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### Why Cost-Benefit Analysis? A Question (and Some Answers) About the Legal Academy

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## WHY COST-BENEFIT ANALYSIS? A QUESTION (AND SOME ANSWERS) ABOUT THE LEGAL ACADEMY

INTRODUCTION .....	2
II. THE RISE OF COST-BENEFIT ANALYSIS: REGULATORY GOVERNANCE ....	6
A. <i>Precursive Developments</i> .....	6
B. <i>Calls for Cost-Benefit Analysis</i> .....	10
C. <i>Early Adoptions</i> .....	11
D. <i>The Role of the Chief Executives</i> .....	12
III. THE RISE OF COST-BENEFIT ANALYSIS: THE LEGAL ACADEMY.....	15
A. <i>Darkness Before the Sunrise and Holmes' Prognostication</i> .....	15
B. <i>The Dawning of Law and Economics</i> .....	16
C. <i>Early Cost-Benefit Analysis Scholarship</i> .....	18
D. <i>The 1970s: Scholarly Paradigm Shift</i> .....	20
1. <i>The National Environmental Policy Act</i> .....	21
2. <i>The Delaware River Basin Commission</i> .....	22
3. <i>Temporal Similarity, Fundamental Differences</i> .....	24
E. <i>Beyond Executive Order 12,291</i> .....	25
1. <i>Initial Systemic Critiques</i> .....	26
2. <i>Moral Critiques</i> .....	27
3. <i>Other Critiques</i> .....	29
4. <i>Defenders: A Beleaguered Minority</i> .....	30
IV. WHY COST-BENEFIT ANALYSIS SCHOLARSHIP SPREAD AS IT DID .....	31
A. <i>The Enabling Development: Law and Economics</i> .....	33
B. <i>The Economics of Cost-Benefit Analysis</i> .....	35
1. <i>Of Supply and Demand</i> .....	35
2. <i>The Other Economics of Cost-Benefit Analysis</i> .....	36
C. <i>Evolutionary Theory and Replicatory Advantage</i> .....	39
D. <i>The "Tipping Point" Analytic: An Epidemic Idea</i> .....	41
V. CONCLUSION.....	43

## INTRODUCTION\*

The United States is a “cost-benefit state,”<sup>1</sup> if one of rather recent advent.<sup>2</sup> In the years since President Ronald Reagan’s first inauguration, the use of cost-benefit analysis as a regulatory decisionmaking tool has been on the rise, and chief executives have required federal agencies to conduct cost-benefit analyses in conjunction with the consideration and promulgation of all major rules.<sup>3</sup> The ubiquity of cost-benefit analysis has created a number of challenges for the law and for legal scholars,<sup>4</sup> and, as a consequence, the legal academy has witnessed an abrupt but persistent increase in cost-benefit analysis scholarship over the same period, inflected near the date of Reagan’s inauguration.<sup>5</sup> In any year prior to 1981, no more than eleven articles from the nation’s law reviews, Continuing Legal Education (CLE) materials, and bar journals mentioned cost-benefit analysis in their text.<sup>6</sup> In 1981, that previous high more than doubled to twenty-seven.<sup>7</sup> The

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\*. This Comment would not be what it is without the help received from several quarters. Thanks first to professors Kimberly Boone, Alfred Brophy, Joseph Colquit, Michael S. Pardo, and Susan Randall, all of whom read and commented on earlier drafts and several of whom have offered me invaluable guidance on this and other projects immeasurably larger in scope. Thanks also to the staff of the Alabama Law Review for their helpful edits. Finally, my most personal thanks to Crystal Carpenter who stubbornly bests me at every turn and has offered her all in every respect.

1. See CASS R. SUNSTEIN, *THE COST-BENEFIT STATE* ix (2002) (noting that “American government is becoming a cost-benefit state, [and that] government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation”); see also U.S. OFFICE OF MGMT. & BUDGET, *REGULATORY ANALYSIS*, CIRCULAR A-4 at 2 (2003) (noting that “[b]enefit-cost analysis is a primary tool used for regulatory analysis”).

2. See Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 *YALE L.J.* 165, 167 (1999); see also SUNSTEIN, *supra* note 1, at x (noting that American regulatory agencies have been required by the executive to conduct cost-benefit analyses of major rules for only twenty years).

3. See Exec. Order No. 12,291, 46 *Fed. Reg.* 13,193 (Feb. 17, 1981) (requiring agencies to prepare in conjunction with the promulgation of every major rule a “Regulatory Impact Analysis” to ensure that regulation was not “undertaken unless the potential benefits to society . . . outweighe[d] the potential costs”). Presidents George H. W. Bush, Bill Clinton, and George W. Bush adopted similar policies. See Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2281 (2001) (noting that the first president Bush retained Reagan’s executive order); Exec. Order No. 12,866, 58 *Fed. Reg.* 51,735 (Sept. 30, 1993) (President Clinton’s order requiring agencies to balance “both the costs and the benefits of the intended regulation”); Exec. Order No. 13,422, 72 *Fed. Reg.* 2,763 (Jan. 18, 2007) (President George W. Bush’s order amending Clinton’s order, but still requiring consideration of “anticipated costs and benefits”).

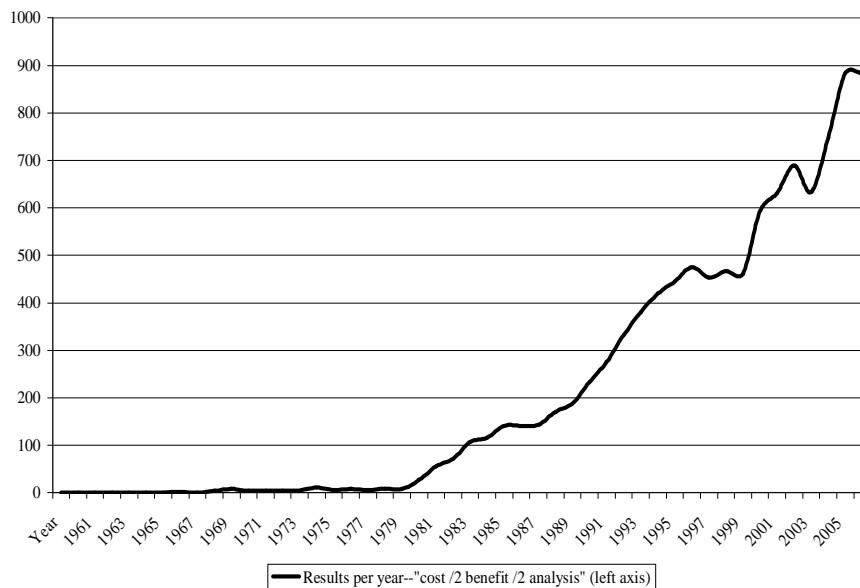
4. See SUNSTEIN, *supra* note 1, at ix.

5. See *infra* text accompanying notes 6–10. The legal academy’s interest postdates the economics academy’s initial fascination, which “gr[ew] tremendously” in the early to mid-sixties. See A.R. Prest & R. Turvey, *Cost-Benefit Analysis: A Survey*, 75 *ECON. J.* 683, 684 (1965). Prest and Turvey offer reasons for economists’ interest, which shed light on lawyers’ subsequent interest: “the growth of large investment projects . . . the growth of the public sector, e.g., the Central Government . . . [and] the rapid development . . . [of] operations research, systems analysis, etc. . . .” *Id.*

6. This and the following quantitative measurements were gathered on January 8, 2008, using the following informal Westlaw search of the Journals & Law Reviews (JLR) database: “te(cost /2 benefit /2 analysis) & da(aft 1/1/X & bef 1/1/[X+1])” where “X” was the year in question. The JLR database “includes selected documents published in the law reviews, Continuing Legal Education (CLE) course

number of articles mentioning cost-benefit analysis continued to rise, reaching 141 by 1986, 445 by 1996, and 628 by 2005.<sup>8</sup> These articles sought to elucidate and address the normative, political, methodological, and bureaucratic issues raised by the use of cost-benefit analysis in a regulatory system of governance.<sup>9</sup> The following illustration depicts the rise in cost-benefit analysis scholarship:<sup>10</sup>

Results Per Year--"cost /2 benefit /2 analysis"



A synchronous upsurge in emphasis occurred in casebooks and hornbooks.<sup>11</sup> For example, the seventh edition of the classic Gellhorn & Byse casebook *Administrative Law, Cases and Comments*, which was published

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handbook collections, and bar journals . . . . Full coverage is available for many of these periodicals[, h]owever, full coverage for some law reviews does not begin until 1994.” <http://lawschool.westlaw.com/> (follow “Westlaw Research” link; enter “JLR” into “Search these databases”; click “i” for scope and information) (last visited Apr. 21, 2008). Admittedly, this database’s coverage varies from year-to-year, but these measures nonetheless provide a useful illustrative measure of the growth of CBA scholarship.

7. See *supra* note 6.

8. See *supra* note 6.

9. Cf. Michael S. Baram, *Cost-Benefit Analysis: An Inadequate Basis for Health, Safety, and Environmental Regulatory Decisionmaking*, 8 *ECOLOGY L.Q.* 473, 480 (1980).

10. See also *infra* illustration accompanying Part IV.

11. The upsurge here is probably a more direct response to the changes taking place in the administrative law realm (i.e., the requirement of near-universal cost-benefit analysis) than part of the academic colloquy and is therefore somewhat tangential to the inquiry of this Comment. It is included to illustrate the rising predominance of cost-benefit analysis both within and without the academy. Additionally, reading all of these texts would have been impractical, so these statements rely upon indices and tables of contents, no doubt imperfect sources of information. At the very least, however, the absence-then-presence of “cost-benefit analysis” in one, the other, or both, is indicative of the rising importance of the topic.

in 1979, contains no index entry for cost-benefit analysis,<sup>12</sup> while the eighth edition, published in 1987, contains sixteen index entries under the subject “cost-benefit analysis.”<sup>13</sup> Similarly, one hornbook, first published in 1974, contains no index entry for cost-benefit analysis,<sup>14</sup> and a second edition, published in 1980, contains three entries referencing a total of thirteen pages.<sup>15</sup> By the 1986 publication of the third edition, the volume gives full treatment to cost-benefit analysis as a mode of executive control of regulation<sup>16</sup> and includes case materials relating to cost-benefit analysis.<sup>17</sup> Perhaps most telling, the first two editions of Judge Richard Posner’s leading text *Economic Analysis of Law* do not contain indexed references to cost-benefit analysis, whereas the next edition following 1981 does.<sup>18</sup>

As these materials illustrate, cost-benefit analysis garnered significant attention in the legal academy following Reagan’s 1981 order. That body of scholarship, though, was not without significant antecedents—much of the foundational work (legal and otherwise) in cost-benefit analysis occurred prior to 1981.<sup>19</sup> This Comment is a study of *how* and *why* both bodies of cost-benefit analysis scholarship developed as they did,<sup>20</sup> and, in particular, how the pre-1981 scholarship set the tone for what followed; it attempts to

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12. See WALTER GELLHORN, CLARK BYSE & PETER L. STRAUSS, ADMINISTRATIVE LAW, CASES AND COMMENTS 1167 (7th ed. 1979).

