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Original Article

Genealogies of cost–benefit analysis in transatlantic regulatory cooperation

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Abstract Cost–benefit analysis (CBA) has become a quintessential tool in administrative law informing a variety of modes of regulatory governance. It provides a justification for the regulation of markets based on a quasi-scientific and seemly neutral logic to assess the impact of secondary legislation by government agencies. A new frontier for CBA is the promotion of trade liberalization. It features prominently in the regulatory chapter of the Transatlantic Trade and Investment Partnership (TTIP). During the TTIP negotiations, scholars deployed CBA as a "neutral" tool to achieve greater convergence or reassert divergence and experimentalism in regulatory governance across the Atlantic. A genealogical examination reveals the existence of at least two strains of cost–benefit analyses in Western legal thought. The first one goes back to social orientations in private law translating into social–scientific expertise for regulators and proportionality for judges. The second one goes back to neoclassical economics in private law translating into economic–scientific expertise for regulators and balancing for judges. Today, scholars in their convergentist, divergentist, or experimentalist approaches to governance deploy CBA and regulatory science as a neutral and quasi-scientific method to legitimize the subjection of national regulation to more demanding standards. Instead, the genealogical approach reveals that CBA is a contingent and open-ended regulatory tool that justifies Contentious political decisions about regulatory strategies while allowing lawyers who apply CBA to remain agnostic on its distributive impact.
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Introduction

In 2013, the European Union (EU) and the United States (US) began their negotiation on the Transatlantic Trade and Investment Partnership (TTIP), aiming

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to improve the trade and investment flow across the Atlantic. The negotiations revealed trade barriers created by regulatory differences between the US and the EU, impeding over 200 billion dollars per year in potential annual gains for producers and consumers on both sides (Delegation of the European Union to the United States, n.d). These divergences are "unintended" non-tariff barriers for exporters when they have to comply with different, and often "unnecessary," standards on food labeling or packaging to address product safety requirements and comply with environmental regulations (European Commission, 2016a). In drafts and leaked documents from EU negotiators, the chapter on regulatory cooperation states that there should be no restrictions on the right of the parties to maintain and adopt measures to achieve legitimate policy objectives (European Commission, 2016b). However, national stakeholders and civil society alike worry that, through international regulatory cooperation (IRC), the new TTIP regime will constrain the autonomy and independence of domestic regulators.

In order to avoid duplicative, costly, and unjustified regulatory barriers, the TTIP negotiators have relied on a cost–benefit analysis (CBA) rationale to analyze the impact of future regulation and carry out a retrospective analysis of the existing regulation to eliminate red tape (European Commission, 2016b).[1] Lawyers and regulators alike are committed to regulatory impact assessments to first determine whether regulation is needed or not and whether there are alternatives to regulation. Impact assessments rely on CBA rationale and regulatory science in order to promote market efficiency (European Commission (2016c)).[2]

Today, EU and US administrative agencies and judges reviewing regulations maintain different attitudes toward CBA, leading toward divergent outcomes or organizing principles for regulation (e.g. approaching scientific uncertainty *vis a vis* new risks) (Sunstein, 2005, p. 351). Instead of focusing on a singular or dominant approach to regulatory governance (Bevir and Phillips, 2017, p. 17), this article considers several differing genealogies of CBAs and their critiques, taking into consideration the totality of ideologies that lies beneath the emergence of a specific belief about governance within a certain period of time (Foucault, 1977, p. 76). The genealogical approach departs from assessing convergence, divergence, or experimentalism in regulatory governance, focusing instead on the strengths and weaknesses, breakdowns, and forms of resistance in legal reasoning to show the contingent and historical construction of a scientific rationality for regulators and judges (Foucault, 1977, pp. 76, 80).

Part I offers a background of the so-called "horizontal" dimension or the regulatory chapter of the TTIP, as opposed to its "vertical" chapters addressing specific industry sectors. Part II maps three modes of regulatory governance that lawyers have developed through convergence, divergence, and experimentalist approaches in order to reconcile the challenges that have emerged in international regulatory cooperation (IRC). Part III traces the existence of two genealogies of cost–benefit analysis that had profound influence in the way regulators and judges assess

the impact and effects of regulations in markets and societies. In departing from regulatory governance as a unified concept with a coherent scientific rationale, this article shows the evolving meaning, implementation, and critiques of CBA as a non-neutral tool driving decision making. Part IV shows how convergence, divergence, and experimentalist approaches to regulatory governance fail to engage with the historical contingency and the critiques of CBA as a non-scientific tool for regulatory review (Rose-Ackerman, 2011), as well as the pressure placed on the Commission through TTIP to adopt CBA for regulatory review (Bartl, 2016). The article debunks the notion that CBA maintains a linear and rational intellectual history, and that its application, despite its global proponents praising it for its transparency and neutrality in regulatory review (see note 1) (Livermore *et al*, 2013), remains highly conflicted and indeterminate (Kennedy, 1981, p. 387).

I. The Horizontal Dimension of the Transatlantic Trade and Investment Partnership (TTIP)

The TTIP negotiations are not the result of a new trend toward greater trade liberalization between the EU and the US (Egan, 2014). While the progress toward the current negotiations started in 2013 appears steady and gradual, in reality the EU and the US sought to identify opportunities for further trade liberalization since 1995 by establishing the Transatlantic Business Dialogue (TABD) in Madrid to serve as a forum for greater cooperation and communication for industry. After 2000, experts recognized that substantive liberalization efforts would require confronting regulatory divergences that remained in place despite transatlantic sectoral mutual recognition agreements in the 1990s (Shaffer, 2002, p. 37).

