2017	Died in Congress
H.R.998–Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act	02/09/2017	Died in Congress
S.951/H.R.5–Regulatory Accountability Act of 2017	S: 04/26/2017 H: 01/03/2017	Died in Congress
S.1448–Independent Agency Regulatory Analysis Act of 2017	06/27/2017	Died in Congress
H.R.3179–Transparency and Accountability for Business Standards Act	07/11/2017	Died in Congress
S.1877–Startup Act	09/27/2017	Died in Congress
S.328–Startup Act	02/04/2019	Died in Congress
S.869–Independent Agency Regulatory Analysis Act	03/26/2019	Died in Congress
S.3208–Regulatory Accountability Act	01/16/2020	Died in Congress
S.4136/H.R.7478–Congressional Oversight to Secure Transparency of Relocations Act (COST) of Relocations Act	S: 07/01/2020 H: 07/01/2020	Died in Congress

S.392/H.R.1272– Congressional Oversight to Secure Transparency of Relocations Act (COST) of Relocations Act	S: 02/23/2021 H: 02/23/2021	Died in Congress
S.2278/H.R.8796–Regulatory Accountability Act	S: 06/24/2021 H: 09/09/2022	Died in Congress
S.2279–Independent Agency Regulatory Analysis Act	06/24/2021	Died in Congress
S.5287–Startup Act	12/15/2022	Died in Congress
H.R.261–Article I Regulatory Budget Act	01/10/2023	Died in Congress
S.487/H.R.1106– Congressional Oversight to Secure Transparency of Relocations Act (COST) of Relocations Act	S: 02/16/2023 H: 02/17/2023	Died in Congress
S.839–Regulatory Transparency Act of 2023	03/16/2023	Died in Congress
S.1615/H.R.442–Regulatory Accountability Act	S: 05/16/2023 H: 01/20/2023	Died in Congress