13. WALTER GELLHORN ET AL., ADMINISTRATIVE LAW, CASES AND COMMENTS 1298 (8th ed. 1987). The entries are: “Costs and benefits of,” “Decisive factor?,” “Executive Order 12291,” “Executive Order 12498,” “Impact on open government,” “Independent regulatory commissions,” “Issues for which not suited,” “Malleability of concepts,” “Occupational health,” “Policy partisanship,” “Procedural due process issue,” “Quantification,” “Regulatory Flexibility Act,” “Risk assessment by EPA,” “Separation of powers,” and “Uncertainty.” *Id.* Professor Bernard Schwartz’s administrative law casebook provides another example. The first edition, published in 1977, contains no index entry for cost-benefit analysis, while the 1983 second edition notes both President Reagan’s order and the *Benzene* cases. See BERNARD SCHWARTZ, ADMINISTRATIVE LAW, A CASEBOOK 736 (1977); BERNARD SCHWARTZ, ADMINISTRATIVE LAW, A CASEBOOK 63–75 (2d ed. 1983).

14. See GLEN O. ROBINSON & ERNEST GELLHORN, THE ADMINISTRATIVE PROCESS 918 (1974).

15. See GLEN O. ROBINSON ET AL., THE ADMINISTRATIVE PROCESS 956 (2d ed. 1980).

16. See GLEN O. ROBINSON ET AL., THE ADMINISTRATIVE PROCESS 123–28 (3d ed. 1986).

17. See *id.* at 675–88 (reproducing *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607 (1980)).

18. Compare RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 401 (1973), and RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 560 (2d ed. 1977), with RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 656 (3d ed. 1986). Judge Posner addressed some of the fundamentals of cost-benefit analysis in the first two editions, as he did in subsequent ones, but the timing of the appearance of the term is significant in its own right.

19. See *infra* notes 139–178 and accompanying text.

20. This Comment is intended as a case study in interdisciplinary legal scholarship. Case studies involve in-depth, longitudinal examinations of a single instance or event, and seek a sharpened understanding of *why* the case happened as it did. Bent Flyvbjerg, *Five Misunderstandings About Case Study Research*, 12 QUALITATIVE INQUIRY 219 (2006). However, the aim of a case study is not only to gain an in-depth insight into a microcosm (the case), but also to shed light on the macrocosm of which it is a part. *Id.* While this Comment’s longitudinal inquiry is into cost-benefit analysis, its larger purpose is to better understand the macrocosmic rise of interdisciplinary legal scholarship. See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 766–77 (1987). Indeed, the law is not longer an “Autonomous Discipline.” *Id.* at 761. Pioneering scholars such as Richard Posner, Bruce Ackerman and Guido Calabresi brought the strengths of related social sciences to bear on legal problems, and would leave the art of legal inquiry forever changed. It is this change this Comment seeks to understand, proceeding toward that understanding by way of a case study in cost-benefit analysis.

understand the ascension of cost-benefit analysis within the academy by tracing the development of relevant scholarship in light of contemporaneous political and regulatory developments.<sup>21</sup> In this pursuit, it attempts to be at once an intellectual history, ethnography, and biography,<sup>22</sup> and in doing so, doubtlessly accepts its own invitation to fall short.<sup>23</sup>

Nevertheless, what emerges is a tale about the rise of the study of cost-benefit analysis from its drab genesis in then-obscure welfare economics to its prominent position in modern academic legal inquiry. Part II provides background and context by offering a brief history of cost-benefit analysis in regulatory administration, drawing on historical antecedents and relevant political pressures for understanding. Part III explores *how* cost-benefit analysis scholarship developed in the legal academy, focusing on the pioneering personalities and their exemplary works both before and after 1981.<sup>24</sup> Part IV delves into the principle questions: why cost-benefit scholarship receives so much (perhaps unjustified) academic treatment and why

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21. The correlation between relevant political and regulatory developments (e.g., President Reagan's Executive Order) and academic treatment of cost-benefit analysis is obvious. *See supra* text and illustration accompanying notes 6–10. Moreover, Judge Posner has noted the reciprocal influences between the legal academy and the administrative apparatus. *See* Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969). Posner argued that as a result of lawyers' dominance of the regulatory system (regulatory commissioners, staff members, legislators, regulated firm representatives, and judges adjudicating regulatory disputes—all principles in the regulatory process—are generally lawyers), much of the regulatory apparatus has been bogged down with issues relating to the "formal process of the law and . . . considerations of fairness and equity" rather than focused on issues of at least equal importance—"economic efficiency in the broadest sense of that term." *See id.* at 624. For Posner, this incoherence resulted because the former, but not the latter, was/is the province of legal education. *Id.* At least at the time of Posner's argument, matters of economic efficiency were seen not as a proper field of inquiry in *law*, but in *economics*. *Id.* While a lawyer's training is indispensable to proper administration of the regulatory process, in the main, lawyers are un- or under-skilled in economics. *See id.* at 623. As a result of this bifurcation, understanding of regulatory problems by both lawyers and economists was retarded. *See id.*; *see also* Robert A. Gorman, *Proposals for Reform of Legal Education*, 119 U. PA. L. REV. 845, 847 (1971) (noting that a modern lawyer should not restrict his studies to "strictly legal" materials, but should also acquire proficiency in economics, as well as other interdisciplinary fields). This retardation, argued Posner, contributed to the continuation of public regulation without reference to its actual social utility. Posner's not-implausible hypothesis illustrates just how closely intertwined the legal academy and the regulatory bureaucracy have been and continue to be. *Cf.* Jonathan Simon, *Risk and Reflexivity: What Socio-Legal Studies Add to the Study of Risk and the Law*, 57 ALA. L. REV. 119, 119 (2005) (noting that related scholarship has been "politically influential").

22. Unfortunately, a full exposition of the personalities behind the articles and ideas explored here are beyond the scope of this project. Nevertheless, the reader should be mindful that the spread of this idea is the direct result of academics propagating their academic product. No doubt a full study of the interpersonal background and undercurrents of the development of the ideas explored in this Comment would be an interesting experiment in the observation of social structures and would add much to the present inquiry.

23. Or, in the words of Jeremy Bentham, "Cogent considerations, however, concur, with the irksomeness of the task, in placing the accomplishment of it at present at an unfathomable distance." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (J.H. Burns & H.L.A. Hart eds., 1970). Another of his Bentham's apologies is most appropriate here: "Dry and tedious as a great part of the discussions it contains must unavoidably be found by the bulk of readers, he knows not how to regret having written them . . ." *Id.* at 4.

24. To be clear, this Comment seeks an understanding not of the development of the substantive cost-benefit analysis principles debated in the literature, but of how the scholarly literature developed—how authors' educations, experiences, politics and paths contributed to the scholarly colloquy. The substantive debate really is of little import for present purposes.

that treatment developed as it did.<sup>25</sup> In presenting answers, this Part draws on economics, sociology, evolutionary biology, jurisprudence and some other, more casual observations. Furthermore, in drawing conclusions regarding this inquiry, Part IV adopts an analytical framework focused on three factors pertinent to the development of cost-benefit analysis scholarship: (1) the ideational attributes of cost-benefit analysis, (2) the reciprocal transmitters/receivers of the idea (i.e. legal academics), and (3) the environment in which both operate.<sup>26</sup> Finally, Part V expounds on Part IV and offers concluding remarks.

## II. THE RISE OF COST-BENEFIT ANALYSIS: REGULATORY GOVERNANCE

The attempt to understand why academics have chosen to devote such a great deal of effort to the study of cost-benefit analysis (CBA) begins in this Part with a brief historical account of the emergence of CBA as a regulatory decisionmaking paradigm. The purpose of this history is twofold: first, to provide a framework for understanding the political pressures that led ultimately to the cost-benefit state, and, second, to set out the intellectual prerequisites to the triumph of CBA. Subpart A provides the pre-history by exposing the political and academic back-story, most of which developed in the first half of the twentieth century. Subpart B details the intermediate effects of much of what occurred in the period covered by the first subpart, and Subpart C begins the exposition of the effect those reactions had on regulation. Finally, in recognition of their special position, Subpart D provides an account of the role of Presidents in the creation of the cost-benefit state.

### A. *Precursive Developments*

Considerations of utility have played a role in legal reasoning and decisionmaking at least since the utilitarian Jeremy Bentham's work in the late eighteenth century,<sup>27</sup> and indeed, CBA seems to be a natural descendent of

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25. The irony presented by an article that attempts to explain a curious glut of articles is not lost on the author.

26. In this way, this Comment adopts the analytical framework of epidemiology, which is that branch of medical science "concerned with the study of disease as it appears in its natural surroundings, and as it affects a community of people rather than a single individual." 1 VAN NOSTRAND'S SCIENTIFIC ENCYCLOPEDIA 1316 (Glen D. Considine & Peter H. Kulik eds., 9th ed. 2002). Epidemiology seeks to gather data about the instances and effects of a particular disease, as well as the relationship between the disease and both its environs and hosts. *Id.* Moreover, epidemiology "is important in elucidating the cause, the modes of transmission, and . . . other facts of fundamental importance." *Id.* As will be evident in Part IV, *infra*, thinking of cost-benefit analysis in epidemical terms is quite useful in understanding its spread.

27. See Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 MD. L. REV. 85, 86-91 (2005); *infra* notes 84-92 and accompanying text. See generally Symposium, *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980) (including articles by Richard A. Posner, Guido Calabresi, Duncan Kennedy & Frank Michelman, Ronald Dworkin, and Lewis A. Kornhauser).

Bentham's "principle of utility."<sup>28</sup> Writing over one hundred years before the rise of the regulatory state, and over two hundred years before Regan's executive order, Bentham philosophized that a "measure of government . . . may be said to be conformable to or dictated by the principle of utility, when in like manner the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it."<sup>29</sup>

Notwithstanding the obvious connection between Bentham's eighteenth-century philosophy and modern CBA, it was not until the early twentieth century that CBA first found favor in government decisions regarding public works expenditures.<sup>30</sup> While CBA can be found in federal statutes as early as The River and Harbor Act of 1902,<sup>31</sup> under which the Army Corps of Engineers was to evaluate projects by "taking into account the amount of commerce benefited and the cost,"<sup>32</sup> modern CBA is an outgrowth of three political and methodological developments, all of which postdate that Act.<sup>33</sup>

First was the rise of "Progressivism" around the turn of the last century.<sup>34</sup> "Progressives believed that government could be separated into a realm of value-laden politics and a realm of administrative expertise based on scientific principles."<sup>35</sup> Progressives argued that then-existing state-by-state regulation was poorly suited to handle the regulatory issues of the early twentieth century: nationwide markets created by advances in transportation and the rise of huge, national corporations.<sup>36</sup> Partially as a result of the Progressives' optimistic views toward government regulation, the country was subjected to eugenics<sup>37</sup> and saw the spread of mandatory schooling,<sup>38</sup> zoning,<sup>39</sup> and increased regulation of the economy.<sup>40</sup>

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28. For a brief discussion of this connection, see *infra* note 198.