Even though membership in the World Trade Organization reduced tariff barriers and achieved substantial liberalization between the two markets, differences in domestic regulations, industry standards, and administrative practices continue to be significant non-tariff trade barriers. WTO disputes, alone, illustrate the extent to which behind the border governmental action has posed a challenge to market access, whether it concerns agriculture imports from the US (such as beef, chicken, or genetically modified soybeans) (European Communities – Measures Affecting the Approval and Marketing of Biotech Products, 2006; European Communities – Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States) or European exports (such as chicken and cheese) (United States – Measures Affecting Imports of Poultry Products, 1997). Since the EU has refused to implement some WTO Appellate Body rulings on beef raised with hormones and genetically modified agriculture products, some of these trade barriers appear insurmountable. While negotiators pursue a grand bargain that seeks to eliminate regulatory differences and chart a new path for transatlantic trade relations based on scientific rationality, to others these challenges appear substantial, institutional and in some sense even existential (Pollack and Shaffer, 2009).

One often-cited cause of the intractability of regulatory conflict is the differing sets of regulatory philosophies in the US and Europe. The US is said to be "risk-taking," while Europe is portrayed as "risk-averse." While this binary assessment has been challenged by political scientists and lawyers alike, it nevertheless maintains salience to policymakers and regulators involved in the negotiations (Vogel, 2012; Wiener and Rogers, 2002; Wiener *et al*, 2011; Kimball, 2015). While public opinion remains concerned with whether the EU and the US can reconcile such divergent regulatory approaches, especially in light of the Greenpeace leaks on TTIP (Greenpeace, n.d.), the technical conversation spurred by lawyers and regulators resorts to the use of convergence in legal reasoning, learning from regulatory variation and scientific rationality in regulatory governance (Majone, 1996).

In fact, lawyers, regulators, and trade negotiators have realized that the challenges to overcome the so-called technical barriers to trade are not merely philosophical, but grounded in legal and regulatory practices (Bermann, 2000). These issues are addressed in the Commission's proposal on Regulatory cooperation (European Commission, n.d.). Take, for instance, industry standards and their administrative supervision or legal incorporation by agencies (Bremer, 2012, p. 136). These have featured prominently in the TTIP negotiations, due to the different production and use of industry standards across the Atlantic. For instance, in Europe, standards are set and adopted by three centralized institutions, to which all national standards bodies are subordinate. National standards bodies also comprise the central standard bodies' membership. By contrast, the US is home to a "wild west" of standards bodies, and the market often dictates the validity of these standards. The result is that, while hundreds of product standards exist, only a small share – about 20 per cent – makes up more than 80 per cent of the market. Nonetheless, regulatory assessments of standards vary widely (Egan, 2001; Büthe and Mattli, 2011).

Led by the European Commission and its trade negotiators, the EU has been willing to share drafts of its position and open up its administrative system to scrutiny from its US counterpart to identify "regulatory equivalences" and commonalities on horizontal regulatory issues (Bercero, 2015). Yet this transatlantic regulatory dialogue has created not only numerous tensions between the two countries but also several important roadblocks in the TTIP negotiations. For instance, the European Commission's Directorate General (DG) for Trade faces political and technical pressures from the United States Trade Representative (USTR) to accept the advantages of its regulatory system as more efficient and transparent with streamlined cost–benefit procedures.

On the other hand, the Commission prides itself on its methodological pluralism in carrying out impact assessments and its proactive, more democratic, institutional attempt to involve large groups of civil society representatives in regulatory processes (Meuwese, 2015). For instance, DG Trade has supported the creation of

an international regulatory mechanism in TTIP modeled after the Canada–US Regulatory Cooperation Council (RCC) in order to facilitate the exchange of information among agencies rather than reproduce the OIRA model of centralized supervision in US regulation (Chase and Pelkmans, 2015).

Because of these challenges and tensions in the TTIP negotiations, regulatory governance scholars engaged in transatlantic regulatory cooperation in radically different ways by seeking for solutions or embracing its differences.

II. Convergence, Divergence and Experimental Approaches to Regulatory Governance

To explain the different approaches to regulatory governance, scholars have addressed the issue from several normative perspectives. From the perspective of convergentists scholars, trade negotiators and regulators share common aspirations to establish the "best" administrative law practices and "common" institutional arrangements. From the perspective of divergentists scholars, history and institutional path dependencies show that regulatory cooperation will gloss over fundamental differences, creating unintended consequences in transatlantic trade agreements. Finally, experimentalists embrace regulatory cooperation as a "living agreement" or a "laboratory" in which convergence might happen or not happen through bottom-up processes ascertaining regulatory equivalences and learning by monitoring.

Regulatory governance in TTIP

	Goals	*TTIP challenges*	*Regulatory tools*	*CBA*
Convergentists	Approximate regulatory assumptions	Transparency and efficiency in regulation	CBA promoting transparency and efficiency	Streamlining and finding middle ground for CBA
Divergentists	Comparative law and history of regulation	Regulatory path dependency	Functional equivalents: CBA, proportionality and precaution	CBA should be abandoned or used with caution
Experimentalists	Learning through regulatory variation by monitoring and continually adjusting regulation	Eliminate unnecessary regulatory burdens and improve regulatory approaches	Regulatory equivalences: sharing objectives, different means and mutual monitoring	Nudge regulators to confront CBA discrepancies for more efficient and better global analysis

From a convergence standpoint, scholars are committed to achieving transatlantic regulatory cooperation because there has been a commitment of industry and government alike since the 1990s (Parker, 2016). To this end, scholars of Global Administrative Law (GAL) have put forward an ambitious agenda to achieve greater convergence among administrative law principles (Krisch and Kingsbury, 2006, p. 1). In tracking commonalities and differences, the convergentist aspirations lie in Western administrative principles of promoting public transparency and public participation in administration. Yet, in practice, transparency has proven to be divisive throughout the TTIP negotiations, in part because it created different opportunities for groups and individuals in regulatory decision-making processes (Nicola, 2015). In the cost–benefit analysis, many found a central tool to promote wealth maximization and regulatory efficiency (Alemanno, 2012, pp. 6–7). These scholars aim at improving regulatory quality by making regulation more transparent and efficient while balancing autonomy and coordination (Parker, 2016, p. 9). Therefore, their TTIP proposal "streamlines" CBA and differing European and US approaches to impact assessments by establishing a middle ground between the two (Wiener and Alemanno, 2015).

From a divergentist standpoint, comparative administrative lawyers have shown that there are regulatory divergences between administrative law regimes. Their work highlights the EU's more "proactive" approach in comparison with the US's "reactive" approach to regulating their respective markets. As a result, EU economic regulation invites producers and labor groups to the negotiating table early on through institutional channels in a neo-corporativist fashion (Bignami, 2016). On the other hand, the US regulatory focus is reactive insofar as it invites ex-post a plurality of stakeholders to participate in the regulatory process after the proposed rule is released (Bignami, 2010).[3] For instance, the US prides itself on its notice-and-comment process for agency rulemaking because it ensures a high level of participation, ranging from economic actors to civil society at large, while requiring agencies to take into consideration the public comments under the threat of litigation. Although, in practice, this process does not entail "effective" opportunities for participation – agencies are not required to monitor participation and solicit underrepresented groups – the USTR can put forward its notice-and-comment process as a hard and tested model for regulatory participation at the negotiating table (Wagner, 2016).

Divergentists tend to downplay the importance of achieving regulatory cooperation through TTIP. Rather than addressing how to achieve regulatory cooperation, these scholars continue to demonstrate the reasons why differences exist and why regulatory review should be understood more broadly in the context of executive and judicial branches (Rose-Ackerman, 2013). For instance, rather than seeking to improve CBA as an appropriate tool for regulatory review, Susan Rose-Ackerman argues that its hegemony ought to be challenged due to the limited

number of policy choices and values that are included in the analysis when efficiency is the overriding concern (Rose-Ackerman, 2011).

Finally, experimentalist scholars have coined the idea of Global Experimental Governance (GXG) out of recognition that there are gains to be made not only in terms of comparative advantage and international trade, but also through acquiring new skills and learning through regulatory variation across different countries (de Burca *et al*, 2014). Regulatory variation could increase gains from trade and additional information sharing by taking into account locally formed opinions. However, proponents of GXG outline some of its underlying and necessary conditions, such as uncertain and diverse environments, the commitment of key actors on basic principles, and cooperation among newly formed civil society actors as agenda setters or problem solvers (de Burca *et al*, 2014, p. 13). For instance, Wiener and Alemanno (2015) have shown that in TTIP regulatory variation can be carried out in many different ways to achieve learning through experimentation.

Experimentalists argue in favor of an experimentalist laboratory for regulation in TTIP that will leverage the benefits of variation through a central governing body which can monitor and select the best practices for regulatory lawmaking (Wiener and Alemanno, 2015, pp. 9–21). This permanent body would identify sectors where new regulation may be aligned and facilitate cooperation through monitoring and exchanging information on principles, establishing procedures for participation, and carrying out impact assessments (European Union, 2015). Their experimental approach, however, presumes that the penalty for noncooperation is a high economic loss and that both the EU and US share Western administrative law values. Experimentalist scholars are increasingly looking at TTIP as a way to induce regulators in the EU and the US to consider the global impact of regulation and align their regulatory outcomes. This may occur through mutual recognition of existing standards or by using regulatory equivalences that allow learning from variation (Sabel and Zeitlin, 2012). This transatlantic laboratory will further allow regulators to discuss their solutions to different administrative problems and to gather public input that is essential for the success of this mechanism at all stages (Wiener and Alemanno, 2015). Only then will regulators be able to decide whether and how regulations can converge. Experimentalist lawyers aim to reconcile conflicting interests by balancing reasons that can universally apply to identify best practices, allowing each country to decide whether and how regulatory convergence should occur. In doing so, they promote CBA as a neutral, coherent and scientific tool for international regulatory cooperation.

Convergentist, divergentist and experimentalist scholars all engage in knowledge production with more or less emphasis on TTIP to ensure that lawyers assisting trade negotiators and regulators remain “on top” of regulatory governance (Garth and Dezelay, 2014).