29. Bentham, *supra* note 23, at 13. This language is so obviously parallel to Executive Order 12,291 as to make Regan's dictate that a regulation not to be "undertaken unless the potential benefits to society . . . outweigh the potential costs" appear to be a mere linguistic update. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981). The connection between utilitarianism and cost-benefit analysis has not gone unnoticed, see, e.g., Robert H. Frank, *Why is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913, 915 (2000), and critics have harnessed classic anti-utilitarian arguments to oppose cost-benefit analysis, see, e.g., Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, REGULATION, Jan.-Feb. 1981, at 33, 34-36.

30. See Prest & Turvey, *supra* note 5, at 683. Nevertheless, the United States was the first country to embrace cost-benefit analysis for regulatory and public works decisionmaking processes. See *id.*

31. River and Harbor Act of 1902 § 3, ch. 1079, 32 Stat. 331, 372 (1902) (codified at 33 U.S.C. § 541 (2000)).

32. Prest & Turvey, *supra* note 5, at 683. The cost-benefit analysis techniques developed by the corps were limited to "tangible" costs and benefits. *Id.*

33. Adler & Posner, *supra* note 2, at 169.

34. See *id.*

35. *Id.*

36. See *id.*

37. MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920*, at 214 (2003).

38. *Id.*

39. Eric R. Claeys, *Zoning and Progressive Political Theory*, in *THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME* 287, 292 (John Marini & Ken Masugi eds., 2005).

40. MCGERR, *supra* note 37, at 214.



Second, and most significant, was Franklin Delano Roosevelt's New Deal. Prior to Roosevelt's 1932 electoral victory, the fundamental philosophy of federal regulatory policy was that a smoothly functioning market was the approach most likely to maximize social welfare, and federal regulatory agencies existed to correct market imperfections—"wrongful" or "unreasonable" conduct.<sup>41</sup> The New Deal administrations, however, took a contrary position—a position that resulted in more regulation, more agencies, more publicly-financed spending, and, generally speaking, more government. Over time, this growth led to a desire for heightened justification for public works projects,<sup>42</sup> and attempts to meet these desires ultimately resulted in pervasive CBA in federal administrative regulation.<sup>43</sup> The initiation of CBA as a way to assuage this desire came with The Flood Control Act of 1936, which directed the Army Corps of Engineers—the Corps was the first government agency to systematically use CBA—to undertake only those flood control projects for which "the benefits to whomsoever they . . .

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41. Robert L. Rabin, *Legitimacy, Discretion, and the Concept of Rights*, 92 YALE L.J. 1174, 1175 (1983); cf. STEPHEN G. BREYER, *REGULATION AND ITS REFORM* (1982) (detailing increases in regulation to correct market failures resulting from the rise of national mass markets: monopoly power, excess profits, externalities and inadequate information, among others). Regulatory agencies like the Federal Trade Commission (FTC), and the Interstate Commerce Commission (ICC) existed merely to coerce equilibrium where it would not be had naturally; the goal was to eliminate the exigencies of an imperfect market. Rabin, *supra*, at 1175. For example, the ICC, the first federal regulatory commission, was established in 1887 according to a process through which interested parties sought to alter the irrationalities of the market by eliminating discriminatory trade practices. *See id.* at 1175–76. Paradigmatically, the FTC was created to eliminate the ultimate market malfunction: monopoly power. *See id.* at 1176; *see also* STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920*, at 123–50 (1982). This era of federal regulation has appropriately been described as "corrective"—the concern was with individual commercial autonomy and a free flow of market transactions. Rabin, *supra*, at 1176. For a number of excellent accounts (written at the cusp of the rise of cost-benefit analysis scholarship) of the influence the New Deal had on American government regulation, see Symposium, *The Legacy of the New Deal: Problems and Possibilities in the Administrative State*, 92 YALE L.J. 1083 (1983).

42. *See* Prest & Turvey, *supra* note 5, at 684. On the heels of the Great Depression, the country's leaders—the leaders of the New Deal era—were no longer confident in the effectiveness of the "corrected markets" of the previous period. *See* Rabin, *supra* note 41, at 1178; *see also* Posner, *supra* note 21, at 620 (noting that government regulation was "the reaction, or perhaps overreaction, to laissez faire that characterized the late 19th and early 20th centuries"); cf. *id.* at 643 (noting that, at least until 1969, there "ha[d] been no major extension of regulation since the 1930's, when the nation, traumatized by the Great Depression, reached the nadir of its faith in private enterprise"). Following the paradigm that "a free market economy, subject only to relatively minor policing activities, was . . . a menace to long-term social welfare[.]" New Deal agency programs were based on the premises that

governmental planning, in cooperation with large-scale business, labor, and consumer groups, was the best means of achieving the public interest in economic recovery and security; that governmental coordination of an essentially privately-run system of business cartels was most likely to effect a return to economic well-being; and that governmental intervention to re-establish a competitive society dominated by small businesses would counter the ill effects of fifty years of growing industrial concentration.

Rabin, *supra* note 41, at 1178; *see also* Posner, *supra* note 21, at 622 (noting the distrust of free markets following the depression). As a result of the New Deal-era confluence of pessimism about the free market as a sufficient regulatory system and optimism about the effectiveness of government as a regulator of markets, the regulatory apparatus began to grow. *Id.* at 621. It is as a result of the New Deal that government regulation "became a firmly embedded element of our intellectual heritage." *Id.* at 622.

43. *See* Adler & Posner, *supra* note 2, at 169 (noting that "the popularity of CBA among administrative agencies increased rapidly [after 1936] with the growth of the federal government").

accrue[d] [we]re in excess of the estimated costs.”<sup>44</sup> The decisional process increased in complexity as time passed, and, by 1945, secondary, indirect and intangible costs and benefits were being considered.<sup>45</sup>

Finally, the maturation of welfare economics supplied the scientific principles required by the progressives and lacking in Bentham’s philosophy. In the mid-nineteenth century, French economist Jules Dupuit began the development of modern welfare economics,<sup>46</sup> which would come to undergird CBA in its modern form.<sup>47</sup> The welfare economics crowd gained influence as the government sought a method by which it could develop CBA procedures; welfare economists believed economic concepts could be used to rationalize the implementation of government policies.<sup>48</sup> The language of Welfare Economics entered the regulatory scheme in 1950 via the “Green Book,” an interagency committee report which sought to elucidate general principles of CBA.<sup>49</sup> Although modern welfare economics, together with progressivism and the burgeoning regulatory state, made pervasive CBA an unrealized potentiality, the full effects of these three historical antecedents did not manifest themselves until 1981.

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44. Flood Control Act of 1936 § 1, ch. 688, 49 Stat. 1570, 1570 (1936) (codified as amended at 33 U.S.C. § 701(a) (2000)); Adler & Posner, *supra* note 2, at 169.

45. See Prest & Turvey, *supra* note 5, at 684.

46. See Prest & Turvey, *supra* note 5, at 683 (noting the publication of Dupuit’s “original path-breaking writing[.]” *On the Measurement of Utility of Public Works* in 1844). *But see* R. B. Ekelund, Jr., *Jules Dupuit and the Early Theory of Marginal Cost Pricing*, 76 J. POL. ECON. 462, 462–63 (1968) (concluding that, “although Dupuit has rightful claims as the first cost-benefit economist, he was not a progenitor of the principle”).

47. See Adler & Posner, *supra* note 2, at 169; cf. Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1153 (2000) (“At the highest level of generality, . . . [CBA] is virtually synonymous with welfare economics.”). *But see* MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 185 (2006) (arguing that CBA “can be rescued from welfare economics”). The modern welfare economics that developed the methodologies employed by CBA has its genesis in the work of Vilfredo Pareto, who advanced the deceptively simple proposition that a project should be undertaken if it makes someone better off without worsening anyone’s position. Adler & Posner, *supra* note 2, at 170; *see also* I. M. D. LITTLE, *A CRITIQUE OF WELFARE ECONOMICS* 84 (2d ed. 1957) (declaring Pareto “[t]he founder of the New Welfare Economics”). Pareto, it is safe to say, did not offer the final formulation, as his theory is impractical in practice—“[f]ew projects satisfy the criterion, because just about every worthwhile government project will hurt people, and compensating those people is usually infeasible.” Adler & Posner, *supra* note 2, at 170. To deal with the impracticality of the Pareto criterion, Nicholas Kaldor and J.R. Hicks suggested compensation to those harmed by those benefited. *See* J. R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939); *see also* LITTLE, *supra*, at 88–96. Their models solved the compensation problem by contemplating hypothetical compensation of those harmed by those benefited; if those benefited would be made sufficiently better off that they could overcompensate those harmed for their loss, the project is desirable. Adler & Posner, *supra* note 2, at 170. The Kaldor-Hicks criterion became the base upon which modern welfare economics, and, in turn, CBA, was built. *Id.* Some economists eventually declared the death of modern welfare economics, coincidentally not long before CBA engulfed the regulatory system from the top down. *Compare, e.g.,* John S. Chipman & James C. Moore, *The New Welfare Economics 1939–1974*, 19 INT’L ECON. REV. 547, 548 (1978) (calling modern welfare economics a failure), *with* Exec. Order No. 12,291, 46 Fed. Reg. 13, 193 (requiring CBA for all major regulations). *See also* Adler & Posner, *supra* note 2, at 170 (noting that despite the view that welfare economics was dead, CBA was embraced by government agencies).

48. Adler & Posner, *supra* note 2, at 169–70.

49. Prest & Turvey, *supra* note 5, at 684.

*B. Calls for Cost-Benefit Analysis*

The final period preceding pervasive CBA has been termed the “Public Interest Era” and was marked by environmental and “quality of life” regulation.<sup>50</sup> The tumultuous yet economically prosperous 1960s led to a regulatory focus motivated not by economic concerns, but driven instead by “[l]ong-term health and safety, preservation of natural sites and species, and a variety of similar problems”—regulating in “the public interest.”<sup>51</sup> Government regulation in this period of political populism promised to ameliorate or eliminate numerous social and economic problems.<sup>52</sup>

The paradigmatic example of this era was environmental risk regulation.<sup>53</sup> In regulating this and other similar areas, government focused on “immediate responses to long-neglected problems; . . . the existence of problems rather than their magnitude; . . . and often based judgments on moral indignation . . . .”<sup>54</sup> Because activists thought natural resources and human health should not be valued in economic terms, the result of this approach was a regulatory structure and a set of rules much different than that which might have resulted from a cost-benefit based regulatory policy—the resulting regulatory scheme was “cost blind,” required those regulated to use “the best available technology,”<sup>55</sup> and notably neglected explicit balancing of costs against benefits.<sup>56</sup> The Clean Air Act, for example, was long held to be based on public health alone, and thus did not permit agencies to consider compliance costs.<sup>57</sup>

As a result of the real or apparent incoherence of an incremental regulatory system, an attack was waged by academics, jurists and others who sought to effect wholesale methodological change.<sup>58</sup> Consequently, by the

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50. Rabin, *supra* note 41, at 1180–81.

51. *Id.*

52. Alexandra A. E. Shapiro, *The Struggle for Auto Safety*, 91 COLUM. L. REV. 710, 710 (1991); see also Adler & Posner, *supra* note 2, at 170–71.

53. See SUNSTEIN, *supra* note 1, at 3.

54. *Id.*

55. *Id.*

56. *Id.* This is not to say that government regulatory schemes did not, as a general matter, result in net benefits. Indeed, most government action effected net benefits. *Id.* at 4. However, for many, problems with 1970s-style regulation militated to a more cost-benefit focused regulatory policy. See *id.* One such problem was poor priority setting—substantial resources devoted to relatively small problems and with little attention to other more serious problems. See *id.*; STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993). Additionally, many thought neglect of CBA lead to excessively costly modes of regulation and inattention to tangential effects of regulation. SUNSTEIN, *supra* note 1, at 6. *But see* FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS 10* (2004) (“[E]vidence of absurdly expensive regulations is . . . mistaken on numerous grounds, and does not deserve to be taken seriously”). That is to say, advocates of CBA argued that implementation of a CBA-based regulatory policy would effect a higher proportion of desirable regulations, force a more diligent consideration of consequences, and encourage regulatory agencies to devise more efficient methods of achieving regulatory goals. SUNSTEIN, *supra* note 1, at 6–7.

57. See SUNSTEIN, *supra* note 1, at 12. Other statutes, including the Occupational Safety and Health Act provided for regulation of significant or unacceptable risks, thus focusing on the magnitude of problems rather than the cost of reducing those risks. See *id.* at 13 (discussing *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607 (1980)).

58. See Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 409

end of the 1970s, if not earlier, “[s]kepticism about the rational implementation of governmental policy was rampant,”<sup>59</sup> the “Great Society” had seemingly failed to meet its promise,<sup>60</sup> and conditions were such that the potential of CBA was soon to be realized.

### C. Early Adoptions

Against this background, CBA came to prominence as part of a larger administrative law decisionmaking paradigm—so-called “comprehensive rationality”—which supplanted the incrementalism of the previous era.<sup>61</sup> Under the comprehensive rationality paradigm, a policymaker was to “specify the goal he seeks to attain[,] . . . identify all possible methods of reaching [the] objective[,] . . . evaluate how effective each method will be in achieving the goal[,] . . . [and] select the alternative that will make the greatest progress toward the desired outcome.”<sup>62</sup> “The most demanding aspect of [comprehensive rationality was] the care with which it require[d] policymakers to consider the consequences of each policy option.”<sup>63</sup> CBA was designed to meet this demand,<sup>64</sup> and was touted as “a practical way of assessing the desirability of projects.”<sup>65</sup>

As a result, Congress began to enact statutes that required various forms of CBA. Some of the earliest examples, such as the National Environmental Policy Act, passed in 1969, loosely applied CBA to administrative decisionmaking.<sup>66</sup> As time passed, the requisite CBA became more concrete and particularized. For example, the Water Pollution Control Act Amendments, passed in 1972,<sup>67</sup> required a “‘limited cost-benefit analysis’ . . . intended to ‘limit the application of technology only where the [benefits are] wholly out of proportion to the costs of achieving such marginal level of reduction,’”<sup>68</sup> and the Toxic Substances Control Act, passed in 1976, authorized the EPA

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(1981).

59. Rabin, *supra* note 41, at 1183. Although regulatory reform of the late 1970s and early 1980s led some to believe the New Deal regulatory paradigm was dying, those reforms were not efforts to revert to nineteenth-century-style regulation, but were a reaction to the regulatory excesses of the early 1970s. ADLER & POSNER, *supra* note 47, at 2.

60. Shapiro, *supra* note 52, at 710.

61. See Diver, *supra* note 58, at 410.

62. *Id.* at 396.

63. *Id.* at 416.

64. *Id.*

65. Prest & Turvey, *supra* note 5, at 683; see also Baram, *supra* note 9, at 473 (noting that “[t]he use of cost-benefit analysis in agency decisionmaking [was] hailed as the cure for numerous dissatisfactions with governmental regulation”).

66. See National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102(c), 83 Stat. 852, 853 (1970) (codified as amended at 42 U.S.C. § 4332(c) (2000)); Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1352 (2002) (noting that agencies could satisfy the CBA requirement of these statutes by showing a good faith attempt to balance costs and benefits).

67. See Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (1972).

68. *Envl. Prot. Agency v. Nat’l Crushed Stone Ass’n*, 449 U.S. 64, 71 n.10 (1980) (citing Remarks of Senator Muskie, reprinted in LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 170 (1973)).

to regulate substances that posed an “unreasonable risk” to health or safety and required consideration of the benefits of the substance and the economic costs of the contemplated regulation.<sup>69</sup> While the late seventies saw a surge of legislative interest in CBA for government decisionmaking,<sup>70</sup> it was the order of a President, not Congressional enactments,<sup>71</sup> that vaulted CBA to prominence as the regulatory decisionmaking paradigm of the administrative state.

#### *D. The Role of the Chief Executives*

Responding to the real or perceived problems with 1960s and 70s regulation,<sup>72</sup> Ronald Reagan made deregulation a centerpiece of his campaign.<sup>73</sup> Reagan perceived the country’s economy as “deteriorating” and saw the decline as a “grave threat[] to [the] very existence” of the United States.<sup>74</sup> Reagan strongly rejected the piecemeal reform efforts of the Carter administration and promised broad reforms aimed at a “swollen, inefficient government [and] needless regulation.”<sup>75</sup> To remedy these problems, Reagan promised to review and change any and all regulations that affected the economy—to modify regulations so they would encourage economic growth and “eliminate waste, extravagance, fraud and abuse.”<sup>76</sup>

After his election, Reagan’s attempt to effect these changes created the major inflection point in the history of executive prescription of CBA and for CBA more generally.<sup>77</sup> Under President Reagan’s Executive Order

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69. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2020 (1976) (codified at 15 U.S.C. § 2601 (2000)); see also Johnston, *supra* note 66, at 1351 (citing the Act as an example of early legislation that required agencies to “balance the costs and benefits of alternative standards for reducing environmental or health risks, and to set the standard at a ‘reasonable’ level.”).

70. 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE 494 (2d ed. 1997). In addition to more loose CBA enacted by the Federal Water Pollution Control Act and the Toxic Substances Control Act, the Energy Policy and Conservation Act of 1975, 42 U.S.C.A. § 6295(c), (d), the Clean Water Act of 1977, 33 U.S.C.A. § 1314(b)(4)(B), as well as other regulatory statutes evidence congress’s growing interest in, and reliance on, CBA as a regulatory decisionmaking paradigm.

71. Congressional dependence on CBA has continued unabated since the late Seventies. See generally KOCH, *supra* note 70, at 494. Modern legislative prescriptions have taken many forms, including substance-specific regulatory statutes and legislation with broad applicability. See *id.* William Rogers has placed congressional CBA into four distinct categories: a “cost-oblivious” model for statutes that set the sought benefit as their sole consideration; a “cost-effectiveness” model for congressional requirements where an agency must find the most cost efficient means of accomplishing a desired benefit; a “cost sensitive” model that requires agencies to balance costs and benefits in a broad, somewhat vague sense (e.g., requirements of the most sought benefit “feasible” or “economically practical”); and finally, a true cost-benefit analysis model, which requires an agency to assign values to all determinable costs and benefits. See William H. Rodgers, Jr., *Benefits, Costs, and Risks: Oversight of Health and Environmental Decisionmaking*, 4 HARV. ENVTL. L. REV. 191 (1980).

72. See *supra* text accompanying notes 58–60.

73. Shapiro, *supra* note 52, at 710 n.1.

74. *Transcript of Reagan Speech Outlining Five-Year Economic Program for U.S.*, N.Y. TIMES, Sept. 10, 1980, at B4.

75. *Id.*

76. *Id.*

77. See *supra* text and illustration accompanying notes 6–10; *supra* note 21; see also James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 859 (2001) (noting that “[b]ecause deregulation had been a

12,291, regulatory action could not be undertaken unless doing so would result in a maximization of net benefits to society—unless “the potential benefits to society for the regulation outweigh[ed] the potential costs to society.”<sup>78</sup> Implementation of the order was ensured by a requirement that each agency prepare in connection with major rules a “Regulatory Impact Analysis”—a CBA that would describe the expected costs and benefits of the contemplated rule or regulation.<sup>79</sup> In what became central to much of the scholarly debate over regulatory CBA, the order required consideration of the benefits and costs of the rule not easily monetized.<sup>80</sup> President Reagan’s executive order sought to “reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and ensure well-reasoned regulations.”<sup>81</sup> The order was urged by “technocrats,” who believed in rational regulatory decision-making and expected implementation of CBA to preclude unreasonable regulation.<sup>82</sup> They hoped that a CBA requirement would force agencies to think clearly about the full impact of their decisions and to make clear the considerations underlying their ultimate conclusions.<sup>83</sup> Additionally, proponents of deregulation more generally supported the order, glad as ever to add an additional impediment to the passage of regulation.<sup>84</sup>

Prior to the “Reagan Revolution,” the federal government’s regulatory decisionmaking was much different<sup>85</sup>—“[b]efore the 1980s, agencies did not systematically rely on CBA when evaluating regulations and other projects.”<sup>86</sup> Executive Order 12,291 was, however, more evolutionary than

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centerpiece of his campaign, President Reagan was eager to begin the process; Executive Order 12,291 represented his first move.”)

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

79. *Id.* at 13,194.

80. *Id.*; cf. KOCH, *supra* note 70, at 496 (“Sound cost/benefit analysis cannot confine itself to the apparent impacts; it must seek out the vague and hidden values directly or indirectly affected by the government action. These values are extremely diverse and hence difficult to compare.”).

81. Exec. Order No. 12,291, 46 Fed. Reg. at 13,193.

82. ADLER & POSNER, *supra* note 47, at 3; cf. Diver, *supra* note 58, at 398, 409–10, 416–17 (noting that President Reagan’s executive order was another step toward the “comprehensive rationality” paradigm, within which cost-benefit analysis plays a central role).