III. Genealogies of Cost–Benefit Analysis in Administrative Law

This part introduces a genealogical approach to tracing the development of two alternative modes of understanding of CBA as used today in regulatory reviews. A first genealogy can be traced back to the “socialization” of private law in the twentieth century, which introduced pluralist, corporativist, and organic understandings of society and its institutions (Kennedy, 2006, pp. 40–41). In legal reasoning, this led lawyers, judges, and jurists to deploy social–scientific principles for regulation and balancing tests for judicial review. A second genealogy can be traced back to the Chicago law and economics approach to private law in the 1970s, which later influenced 1990s administrative law in which cost–benefit analysis became central to welfare economics based on Kaldor–Hics efficiency, transaction costs, and willingness to pay (Kaplow and Shavell, 2002). Each genealogy appears well entrenched on each side of the Atlantic as the social genealogy resonates with EU-educated economists and lawyers working in the Commission, whereas the Chicago law and economics genealogy is predominant among US-trained economists and lawyers working in the executive branch.

1. The Social Genealogy of CBA

In contrast to the formalist mid-nineteenth century approach to contract law that was rooted in natural law and translated into private law through the notion of individual rights and aimed to guarantee private individuals freedom from any interference in the enjoyment of their private rights (Wieacker, 1967a, b),[4] a social intellectual tradition emerged in Europe at the turn of the century. During the early twentieth century, the idea that the state was increasingly involved in market economies in social democracies led to the expansion of the administrative state with the goal of limiting non-neutral private law regimes. For instance, lawyers began showing how freedom of contract and private property rules created unequal entitlement regimes through coercion rather than “market freedom” (Kennedy, 1991). During the Weimar Republic, scholars like Herman Heller, Franz Neuman and Hugo Sinzheimer analyzed labor, consumer and housing law to advance ideas of neo-corporatism, which built on theories of legal pluralism in administrative law put forward by Otto Von Gierke and Santi Romano.

The social intellectual tradition created its own “vocabulary of legal concepts” (Kennedy, 2003) that underwent a radical shift when European scholars elaborated a critique of contractual freedom (Collins, 1997). Their approach was based on the social and moral perception that industrialization heightened existing economic disparities and created unfairness between contracting parties. For instance, Jhering’s (1879) critique of individual sovereignty brought into question the coherence of legal reasoning, which was no longer a matter of deductive interpretation but was rooted in mechanical social causes and moved by human

ends. French and German scholars, such as Josserand or Gierke, gained prominence by reacting to the formalist thinking of the classical era (Kennedy, 2003).[5]

For social jurists, the unfairness resulting from the individualist doctrine of freedom of contract was to be corrected by an objective notion of contract, endorsing altruistic values and state intervention. A contract was no longer based on the subjective intention of the parties as an expression of their free will, but required a limitation of contractual freedom to fulfill the objective function of those transactions involving a plurality of social and economic interests (Durkheim, 1998). In response to the rapid industrialization and the growing interdependence of social reality in the beginning of the twentieth century, the objective function of contract developed as a doctrine to address inequalities in Western legal thought and to protect disadvantaged groups and minorities through special legislations (Wieacker, 1967a, b).

The notion of an organic solidarity was founded by republican states on the division of labor which simultaneously increased specialization and interdependence among individuals (Donzelot, 1984). The rise of organic solidarity in an increasingly specialized and interdependent society whose members were informed through representatives of the administrative state in the housing sector after WWI became a “coerced housing economy” in which state agencies were intimately involved (Wieacker, 1967a, b). While state regulators were seeking to adopt more objective socio-scientific criteria, judges deployed proportionality as quasi-administrative reviewers of regulation. Proportionality became the quintessential method for judges to produce ad hoc rules that were based on balancing conflicting interests of the parties while making legal reasoning appear more rational and objective.

A quintessential example of this form of common faith in judicial balancing or proportionality in German and French legal traditions is evident in the famous *Cassis de Dijon* ruling in 1979 (Case 120/78, Rewe-Zentral A.G. v. Bundesmonopolverwaltung für Branntwein).[6] In *Cassis*, the European Court of Justice (ECJ) held that a legislation having the equivalent effect of quantitative restrictions to trade,[7] thus limiting the free movement of goods, was permitted only in non-discriminatory cases when a Member State, regulating the alcohol content for consumer protection or public health reasons, was doing so in a proportionate manner. After *Cassis*, European judges were called to balance whether any Member State legislation to protect a specific public interest could limit the market freedoms (goods, people, services and capitals) as long as the measure at stake was proportionate to the goals of the measure in question. Proportionality allowed judges, almost in a parallel way to CBA’s attempt to balance different goals by translating them narrowly into a monetary scale of value, to list the public interest aim, less restrictive means and balancing of conflicting interests, including broadly qualitative and quantitative results.

Judicial balancing appeared as a lifesaver to federalists who believed that the legal challenge to the European Community was the issue of reconciling the

authority the different Member States with the economic drive to integrate the internal market. The compromise struck between the Court and the Commission and their agreement over a "managed mutual recognition" approach (Nicolaïdis, 2016) represented the commitment of both judges and regulators to integrate the market by reconciling both free market and social goals in European Regulation.

In the past decade, however, skepticism toward proportionality has emerged in European jurisprudence (Joerges and Rodl, 2009). Shortly before the financial crisis in 2008, scholars began to lose faith in the proportionality analysis when, through cases such as *Viking* and *Laval,* the Court balanced workers' and social protections against the free movement of services by favoring the second over the first ones (de Vries, 2013).[8] At this point, those who thought that proportionality was a judicial tool able to tame the privatization of services in the single market lost their faith in legal reasoning. As a result, the increasing faith in regulators, rather than judges, went hand-in-hand with the EU moving away from its obscure comitology process and introduce instead ambitious Integrated Impact Assessment model committed to transparent and neutral regulatory science. However, the Commission's Impact Assessment model was committed to multi-criteria analysis departing from welfare economics predominant in the US approach (COM, 2002).