83. Cf. KOCH, *supra* note 70, at 493.

84. ADLER & POSNER, *supra* note 47, at 3.

85. See SUNSTEIN, *supra* note 1, at 3 (arguing that “[t]he rise of interest in cost-benefit balancing signal[ed] a dramatic shift from the initial stages of national risk regulation”). Prior to the twentieth century, the country’s courts performed most regulatory oversight through tort law. ADLER & POSNER, *supra* note 47, at 1. Under this ad hoc and decentralized approach to regulation, courts did not explicitly engage in cost-benefit analysis (though Judge Learned Hand did eventually proffer the idea that the concept of negligence was inherently balanced costs and benefits). *Id.*

86. Adler & Posner, *supra* note 2, at 167. It is also true that “a great deal of unconscious or unarticulated CBA has been done over the past 100 years or so since the advent of administrative agencies.” WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 187 (4th ed. 2000). Before agencies used CBA, it was “never clear what methodology [they] did use.” Adler & Posner, *supra* note 2, at 175. It appears that some agencies used an intuitive, qualitative balancing of costs and benefits—a regulation was justified if it resulted in some “fairly concrete” positive effects, and so long as the regulation would not result in “enormous price increases” or financial distress in the regulated industry. *Id.* at 176.

revolutionary.<sup>87</sup> Earlier presidents, beginning with Nixon,<sup>88</sup> and followed by Ford<sup>89</sup> and Carter,<sup>90</sup> had attempted regulatory reform in which CBA played a material, if varied, role.<sup>91</sup> Nevertheless, against the narrower scope and ambition of these previous efforts, Reagan's adoption of a comprehensive CBA requirement represented a sea-change in regulatory thinking.<sup>92</sup>

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87. See Peter M. Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235, 1235 (1981) (arguing that the order was "both a bold innovation and the obvious next step in the evolution of Presidential oversight of the regulatory process."); see also Blumstein, *supra* note 77, at 859 (noting that before Executive Order 12,291, "[t]here had been a long tradition of attempts to expand presidential influence over the regulatory activity of federal agencies." (citation omitted)).

88. President Nixon's effort was termed a "Quality of Life" program, and required agencies to, *inter alia*, provide a comparison of the expected costs and benefits of alternative regulations. Memorandum from George Shultz, OMB Dir., to Heads of Departments and Agencies (Oct. 5, 1971), available at <http://www.thecre.com/ombpapers/QualityofLife1.htm> [hereinafter Schultz Memorandum]. The Quality of Life program, while ostensibly focused on health and safety regulations, was criticized as affecting in practice only the Environmental Protection Agency. See Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 9 (1984); Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 221 (1993). Additionally, it was meager in scope relative to later reforms, as it was intended only as a tool of interagency cooperation. See Schultz Memorandum, *supra*. Nevertheless, Nixon's efforts would serve as a functional foundation for subsequent reforms. John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 957 (2006).

89. In 1974, President Ford issued Executive Order 11,821, which required the Office of Management and Budget to prepare an Inflation Impact Statement (IIS) to accompany all "[m]ajor proposals for legislation, . . . regulations or rules" to the end of improved objectivity and performance of federal regulatory agencies. Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (Nov. 27, 1974); see also Charles W. Vernon III, Comment, *The Inflation Impact Statement Program: An Assessment of the First Two Years*, 26 AM. U. L. REV. 1138, 1138-39 (1977). Cost-benefit analysis figured prominently in the IIS program's evaluations of economic impact, and the IISs were renamed "Economic Impact Statements" in a subsequent order to better accord with the scope of the analysis required. Compare Exec. Order No. 11,821, *supra*, with Exec. Order No. 11,949, 42 Fed. Reg. 1,017 (Dec. 31, 1976). Indeed, "if the cost of a regulation exceed[ed] its benefits, or if an alternative proposal could provide greater benefits in relation to costs, the regulation [was] characterized as 'inflationary'; if benefits exceed costs it [was] not considered inflationary." Vernon, *supra*, at 1143 (citation omitted).

90. President Carter's Executive Order 12,044 sought to prevent regulations that would "impose unnecessary burdens on the economy, on individuals, on public or private organizations, or on State and local governments." Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978).

91. See JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 6-12 (1978); Kevin Whitney, Comment, *Capitalizing on a Congressional Void: Executive Order No. 12,291*, 31 AM. U. L. REV. 613, 613-14 (1982) (noting that the executive order was in response to forty years of call for regulatory change, and noting the "unprecedented" nature of the order); cf. Shane, *supra* note 87, at 1235 (arguing that the order was "both a bold innovation and the obvious next step in the evolution of Presidential oversight of the regulatory process"). See generally Graham et al., *supra* note 88, at 955-65.

92. Executive Order 12,291 was later superseded by Bill Clinton's substantially similar Executive Order Number 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), which, as amended, remains in force. Exec. Order No. 13,422, 72 Fed. Reg. 2,703 (Jan. 18, 2007). The preamble to Clinton's order proclaims "[t]he American people deserve a regulatory system that . . . protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society." Exec. Order No. 12,866, 58 Fed. Reg. 51,735. Toward this end, it requires agencies to "assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." *Id.* Clinton's order did have a more Democratic flair to it, requiring consideration of "distributive impacts" and a regulation's expected effect on "equity" as part of the benefits to be maximized. *Id.*

## III. THE RISE OF COST-BENEFIT ANALYSIS: THE LEGAL ACADEMY

The previous Part attempted an explanation of both how and why the United States became a cost-benefit state. With respect to the legal academy's interest in CBA, the task of understanding how and why is bifurcated between this and the next Part; this Part explains how CBA scholarship developed within the legal academy. Again, as an aid to understanding, Subpart A provides the pre-history, which, here, concerns early adoptions of efficiency as a legal concern. Subparts B and C detail early law and economics scholarship and early CBA scholarship, respectively. Subpart D looks comparatively at several articles in order to illustrate the nature of the primary inflection point in the study of CBA, and Subpart E surveys, however briefly, the corpus of contemporary cost-benefit scholarship.

*A. Darkness Before the Sunrise and Holmes' Prognostication*

A brief sketch of familiar legal history will serve to delineate the conditions precedent to the rise of CBA as a mainstay of legal scholarship. The starting point is the common law judges of England who conceived of law as discrete—law was “a subject properly entrusted to persons trained in law and in nothing else.”<sup>93</sup> Despite this view, early legal theorists took due cognizance of extra-legal concerns. Thomas Hobbes, writing in the mid-seventeenth century, argued that “law should *not* be understood or justified only on its own terms”—Hobbs rejected the contention that only lawyers steeped in judicial opinions and legal jargon could understand and contribute to law.<sup>94</sup> Jeremy Bentham, Oliver Wendell Holmes and the law and economics scholars echoed this argument, and in doing so owe a debt to Hobbes.<sup>95</sup>

Salient among the extra-legal considerations urged by Hobbes was utility or efficiency. For example, Blackstone's commentaries are sprinkled with utilitarian principles, the economist Adam Smith gave lectures on jurisprudence, and Jeremy Bentham made the most significant, if not the earliest, arguments for efficiency as a legal concern.<sup>96</sup> Additionally, in the century between the writings of Bentham and Holmes (who was next to adopt Hobbes' ideas) Langdellianism came to prominence, and “law” became an academic and scientific idea; cases were to be analyzed in order to divine legal principles and the skills relevant to law and legal reasoning pertained to the divination of these principles.<sup>97</sup> Holmes made clear the inadequacies

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93. Posner, *supra* note 20, at 762.

94. Hylton, *supra* note 27, at 87; *see id.* at 87–88 (arguing that Hobbs is the principle source for this idea).

95. *Id.* at 88.

96. *Id.* at 86. Bentham urged a utilitarian-instrumentalist approach to legal reasoning, which sought “to determine the function of law and the manner in which it solves the social problems thrown before it.” *Id.*; *see also supra* notes 27–29.

97. Posner, *supra* note 20, at 762 (discussing C. C. LANGDELL, A SELECTION OF CASES ON THE



of Langdellianism by drawing on Bentham and teaching that law was a mode of social control—a means to achieve social ends.<sup>98</sup> Holmes' *The Common Law* presented a largely utilitarian view of the law,<sup>99</sup> and in his estimation, the future of legal studies belonged to the economist and the statistician rather than the “black-letter” man.<sup>100</sup> The lawyer-economists' triumph, predicted by Holmes as the nineteenth century waned, did not take hold until the 1960s.<sup>101</sup>

### B. *The Dawning of Law and Economics*

Early legal theorists' concerns with efficiency are distinct from modern law and economics. The distinction became clear in the early 1960s when Ronald Coase's *The Problem of Social Cost*,<sup>102</sup> Guido Calabresi's *Some Thoughts on Risk Redistribution and the Law of Torts*<sup>103</sup> and *The Cost of Accidents: A Legal and Economic Analysis*,<sup>104</sup> and Gary Becker's *Crime and Punishment: An Economic Approach*,<sup>105</sup> demarked this new, interdisciplinary field. These works drew on a boom in the economics academy, which by 1960 had “become more rigorous . . . [and] branched out from market to nonmarket behaviors.”<sup>106</sup>

Ronald H. Coase authored *The Problem of Social Cost* while a professor of economics at the University of Virginia,<sup>107</sup> but the events that led to the article—“probably the most widely cited article in the whole of the modern economic literature”<sup>108</sup>—were largely fortuitous.<sup>109</sup> Incident to his work

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LAW OF CONTRACTS WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES (2d ed. 1879)); see also MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* xii (1977).

98. Posner, *supra* note 20, at 762 (discussing O.W. HOLMES, JR., *THE COMMON LAW* (1881)).

99. Hylton, *supra* note 27, at 88.

100. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

101. See Hylton, *supra* note 27, at 88 (noting the “long dry spell” between Holmes' utilitarian ideas and the rise of law and economics in the 1960s).

102. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); see also A.W. Brian Simpson, *Coase v. Pigou Reexamined*, 25 J. LEGAL STUD. 53, 53 (1996) (“‘The Problem of Social Cost,’ has generated a massive literature . . .”).

103. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961). Prior to these two articles, the domain of economics within the law was largely confined to antitrust. See Posner, *supra* note 20, at 764–65.

104. GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

105. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

106. Posner, *supra* note 20, at 767; see also RICHARD A. POSNER, *OVERCOMING LAW* 3 (1995) (discussing the connection between a vibrant economics academy and the law and economics movement); Richard A. Posner, *The Future of the Law and Economics Movement in Europe*, 17 INT'L REV. L. & ECON. 3, 4 (1997) (arguing that the prestige of applied economics and the expansion to non-market behaviors was conducive to the growth of law and economics). Gary Becker was central to this effort. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 4 (2d ed. 2007).

107. See Coase, *supra* note 102, at 1; Ronald H. Coase, *Biography of Ronald H. Coase*, in NOBEL LECTURES IN ECONOMIC SCIENCES 1991–1995, at 7, 7–10 (Torsten Persson ed., 1997) [hereinafter NOBEL LECTURES].