The European Commission articulated a template for regulatory impact assessments based on three distinct pillars – economic, social and environmental – thereby establishing a trifurcated approach to assessing regulations (Radaelli, 2009). The consequence was that, while regulatory impact assessments in the US seek to harmonize competing interests through monetizing the various interests and effects of regulatory action, the EU followed a siloed approach and would produce impact assessments separately under the three pillars (Close and Mancini, 2007). This philosophy was articulated at the 2001 Stockholm Council, where ministers agreed that "economic growth, social cohesion, and environmental protection must go hand in hand" (European Commission, COM, 2001a). Thus, economic considerations were to be considered alongside social and environmental concerns, with no single area outweighing the others. Even though this system has since been reformed to integrate the three pillars into a single impact assessment under the pretext of regulatory simplification, the siloed approach persists to this day (European Commission, COM, 2015a). Even while cost–benefit analysis methodology is further integrated into assessments, they are not compulsory, and qualitative concerns overcame quantitative concerns in a number of circumstances (Close and Mancini, 2007).

Another difference was timing of impact assessments. Whereas the US approach to CBA follows regulatory agency action in a field defined by the legislature, regulatory acts in the EU are taken under the co-decision procedure, which requires the full participation of the executive, the Commission and the legislature, and the European Parliament and the Council.[9] Impact assessments of regulations are undertaken in the drafting phase of the regulations (Close and Mancini, 2007),

consider the extent to which regulations are necessary, and the appropriateness of European regulations versus deferring to Member State action (COM, 2001b, p. 428). The consequence of the timing is that Commission regulations advanced to the Council and Parliament may be substantially amended to nullify the findings of impact assessments, as opposed to US impact assessments, which consider how the regulation will operate in practice (Close and Mancini, 2007, p. 8).

While US impact assessments are a function of a regulatory dialogue with stakeholders and the public, the European Commission's impact assessments are the bases of technical discussions between the executive and legislative branches of the European Union, with input from the public solicited by the Commission (Radaelli, 2010, p. 273). Consequently, EU impact assessments shape the political debate over authorizing legislation and make sure that all sectors of society are involved. In practice, this leads to a greater reliance on qualitative analysis when confronted with factors which cannot be assessed quantitatively (European Commission, SWD, 2015b). For instance, Close and Mancini (2007) argue that the greater reliance on qualitative criteria in Commission impact assessments has led to preferences against regulation due to the perceived social impact of a measure, due in large part to the utilization of impact assessments when considering broad policy initiatives.

Today, regulatory impact assessment review has been the subject of ongoing reform, with the latest iteration announced in May 2015 (COM, 2015a). The reform, titled "Better Regulation for Better Results – An EU Agenda," expands stakeholder participation in regulatory review and seeks to promote "smarter" regulation (COM, 2015a). Further, the reforms expand programs such as the Regulatory Fitness Programme (REFIT) and empower the Regulatory Scrutiny Board (formerly the Impact Assessment Board) to process and assess reviews by the Commission. Even though the convergence of the US and EU regimes is obvious and it is driven by the necessity of achieving regulatory cooperation in TTIP, the philosophical approaches of impact assessments most substantively differentiate the US approach from its EU counterpart. The social-genealogical origins of European regulatory impact assessments remain ever present under the Better Regulation Agenda and continue to reflect the transatlantic divergence over purely economic CBA in the US versus the holistic approach practiced with CBA in the EU.

2. The Chicago Law and Economic Genealogy of CBA

In the United States, the concept of cost–benefit analysis can be traced back to neoclassical economics that was further developed in private law by the Chicago rational choice approach in the 1970s. CBA was later modified by behavioral law and economics and migrated to regulation in the 1990s.

The hegemonic concept of efficiency in CBA can be traced back to the Pareto principle in which a project is desirable if it makes at least one person better off without making anyone else worse off (Calabresi, 1991, pp. 1218–1219). Because most government interventions hurt some people, and compensating all individuals is unfeasible, economists deployed the Kaldor–Hicks approach holding that a project is desirable if its beneficiaries are enriched enough that they could overcompensate those hurt by the governmental action, thereby enabling the decision maker to quantify positive and negative effects of action (Coleman, 1980). This new approach increased the range of actions that could be evaluated under Pareto's ideas as well as simplified the evaluation process.

Kaldor–Hicks, however, was vulnerable to approving regulations that did not benefit anyone, and it barred regulations that appeared sensible to allow dollars to be used for every calculation. While it was clear that agencies should use CBA to maximize utility, no practical method of weighing costs and benefits had been determined. Scholars such as Adler and Posner put forward CBA as a proxy for overall well-being in regulatory decision making, arguing that it is an imperfect but practical tool by which governmental decision makers implement the criterion of overall welfare (Adler and Posner, 2006). They further argue that CBA is consistent with political theories, which hold that the government should care about the overall wellbeing of its citizens. They aim to detach CBA from Kaldor–Hicks efficiency, which they argue lacks moral relevance and instead see CBA as a rough, administrable proxy for overall well-being through the lens of weak welfarism – a moral view that sees overall well-being as one among a possible plurality of foundational moral criteria. They propose that agencies screen out poorly-informed or disinterested preferences from willingness to pay and willingness to accept determinations.