108. NOBEL LECTURES, *supra* note 107, at 10.

109. See generally NOBEL LECTURES, *supra* note 107, at 7–10. Although he planned to study industrial law at the London School of Economics (LSE), a Sir Earnest Cassel Traveling Scholarship in economics diverted his path and took him to the United States to study industry. *Id.* at 9. This was the second time happenstance thwarted Coase's academic preferences: while at Kilburn Grammar School, he

with the London School of Economics, Coase cultivated an interest in the broadcasting industry; this interest continued through his years at the University of Virginia<sup>110</sup> and resulted in his article *The Federal Communications Commission*.<sup>111</sup> While economists at the University of Chicago initially thought this article was flawed, Coase convinced them otherwise,<sup>112</sup> and they invited him to publish in the new *Journal of Law and Economics*.<sup>113</sup> Coase undertook a second article, *The Problem of Social Cost*, to clarify his position.<sup>114</sup> Had the Chicago economists not doubted Coase's *The Federal Communications Commission*, *The Problem of Social Cost* "probabl[y] . . . would never have been written."<sup>115</sup>

Coase's article urged a system that would account for the total effect of regulatory decisions—account for not only the benefits of a new system, but also its costs: direct, transitional, and systemic.<sup>116</sup> In short, Coase advocated that, when changes are contemplated to the social order, the changes made should "have regard for the total effect."<sup>117</sup> While *The Problem of Social Cost* was "concerned with a technical problem of economic analysis," it was nevertheless interdisciplinary—Coase's article sought to refute the legal conclusions reached as a result of the work of the economist Arthur Pigou<sup>118</sup> and drew on works in the law of torts for support.<sup>119</sup>

While Coase broadened the scope of economic inquiry to include legal and regulatory matters more completely, the work of Guido Calabresi was, according to contemporary critics, an "ambitious effort to employ a social science perspective . . . in a field of law in which . . . there was no suppor-

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intended to study history, but was turned away for want of proficiency in Latin. *Id.* at 8. Had the University of London not awarded him this scholarship, Coase "undoubtedly [would] have gone on to become a lawyer." *Id.* at 9. While in the United States, he developed two principal ideas: transaction costs and the theory of the firm. *Id.* The latter field of inquiry became Coase's article *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937), which, together with *The Problem of Social Cost*, *supra* note 102, earned him the Nobel Prize in Economics. See NOBEL LECTURES, *supra* note 107, at 9. It is also worth noting here that *The Problem of Social Cost*, so important in the law and economic literature, has its actual genesis in *The Federal Communications Commission*, an article concerned with regulatory policy. From this starting point, one could draw a direct line through the economics literature to modern CBA scholarship.

110. See NOBEL LECTURES, *supra* note 107, at 7–10.

111. 2 *J.L. & ECON.* 1 (1959). *The Federal Communications Commission* advocated the distribution of bandwidth through a competitive bidding process. See *id.*

112. NOBEL LECTURES, *supra* note 107, at 10.

113. See *id.*

114. *Id.*

115. *Id.* *The Problem of Social Cost* garnered instant acclaim. *Id.* In 1964, following the publication of these articles, Coase accepted an invitation to join the faculty of the University of Chicago and became editor of the *Journal of Law and Economics*. *Id.* There is no question that Coase and the journal he edited went far toward establishing law and economics as a resonant interdisciplinary subject.

116. See Coase, *supra* note 102, at 44.

117. *Id.* This sentiment is obviously evoked by Regan's Executive order, which required consideration of *all* costs and benefits, even those not easily monetizable. Exec. Order 12,291, 46 *Fed. Reg.* 13,193 (Feb. 17, 1981); see *supra* notes 77–84 and accompanying text; see also Kelman, *supra* note 29, at 33 (noting the assumption that when conducting cost-benefit analysis, it is advantageous to include consideration of all costs and benefits).

118. Coase argued that the implications drawn by policymakers from Pigou's *THE ECONOMICS OF WELFARE* 183 (4th ed. 1932) lead to undesirable results.

119. *E.g.*, W.L. PROSSER, *THE LAW OF TORTS* (3d ed. 1955).

tive tradition, [and] no pioneering work by economists or other social scientists.”<sup>120</sup> Both Calabresi’s book, *The Cost of Accidents: A Legal and Economic Analysis*,<sup>121</sup> and his article *Some Thoughts on Risk Redistribution and the Law of Torts* drew heavily on both law<sup>122</sup> and economics<sup>123</sup> literature, and went far towards integrating legal and economic analysis.

Together with Gary Becker’s *Crime and Punishment: An Economic Approach*,<sup>124</sup> *The Cost of Accidents*, *Some Thoughts on Risk Distribution and the Law of Torts*, and *The Problem of Social Cost* became the cradle for not only law and economics, but also for the lesser included inquiries into CBA.

### C. Early Cost-Benefit Analysis Scholarship

Beginning in the mid- to late-1960s, legal scholarship increasingly drew on economic literature and addressed issues of CBA, but the earliest legal CBA scholarship was merely incident to the adoption and assimilation of economic principles and economic literature by legal scholars rather than a distinct field of study. This subpart presents a close look at a typical article from the period to illustrate both the state of the art in the late sixties and how CBA terminology was incorporated into the law and economics lexicon.

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120. Richard A. Posner, *Guido Calabresi’s The Costs of Accidents—A Legal and Economic Analysis*, 37 U. CHI. L. REV. 636, 638 (1970) (book review); cf. Hylton, *supra* note 27, at 89. Calabresi’s training at Yale prepared him well for his pioneering scholarship in law and economics—he earned a B.S., *summa cum laude*, in economics from Yale College, and graduated *magna cum laude* from Yale Law School. *See id.*

121. CALABRESI, *supra* note 104.

122. E.g., Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Fleming James, Jr., *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537 (1952); Clarence Morris, Sr., *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

123. E.g., Harry Gunnison Brown, *The Incidence of Compulsory Insurance of Workmen*, 30 J. POL. ECON. 67 (1922); J. M. Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940); Nancy Ruggles, *Developments in Theory of Marginal Cost Pricing*, 17 REV. ECON. STUD. 107 (1949).

124. *See* Becker, *supra* note 105. Both *Crime and Punishment: An Economic Approach*, *supra* note 105, and another late 1960s scholarly publication, *The Cost of Accidents: A Legal and Economic Analysis*, *supra* note 104, have been called the start of “law and economics, as we see it practiced today.” Hylton, *supra* note 27, at 85. Interestingly, Gary Becker would become an academic companion to Richard A. Posner at the University of Chicago. *See* Gary S. Becker & Richard A. Posner, *The Becker-Posner Blog*, <http://www.becker-posner-blog.com> (last visited Apr. 1, 2008).

Perhaps the principal harbinger of CBA was Richard Posner.<sup>125</sup> His writings while an associate professor at Stanford Law School<sup>126</sup> are representative of what would become the larger debate over the normative desirability of government regulation, and his 1969 article *Natural Monopoly and its Regulation*<sup>127</sup> is a characteristic early use of CBA terminology in academic legal writing.<sup>128</sup> Then-Professor Posner sought to determine “whether natural monopoly provide[d] an adequate justification for the imposition of [] regulatory controls.”<sup>129</sup> Based on his experience within the regulatory apparatus and subsequent scholarly study, Posner was convinced that regulation of natural monopolies was a poor use of government resources: in his estimation, “public utility regulation [was] probably not a useful exertion of governmental powers . . . its *benefits [could not] be shown to outweigh its costs.*”<sup>130</sup> With this phrasing, Posner framed the initial, but yet to occur in earnest, debate about the normative defensibility of government regulation, and he framed it in the language of CBA. Much academic scholarship at the time focused on the mechanics of government regulation—the “details of its application.”<sup>131</sup> For Posner, this focus was more important for what it neglected than what it addressed—academic focus on the application of government regulations presumed their normative validity.<sup>132</sup> Posner questioned this predicate—he questioned the con-

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125. In any event, the work of Posner will aptly illustrate the state of the art during this period. Moreover, he is unquestionably one of the principle figures in the movement, and his early work deserves close attention because of its precipitating effects. After taking a degree in English at Yale College, see Judge Richard Posner, Brief Biographical Sketch, <http://home.uchicago.edu/~rposner/biography>, Posner was trained in law at Harvard Law School at the height of doctrinal or “legal process”—non-interdisciplinary—legal scholarship. Posner, *supra* note 20, at 763. In Posner’s estimation, “the faculty believed, or at least appeared to believe, that the only thing law students needed to study was authoritative legal texts—judicial and administrative opinions, statutes, and rules—and that the only essential preparation for a legal scholar was the knowledge of what was in those texts.” *Id.*; see also MORTON HORWITZ, TRANSFORMATION OF AMERICAN LAW 1870–1960 (1992); LAURA KALMAN, YALE LAW SCHOOL AND THE SIXTIES (2005) (describing tumult at Yale Law School in the 1960s).

126. See Posner, *supra* note 21, at 548 n.1.

127. *Id.* at 548.

128. Other than the instance noted here, the language of CBA was used in a number of other contexts during this period, but not in the sense in which it would later be used—as a term of art. Other academics used the term even more casually than Posner does in this article and do not address regulatory decision-making. See, e.g., Murray L. Schwartz, Book Review, 21 STAN. L. REV. 1277 (1969) (noting the use of a loose consideration of costs and benefits in Herbert L. Packer, *The Limits of the Criminal Sanction*).

129. Posner, *supra* note 21, at 548.

130. *Id.* at 549 (emphasis added).

131. *Id.*; cf. *infra* text accompanying notes 179–182 (noting that before the 1980s, the legal academy debated the normative worth of government regulation). Because debates about regulations’ normative validity was largely mooted by the passage of time and the seeming lack of affect of the critiques, the debate became a methodological one, and became one focused on the normative worth of methodologies. Posner, *supra* note 21, at 549.

132. See Posner, *supra* note 21, at 549. It is interesting that Posner saw himself as initiating a new debate—a debate about the normative worth of government regulation. See *id.* Toward the end of the 20th century, the normative debate was largely mooted, and the scholarly debate came full circle—it began again to address methodological concerns. See *infra* note 179 and accompanying text.

ventional wisdom that government regulation of natural monopolies was “inevitable, wise, and necessary.”<sup>133</sup>

While noteworthy, Posner’s use of a balancing of costs and benefits represents not the term of art the phrase later became, but a cost-benefit balancing as commonly understood.<sup>134</sup> The article offers a “Balance Sheet” of natural monopoly regulation, noting that, although there are justifications for such regulation, none of them make a case in which “the benefits clearly outweigh the costs.”<sup>135</sup> While modern CBA “is not a matter of just adding up all of the effects of a project and labeling all those that appear good as benefits and those that appear bad as costs,” this is exactly what Posner’s “Balance Sheet” did.<sup>136</sup> From this it is apparent that at the time he penned this article, use of the term “Cost-Benefit Analysis” had not yet reached maturity within the legal academy. *Natural Monopoly and its Regulation* used CBA as a rhetorical tool not significantly different than a list of “pros” and “cons”<sup>137</sup>—within the legal academy, at least, CBA was not yet synonymous with rigorous welfare economics-derived regulatory decisionmaking.<sup>138</sup>

#### D. The 1970s: Scholarly Paradigm Shift

The two prior subparts are introductory—prologues to this one, which presents the major inflection point in CBA scholarship. The political and administrative happenings of the 1970s provided more than adequate fodder for legal CBA scholars. In beginning to address the CBA that had developed in water management in the 1960s—one of the first areas in which CBA was widely utilized as an administrative decision-making paradigm was water resource development<sup>139</sup>—legal scholars undertook thorough analyses of cost-benefit principles and evaluation of the methodology within the

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133. Posner, *supra* note 21, at 549.

134. “[T]he popular view of cost/benefit analysis sees it as a simple listing of the good and bad impacts of a particular action. The balance, under the popular view, is more intuitive than scientific.” KOCH, *supra* note 70, at 495–96. Posner’s early use of the term reflects this understanding, but his and others’ later treatments reflect the enshrinement of CBA as an intensely sophisticated methodological tool.

135. Posner, *supra* note 21, at 618.

136. KOCH, *supra* note 70, at 496 (quoting LEE ANDERSON & RUSSEL SETTLE, *BENEFIT-COST ANALYSIS: A PRACTICAL GUIDE* 15 (1977)).

137. See Posner, *supra* note 21, at 618.

138. The publications of another eminent defender of CBA also illustrate this distinction. A reviewer of Cass Sunstein’s *The Cost-Benefit State* drew the juxtaposition this way:

[Early in his career.] Cass Sunstein published an article entitled *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*. Sunstein apparently meant the words “costs” and “benefits” in an informal sense, as the article considered the advantages and disadvantages of aggressive judicial review without pretense of explicit quantification. . . . *The Cost-Benefit State* . . . uses the words “costs” and “benefits” as labels for quantitative assessments of the effects of governmental actions.

Michael Abramowicz, *Toward a Jurisprudence of Cost-Benefit Analysis*, 100 MICH. L. REV. 1708, 1709 (2002).

139. See *supra* note 44.

framework of a trained lawyer's understanding.<sup>140</sup> What follows, in respective subparts, is a brief look at the initial CBA scholarship that attempted to engage welfare economics-derived administrative decision-making methodologies,<sup>141</sup> a slightly fuller analysis of a series of articles that land firmly on the temporally near side of the point of inflection, and, finally, an exposition of exactly those differences that justify describing the change from the former to the latter as profound.

### 1. *The National Environmental Policy Act*

In 1969, Congress passed the National Environmental Policy Act (NEPA),<sup>142</sup> which required the preparation of an Environmental Impact Statement (EIS) in connection with proposed agency action.<sup>143</sup> While courts' initially interpreted the act to be a purely procedural mandate,<sup>144</sup> two judicial decisions, one by the District of Columbia Circuit in 1971,<sup>145</sup> and another by the Eighth Circuit in 1972,<sup>146</sup> interpreted the consideration of environmental factors embodied in the agencies' EISs to require a balancing of the environmental costs of a project against its economic benefits.<sup>147</sup>

Representative scholarship in this area addressed the difficulty courts faced when attempting to review an agency's CBA (i.e., EIS).<sup>148</sup> For example, recognizing the inherent difficulty in monetizing known environmental harms, which, though necessary for an effective CBA, was then beyond the state of the art, one scholar commented on the difficulty courts faced when required to evaluate a CBA when material inputs were then unmonetiz-

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140. The two areas of cost-benefit scholarship detailed here were chosen because one of the first areas in which cost-benefit analysis was widely utilized as an administrative decisionmaking paradigm was water resource development. They are not exhaustive of the range of inquiry at the time—they are presented as illustrative, for contrast, and because they represent some of the most relevant and noteworthy scholarship.

141. As contrasted with the cost-benefit analysis scholarship presented in the previous subpart.

142. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4331–32 (2000)).

143. 42 U.S.C. § 4332. The NEPA provides an excellent case study in the early tension between cost-benefit analysis and the status quo. That is, recognizing that “that each person should enjoy a healthful environment,” the Act directs federal agencies to “use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . .” *Id.* § 4331. On the other hand, and in addition to this broad substantive guarantee, the NEPA required the preparation of an Environmental Impact Analysis. *Id.* § 4332; see also Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735, 735–36 (1975) [hereinafter *The Least Adverse Alternative*] (discussing this tension).

144. See, e.g., *Nat'l Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971); see also Edmund S. Muskie & Eliot R. Cutler, *A National Environmental Policy: Now You See It, Now You Don't*, 25 ME. L. REV. 163, 164–65 (1973).

145. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm.*, 449 F.2d 1109 (D.C. Cir. 1971). The court's decision was based on a section of legislative history, which indicated that the Act “require[d] the development of procedures designed to insure that all relevant environmental values and amenities are considered in the calculus of project development and decisionmaking.” *Id.* at 1113–14 n.9.

146. *Envtl. Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army*, 470 F.2d 289 (8th Cir. 1972).

147. *Calvert Cliffs'*, 449 F.2d at 1115. Moreover, failure of agencies to comply with this requirement would subject their decisions to judicial review. See *Envtl. Def. Fund*, 470 F.2d at 298.

148. See, e.g., *The Least Adverse Alternative*, *supra* note 143, at 735.

able—if the agency was ill equipped to evaluate a CBA, how could a generalist judge?<sup>149</sup> During this period, the academic methodology was traditional and legal, even if the subject covered was newfangled and economic.

## 2. *The Delaware River Basin Commission*

A series of articles by Bruce Ackerman and, variously, James Sawyer, Susan Rose Ackerman, and Dale W. Henderson, are exemplary early analyses of regulatory CBA by legal academics and represent a distinct break with the methods and foci of the past.<sup>150</sup> These *Uncertain Search for Environmental Policy*<sup>151</sup> articles were an academic response to the activities of the Delaware River Basin Commission (DRBC)<sup>152</sup>—activities that “had significance not only for environmentalists, but for every student of American institutions.”<sup>153</sup> The activities of the Commission promised to effect more rational regulatory decisionmaking.<sup>154</sup> This newfound rationality took the form of a study made by the Department of the Interior in support of the DRBC, which attempted to “quantify the costs and benefits” of the activities proposed by the DRBC.<sup>155</sup> That report resulted in an analysis of the quantifiable costs and benefits of five different water quality standards in the Delaware Estuary.<sup>156</sup> Ackerman’s articles sought, as much early scholarship

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149. See *id.* at 743 (citing *Envtl. Def. Fund v. TVA*, 371 F. Supp. 1004 (E.D. Tenn. 1973), as an example of a court attempting to weigh the costs and benefits of dam construction that was to destroy archeological sites, trout fishing waters and alter historical landmarks’ environs).

150. The first article was written with James Sawyer. See Bruce Ackerman & James Sawyer, *The Uncertain Search for Environmental Policy: Scientific Factfinding and Rational Decisionmaking Along the Delaware River*, 120 U. PA. L. REV. 419 (1972) [hereinafter *Scientific Factfinding*]. The second was written with Susan Rose Ackerman and Dale W. Henderson. See *The Uncertain Search for Environmental Policy: The Costs and Benefits of Controlling Pollution Along the Delaware River*, 121 U. PA. L. REV. 1225 (1973) [hereinafter *Costs and Benefits*].

151. *Scientific Factfinding*, *supra* note 150; *Costs and Benefits*, *supra* note 150.

152. The DRBC began operations in 1961. *Scientific Factfinding*, *supra* note 150, at 432. The articles, as well as a book-length study, were the result of a three-year project spearheaded by Bruce Ackerman at the University of Pennsylvania. See BRUCE A. ACKERMAN ET AL., *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* ix (1974). Those three years were spent scrutinizing the decisionmaking process undertaken by the DRBC, including the Delaware Estuary Comprehensive Survey (DECS) report. *Id.*

153. *Scientific Factfinding*, *supra* note 150, at 421. In the opinion of the authors, these activities seemed a triumph of comprehensive rationality, see *supra* notes 61–64 and accompanying text, and a “vindicat[ion] [of] the American faith in the power of men to create both new modes of thought and novel organizational forms that [could] promise to control the problems of a rapidly changing industrialized society.” *Scientific Factfinding*, *supra* note 150, at 421.

154. See *Scientific Factfinding*, *supra* note 150, at 421 (noting that the Commission’s pollution control measures were “grounded in a conceptual approach that promised to enhance dramatically the rationality of decisions affecting environmental quality”).

155. *Id.* at 422. CBA found its way into this project through the Public Health Service (PHS), which adopted some form of cost-benefit analysis in the 1950s. *Id.* at 432. The PHS was put in control of water quality in the Delaware watershed, and in the late 1950s included in its initial report a small section on pollution of the Delaware. *Id.* As the PHS burgeoned, it became eager to apply its new cost-benefit techniques to water quality problems, and, as a result of much of the initial work having already been completed, chose the Delaware Basin as a testing ground for the new techniques. *Id.* Hence, in 1962, the PHS began the Delaware Estuary Comprehensive Survey (DECS), a 1.2 million-dollar, four-year comprehensive survey. *Id.* at 432–33.

156. *Id.* at 434–35.

did, to “deal with the institutional and conceptual novelties involved” in the administrative use of CBA.<sup>157</sup>

The first article in the series, *Scientific Fact-Finding and Rational Decision Making Along the Delaware River*,<sup>158</sup> critically analyzed the factual presentation by the DRBC to the Department of the Interior in order to better understand the susceptibility of CBA to input problems.<sup>159</sup> The article focused on the reliability and impact of model inputs, as well as institutional problems with CBA,<sup>160</sup> as the ultimate goal was the development of a regulatory system suited to adequately compensate for necessarily imperfect information.<sup>161</sup> In conclusion, the authors unassumingly note the importance of their work: “studies similar to the [Deleware Estuary Comprehensive Survey] DECS [were] being pursued around the country and if lawyers and other policymakers [we]re to understand their significance and validity, they must learn the questions they should ask of the experts.”<sup>162</sup>

The second article in the series, *The Costs and Benefits of Controlling Pollution Along the Delaware River*,<sup>163</sup> shifted the inquiry more squarely on the unexpectedly consequent CBA employed by the DECS report.<sup>164</sup> The article carried two main objectives: One was to offer and elicit criticism for the CBA embodied in the DECS report<sup>165</sup> and measure the effect the implementation of CBA methodology had on the rationality of agency decision making (how great a step was the DECS toward the comprehensive rationality paradigm?).<sup>166</sup> Another was to urge a coming together of lawyers and economists—a melding of legal and economic analysis—so they could

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157. *Id.* at 422. In other words, these articles represent the beginning of a truly interdisciplinary approach to analysis of regulatory issues. *Cf. supra* note 21 (noting that prior to this time, considerations of costs and benefits were viewed as the prerogative of economics scholars, not legal ones, and that this bifurcation retarded comprehensive understanding of the regulatory process—the skills of both lawyers and economists are necessary). This article also points to a suspect simplification which it and this Comment engage: the simplification of the archetype of CBA, which undoubtedly has numerous subtypes, into a single concept. *Scientific Factfinding*, *supra* note 150, at 422.