The compensation tests in Kaldor–Hicks efficiency led to CBA's support from welfare economists and agency officials (Adler and Posner, 1999). When the government proposed a project, the public demanded justification, and CBA allowed them to do so. Although popular throughout the 1960s, economists and government officials began to question its practicality in the 1970s. It was difficult to obtain relevant data, especially in measuring environmental resources and human life. The biggest victory of welfare economists deploying the Chicago law and economics approach was establishing the view that judges should pursue Kaldor–Hicks efficiency and set aside distributive goals in adjudication (Cooter and Ulen, 1999). According to them, it was impossible to redistribute through judicial balancing, and only legislatures had the competence to deal with distribution of resources (Polinsky, 1989). By means of the government's tax and transfer systems, legislative decisions were likely to be more precise than the decision of a random judge. This enhanced skepticism toward judicial balancing expressed by welfare economics was successfully deployed by the Raegan administration's attack against "judicial activism" (Kennedy, 2011, p. 216). Even though balancing did

not disappear from the discursive practice of judges, lawyers, and regulators, judicial balancing was no longer highly theorized in legal academia (Kennedy, 2011, p. 217).[10] Since *Bush v. Gore (2000)* the predominant focus of inquiry shifted from judges to regulators and CBA became a primary legal tool for agencies rather than courts through which agencies could rationally regulate only is the benefits of regulation justify its costs (Sunstein, 2007).

CBA was first incorporated into the US government in 1970 through President Nixon's National Industrial Pollution Control Council, which focused its efforts on the cost of increasingly stringent pollution control regulations (Tozzi, 2011). In response to the rising cost of environmental regulation, Assistant to President Nixon for Domestic Affairs John Ehrlichman established the Quality of Life Committee to ensure that agencies analyze the benefits and costs during the decision-making process (Tozzi, 2011). During this time, the Office of Management and Budget (OMB) in the White House began a review of Environmental Protection Agency (EPA) regulations, mandating that OMB includes analyses that estimate the regulation's costs and benefits. While the analytical tools used in CBA have become more sophisticated over time, the combination of cost–benefit analysis, comparison with regulatory alternatives, and need to justify alternatives was analogous to subsequent maximization of net benefit requirements (Tozzi, 2011, p. 46).

President Gerald Ford was the first President to issue Executive Orders requiring an economic analysis of regulations as part of OMB's oversight activities. Executive Order (EO) 11821 (1974) required all agencies to consider the inflationary impact of all major regulations. EO 11949 expanded this, requiring agencies to prepare economic impact statements administered by the OMB and Council on Wage and Price Stability (OMB/CWPS). The Carter administration also issued EO 12,044, the first executive order dedicated to regulatory review (Tozzi, 2011, p. 52).[11] Alice Rogoff, Special Assistant to the Director of OMB, created the Office of Regulatory and Information Policy (OIRA) under the OMB to review regulations (Tozzi, 2011, p. 52). The Carter Administration also created the Regulatory Council, an interagency group tasked with eliminating duplication of regulations (Tozzi, 2011, p. 56).

Regulatory reform in the Reagan era replaced the social reform movements of the twentieth century – the Progressive movement at the beginning of the twentieth century, the New Deal of the 1930s, and the Civil Rights, Consumer, and Environmental movements of the 1960s and 1970s, with a more economic approach to reducing "burdensome" regulation (Vogel, 2012, p. 258). This approach was concerned with freedom, accountability, efficiency, and economic growth, and economists and policy analysts dominated the discussion (McGarthy, 1986, pp. 253–254). In the midst of this social and political environment, on February 7, 1981, President Reagan issued executive order 12,291, replacing Carter's executive order because it had "proven [to be] ineffective" (McGarthy,

1986, p. 19). Reagan's EO required the Office of Information and Regulatory Affairs (OIRA) to ensure that federal regulations reduce the burdens of existing and future regulations while increasing agency accountability for regulatory actions. The order also provided for Presidential oversight of the regulatory process, minimized duplication and conflict of regulations, and called for well-reasoned regulations (McGarthy, 1986, p. 19). Under Reagan, administrative agencies began to start taking CBA into consideration when making regulatory decisions, but the paradigmatic executive order that led agencies to engage in cost–benefit analysis commenced with President Clinton's EO 12,866 in 1993 (McGarthy, 1986, p. 21; Copeland, 2011). This order made significant modifications that simplified the process, made it more selective, and introduced more transparency into agency consultation. This remained a centerpiece in administrative rulemaking, which permits analysts to compare a set of regulatory actions with the same primary outcome (Copeland, 2011, p. 4).

In the wake of EO 12,866, Congressional initiatives sought to further the goals of the cost–benefit analysis. The statutory provision that most likely mirrors 12,866 is the Unfunded Mandate Reform Act of 1995 (Copeland, 2011, pp. 10–11).[12] Currently, several agencies (not covered by 12,866 because they are independent agencies) such as the Securities and Exchange Commission, Federal Deposit Insurance Corporation, and the Commodities Future Trading Commission are required to undertake a cost–benefit analysis to assess implementation of necessary regulations in the most efficient way (Copeland, 2011, pp. 17–19). In a well-known court opinion, Judge Patricia Wald highlighted the importance of regulatory analysis given the complexities of governance (Lubbers, 2012).[13] This shows how cost–benefit rationales successfully penetrated not only agencies but also the judiciary. The OMB's Circular A-4, issued in 2003, is a formal, binding guidance document governing the analysis of regulatory impacts by executive agencies (Office of Management and Budget, 2003).

President Obama reinforced and expanded regulatory analysis and oversight (Dudley, 2015). On January 18, 2011, he published EO 13,563, titled: "Improving Regulation and Regulatory Review" (Dudley, 2015, p. 1043). This order revised cost–benefit analysis, allowing agencies only to proceed with regulation if the benefits justify the costs and maximizes net benefits. Under EO 13,563 each agency must use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible, reflecting an unprecedented emphasis on the importance of quantification (Executive Order No. 13,563, 2012; Sunstein, 2013). This EO further recognizes the difficulty in quantifying certain values, including human dignity. He further issued EO 13,579 in July 2011, encouraging independent regulatory agencies to comply with EO 13,563 requirements concerning "public participation, integration and innovation, regulatory approaches, and science" (Sunstein, 2013; Executive Order No. 13,579, 2011). Under 13,563 and 12,866, executive agencies must submit all significant rules to OIRA, which may not be

published in the Federal Register until OIRA completes its review (Executive Order No. 12,866, 1994); Executive Order No. 13,563, 2012; Sunstein, 2013).

Recently, the Obama Administration turned its attention to regulatory review. President Obama issued EO 13,610 in May 2011, titled: "Identifying and Reducing Regulatory Burdens," which directed agencies to engage the public in their retrospective review of existing regulations, prioritize reviews that would produce significant quantifiable savings, and report their process to OIRA (Sunstein, 2013; Executive Order No. 13,579). The advantages of such regulatory analysis range from the identification of options to bureaucratic accountability. For instance, options identification allows an agency to look for more market-oriented and less-burdensome alternatives (McGarity, 2005, p. 1243). In addition, agencies can gather and analyze information, which allow upper-level policy-makers to look at the impact their decisions have on the broader society, making them more sensitive to the economic costs of the regulation (McGarity, 2005, p. 1262). Furthermore, agencies have a greater sense of the broader policy goal, in which it would resist adhering to precedent and unarticulated bureaucratic folk wisdom (McGarity, 2005, p. 1263). An agency can thus identify the gaps of information and assumptions that the regulation rests upon. This is to provide a better understanding how these assumptions and information gaps affect regulatory policies (McGarity, 2005, p. 1264). Finally, regulatory analysis restrains bureaucrats from being unduly influenced from political forces. In other words, the remote decision makers in the White House, Congress, and reviewing courts are assured that the decision was made in a nonpartisan fashion (McGarity, 2005, p. 1265).

Nevertheless, the Chicago law and economics rationale used in regulatory analysis confronts excessive proceduralism to prevent red tape. This approach, taken to its extreme, could lead to an increase in litigation for agencies to defend the current rules. More importantly, as theorized by welfare economists, cost–benefit analysis inappropriately quantifies things such as life, health, and environmental risk (Ackerman and Heinzerling, 2004). For some critics, this cannot produce more efficient decisions because the process of reducing life, health, and the natural world to monetary values is inherently flawed (Asimow *et al* (2014)).

As Michael Asimov has noted, cost–benefit analysis equates the risk of death with death itself, whereas these should be accounted for separately in considering the costs and benefits of regulatory actions (Asimow *et al*, 2014). It also ignores the notion that citizens are concerned about risks to their families and others as well as themselves, the fact that market decisions are generally distinct political decisions, and the incomparability of many different types of risks to human life. In a similar vein, the technique of "discounting" makes sense in comparing alternative *financial* investments, but it cannot reasonably be used to make a choice between preventing noneconomic harms to present generations and preventing similar harms to future generations. Nor can discounting reasonably be used to make a

choice between harms to the current generation; the choice between preventing an automobile fatality and a cancer death should not turn on prevailing rates of return on financial investments. Additionally, discounting tends to trivialize long-term environmental risks, minimizing the very real threat our society faces from potential catastrophes and irreversible environmental damage, such as those posed by climate change and nuclear waste.

Finally, the Chicago law and economic genealogy of CBA has ignored distributive questions regarding who suffers as a result of environmental problems and therefore threatens to reinforce existing patterns of economic and social inequality (Asimow *et al*, 2014, p. 2). At best, cost–benefit analysis treats questions about equity as a side issue, which contradicts the widely-shared view that equity should count in public policy (Asimow *et al*, 2014, p. 2). Poor countries, communities, and individuals are likely to express less willingness to pay to avoid environmental harms because they have limited resources. Some regulations are not intended solely for the purpose of economic efficiency, but are designed to eliminate illegitimate discrimination. Some are designed to protect cultural aspirations, and some are designed to transform preferences. But in dealing with cost–benefit analysis, very little attention is paid to determining the value of these particular and often qualitative variables.

By defending cost–benefit analysis in regulatory development, behavioral legal economists like Cass Sunstein, former Administrator of OIRA during the Obama administration, pointed out the inherent bias the person conducting the research might come across. Because a party naturally desires that its submissions be cast in the most favorable light, an interested party will hire experts who exercise their professional judgment in a way that reflects that party's view. In addressing these biases, Sunstein proposed that agencies should take into consideration the nature of the risk; the controllability of the risk; whether the risk involves irretrievable or permanent losses; whether the risk is voluntarily incurred; how equally distributed it is for identifiable vulnerabilities, and traditionally disadvantaged victims; how well understood the risk is; whether the risk is faced by future generations; and how familiar everyone is with the risk (Sunstein, 2013 at 37).

According to Sunstein, CBA should promote social consensus and should operate regardless of political commitments so that this neutral and transparent tool should serve everyone – including those who support and criticize social, environmental, and labor issues. In his view, CBA has significant democratic advantages by promoting public attention to what is really at stake in a way that increases accountability and transparency. Sunstein acknowledges the possibility that CBA could be skewed against the poor, but he believes that this can be corrected and de-biased within the CBA system. Finally, by reaching to some of the underlying principles of the social genealogy of CBA, Sunstein proposes a qualitative understanding of the interests at stake in CBA in addition to the traditional quantitative approach (Sunstein, 2001).

IV. Evaluating CBA Genealogies in EU–US Trade Relations

A genealogical approach departs from convergentist, divergentist, and experimentalist approaches to regulatory governance which only partially engage with the historical contingency, different attitudes in legal reasoning and critiques of CBA as a neutral scientific and coherent rationale for decision-making. For instance, scholars seeking greater convergence through CBA aim to reconcile challenges in regulatory cooperation without tracing its origin and deeply political history. In doing so, they aim to legitimize CBA as neutral and scientific without highlighting the fact that this entails political choices, limits the regulatory options while endorsing excessive regulatory scrutiny.

By contrast, divergentist scholars have shown how historical contingencies and path dependencies in administrative law regimes driven by different values resulted in different institutional arrangement and diverge in the implementation of regulation. By not focusing on TTIP, these scholars do not explain the cross-influences in the recent changes in regulatory approaches, despite being skeptical of the neutrality of CBA. For example, decreased faith in judicial balancing and pressure under free trade agreements led European regulators to import Chicago law and economics to increasingly shape the way the EU has broadened the scope of application of CBA via greater use of scientific evidence for impact assessments. While Chicago law and economic genealogy of CBA through the "willingness to pay" criteria and welfare economics play an increasing role in the assessments of regulatory proposals in the EU, the social genealogy of CBA continues to play an outsized role in assessing regulations, as illustrated by the Commission's insistence that the Better Regulation Agenda improve regulation instead of reducing it (European Commission, COM, 2015a).

Finally, experimentalists recognize the hybridization of the two models because of their attempt to show how learning from regulatory differentiation led to the adoption of more social approaches in the US which value the precautionary principle in some sectors while increasing the use of CBA and impact assessment, despite underlying divergences in implementation in the EU. Because some experimentalist scholars focus on the sociology of the organization and its various actors, they miss the relevance of legal reasoning and legal doctrines and, in particular, the relation between balancing and proportionality and CBA (Rose-Ackerman, 2013). Finally, experimentalists put forward CBA as a neutral and technical tool that, at that at time, ought to be adjusted to respond to regulatory variation, biases or social circumstances. Overall, it reflects transparent and efficient regulatory outcomes that pay little attention to income inequalities and social costs.

The genealogical approach departs from the idea that cost–benefit analysis has a linear and rational intellectual history and that its application would necessarily become similar across the Atlantic. Yet both genealogies are not self-fulfilling

prophecies, as they can adapt and change through political pressures, advocacy and cross-fertilization among economists and lawyers, demonstrating the continuous negotiation and contingency of each genealogy depending on the constituencies involved in their application.

About the Author

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Notes

1 Article x5 notes: “Specific activities promoting regulatory compatibility, (b) mutual recognition or reliance on each other’s implementing tools, to avoid unnecessary duplication of regulatory requirements, such as testing, certification, qualifications, audits, or inspections.”

2 Stating

> 2. When carrying out a regulatory impact assessment in accordance with paragraph 1, each Party shall ensure that it:
> (a) considers the need for the proposed regulatory act and the nature and the significance of the problem the regulatory act is intended to address; (b) examines feasible regulatory and non-regulatory alternatives (including the option of not regulating), if any, that would achieve the objective of the regulatory act; c. assesses potential short- and long-term social, economic, and environmental impacts of such alternatives and the anticipated costs and benefits (quantitative, qualitative, or both, recognizing that some costs and benefits are difficult to quantify).

3 Bignami offers examples of the difference between managed neo-corporatism and competitive pluralism between the European and the US regulatory regime].

4 This conception of individual rights is traced back to classical legal thought of Savigny. In case of conflict between two individual rights, legal professors resolved the conflict by deducing a solution from individual rights.

5 The social mode of thought, which characterized the 1900–1950s has recently yielded to a third globalization of "americanized" legal thinking. This mode consists of a neo-formalist revival in the law, once more understood as a merely technocratic artifact serving the needs of economic expansion rather than those of human civilization and solidarity. In a sense, the "social" has been finally abandoned while a mode of reasoning derived from the social, namely balancing between conflicting policies, is still predominant in current legal thinking.

6 Cassis is the landmark decision concerning the free movement of goods and the elimination of measures equivalent to quantitative restriction to trade, namely protectionist or domestic legislation.

7 See Article 34 of the Treaty on the Functioning of the European Union (TFEU).

8 Commenting on Case C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. I-11767 and Case C-438/05, International Transport Workers' Federation v. Viking Line ABP, 2007 E.C.R. I-10779.

9 Article 289 of the Treaty on the Functioning of the European Union (TFEU).

10 Explaining the balancing retreat in the US after 1980s.

11 Identifying OMB in a regulatory oversight role for the first time.

12 Pursuant to UMRA, agencies are mandated to prepare a "written statement" that contains a qualitative and quantitative assessment of the anticipated costs and benefits as well as the effect of the Federal mandate on health, safety, and natural environment.

13 Jeff Lubbers, A Guide to Federal Agency Rulemaking. Quoting Judge Wald as stating that

> the court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. […] Regulations demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive.

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