158. *Scientific Factfinding*, *supra* note 150, at 419.

159. *Id.* at 430.

160. *See id.* at 435. Specifically, the article sought to determine: (1) whether the definition of the problem would affect the analysis by inviting the decisionmaker to over- or under- weight various considerations in the analysis? (2) when taken on its own terms, how reliable was the factual information used in the study?, and (3) what was the impact of attempting to meld the efforts of a technocratic (i.e. cost-benefit-focused) branch of government—the DECS—and a political body—the DRBC? *id.*; *see also* Graham et al., *supra* note 88, at 979–80 (noting that cost-benefit analysis is only as good as the data being analyzed and that both cost and benefit data are suspect).

161. *See Scientific Factfinding*, *supra* note 150, at 430. Specifically, the article was concerned with the extent to which scientific definitions of key terms like “water pollution problem” would influence decisionmakers, the maximum feasible reliability of data, and the proper institutional design to systemically compensate for these and other failings. *Id.* at 431.

162. *Id.* at 495.

163. *Costs and Benefits*, *supra* note 150.

164. *Id.* at 1227. Unexpectedly consequent because, drawing on the work of the DRBC, in 1972 Congress amended the Federal Water Quality Control Act to require the Department of the Interior to conduct CBA modeled after the DECS report for all water control projects nationally. *See id.* at 1292–93.

165. *Id.* at 1227.

166. *Id.* at 1227–28.



concertedly consider how best to optimize regulatory CBA.<sup>167</sup> Prior to these articles, the esoteric mathematical language in which CBA models were presented largely precluded the necessary involvement of lawyers in cost-benefit model building<sup>168</sup>—one can understand the role of CBA in project evaluation only by understanding how agencies interact.<sup>169</sup>

### 3. *Temporal Similarity, Fundamental Differences*

The academic response to the DRBC, when contrasted with earlier works regarding the NEPA, illustrates the paradigm shift that was occurring in legal scholarship. While it is true that some scholars previously attempted to address some of the issues embraced by Ackerman's group, those scholars were engaged in "preliminary work" and were not lawyers, but economists;<sup>170</sup> before the *Uncertain Search for Environmental Policy* articles, the basic concepts in CBA model building were forbidding to those trained in law.<sup>171</sup> Hence, presumably for lack of legal knowledge and training, the earlier scholarship focused on critiques of specific policy areas but missed the larger democratic and administrative systematic issues—"nothing like a general theory on either the normative or empirical levels ha[d] yet emerged [to] satisfactorily enlighten[] the complex interrelationships between technocratic intelligence, political decision making, and legal enforcement in modern government."<sup>172</sup> Ackerman's team sought to "bridge the gap"—lawyers were necessary, if theretofore absent, for effective CBA model building.<sup>173</sup> This confluence of technocracy, polity, and legality in time became the domain of legal scholars of CBA—as Ackerman and his team understood, "many of the most important and interesting issues concerning the art of government involve the interrelationship of various disciplines."<sup>174</sup>

The scholarship critiquing the DRBC report was progressive in another sense: it focused on administrative agencies. Ackerman argued that the

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167. *Id.* at 1228.

168. *Scientific Factfinding*, *supra* note 150, at 495 ("[u]p to the present time, the basic concepts involved in model building have been presented in a mathematical language forbidding to most law trained professionals"—their article sought to "bridge the gap").

169. Adler & Posner, *supra* note 2, at 175.

170. See ACKERMAN ET AL., *supra* note 152, at 2; *id.* at 2 n.1. This is not intended to understate the importance of economists in law and economics—their role was and is central. Indeed law and economics journals publish more work by economists than by lawyers. See Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in the Europe and the United States*, 59 ALA. L. REV. (forthcoming 2008).

171. *Scientific Factfinding*, *supra* note 150, at 495.

172. ACKERMAN ET AL., *supra* note 152, at 2.

173. *Scientific Factfinding*, *supra* note 150, at 495. The DRBC project was an ideal starting point for this upset, as it involved the rejection of "impressionistic" evaluations of environmental conditions in favor of sophisticated fact-finding and economic analysis and sought to design a system of legal controls for implementation of its policy conclusions (the DRBC was an interstate body—a regional governing body with no pre-existence). ACKERMAN ET AL., *supra* note 152, at 3–5.

174. ACKERMAN ET AL., *supra* note 152, at 6. Moreover, the adoption of cost-benefit analysis by the legal academy proved to be part of a larger interdisciplinary movement within the academy—attention to the interactions of "natural science, economics, politics, law, [and] philosophy." *Id.* at 6.

academy's focus on courts was myopic, and when critiquing a regulatory state, cripplingly so.<sup>175</sup> Then, as now, public policy decisions were increasingly made by administrative agencies—unfamiliar terrain to academics of the time, but nonetheless an area in which legal professionals would ultimately make significant contributions.<sup>176</sup> Ackerman's articles are examples of a genre of legal scholarship he was an early advocate of—a genre in which much of the CBA debate would unfold—a genre that critiques the workings of administrative agencies rather than the traditional subjects of legal scholarship: courts and Congress.<sup>177</sup> Whereas “law reviews ha[d] traditionally criticized the rationality of judicial opinions, [this new genre] attempted to perform a similar function for a less familiar aspect of the administrative process.”<sup>178</sup>

### *E. Beyond Executive Order 12,291*

Prior to the 1980s, the academy focused on the normative defensibility of the regulatory state itself.<sup>179</sup> Very simply, the Left advocated for an increased regulatory presence, while the Right urged deregulation.<sup>180</sup> Posner's article *Natural Monopoly and Its Regulation*<sup>181</sup> was part of the leading edge of this debate.<sup>182</sup> Partially because of the precipitating effect of Reagan's Executive Order, and partially because “the Left prevailed,”<sup>183</sup> the modern debate within the legal academy has been focused on methodologies rather than normative worth of government regulation.<sup>184</sup> Insofar as the scholarship in the legal academy is “about the decision procedures [i.e. CBA] that agencies should use when evaluating regulations,” it is similar to earlier exchanges in the economics academy.<sup>185</sup> The legal academic debate is different in scope and perspective, however, in that it brings together address of the technocratic,<sup>186</sup> political, and legal issues<sup>187</sup> for consideration of the

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175. See *Scientific Factfinding*, *supra* note 150, at 495.

176. See *id.* The authors also note that lawyers' training pedagogically predisposes them to be apt critics—a lawyers ingrained skepticism should lead her to ask questions that others would readily dismiss and consider obtuse contingencies. See *id.*

177. See *id.*

178. *Id.*

179. ADLER & POSNER, *supra* note 47, at 2.

180. *Id.*

181. Posner, *supra* note 21.

182. See *supra* notes 127–138 and accompanying text.

183. ADLER & POSNER, *supra* note 47, at 2. While the left may well have “prevailed,” many of the modern defenders of CBA are relatively moderate or liberal. *Id.* at 4; see also *id.* (noting collaboration between the American Enterprise Institute (a center-right think tank) and the Brookings Institution (a center-left think tank) that assumes CBA is “the proper decision procedure”).

184. *Id.* at 2. For example, in the 1960s, Richard Posner argued against the normative worth of regulating natural monopolies, but, in the 1990s, Eric Posner argued for the normative worth of CBA as a regulatory methodology. Compare Posner, *supra* note 21, with Adler & Posner, *supra* note 2, and ADLER & POSNER, *supra* note 47.

185. ADLER & POSNER, *supra* note 47, at 2; see *supra* text accompanying note 170.

186. The technocratic debate is that which has its genesis in the economics academy. See *supra* text accompanying note 170.

187. The political and legal issues largely address “the relationship between agencies, courts, Con-

system as a whole. Ackerman's *Uncertain Search for Environmental Policy* articles were part of the leading edge of this debate.<sup>188</sup> Although Ackerman's articles urged this approach, its intricacies did not capture widespread academic attention until 1981—until the issuance of Executive Order 12,291. Although a full survey of CBA literature since 1981—with its rich subtlety and extensive vagaries—is well beyond the scope of this Comment, this subpart will detail the most important threads within the corpus by focusing on the most salient critiques and critics as well as prominent defenses and defenders.

### 1. Initial Systemic Critiques

Not surprisingly, some of the initial critiques following the issuance of Executive Order 12,291 pertained to the constitutional propriety of the Order, and the desirability of Unitary Executive oversight of regulatory decisionmaking.<sup>189</sup> These critiques drew on exactly that lawyerly understanding Ackerman had urged was necessary to a full debate of the costs and benefits of CBA. Noteworthy among them is Professor Cass Sunstein's article *Cost-Benefit Analysis and the Separation of Powers*.<sup>190</sup> This work is significant not only because of its author's eventual prominence in the field,<sup>191</sup> but also because he was working in the Department of Justice's Office of Legal Counsel at the time that office issued an opinion on the Order.<sup>192</sup> Sunstein's article addressed issues of "institutional competence and authority," the pragmatic issue of whether administrative agencies were competent to carry out meaningful CBA, and the distinctively lawyerly issue of "whether, in the absence of congressional authorization, the executive branch may prop-

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gress, and the President." ADLER & POSNER, *supra* note 47, at 2.

188. See *supra* text accompanying notes 150–169.

189. See, e.g., Shane, *supra* note 87; Cass R. Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267 (1981); Whitney, *supra* note 91. See generally Symposium, *Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1195 (1981).

190. Sunstein, *supra* note 189.

191. Professor Sunstein became one of the leading figures in the CBA debate, and brought several unique arguments to bear on relevant issues. His early regulatory scholarship was largely legal-institutional and focused in large measure on the courts' role in regulatory oversight. See, e.g., Cass R. Sunstein, *Deregulation and the Courts*, 5 J. PUB. POL'Y & MGMT. 517 (1986); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177; Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51 (1984); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985); cf. Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986). Later, Sunstein developed an interesting and unique area of study within the CBA literature—his later scholarship brought cognitive science to bear on CBA. See, e.g., Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999); Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059 (2000); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247 (1996).

192. See Sunstein, *supra* note 189, at 1267, n.\*\*; see also PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS* 355–59 (1988) (reprinting a Memorandum from Larry L. Simms, Assistant Attorney Gen. for the Office of Legal Counsel, to Hon. David Stockman, Dir., Office of Mgmt. and Budget (Feb. 12, 1981)).

erly make the outcome of regulatory decisions dependent on application of [CBA].”<sup>193</sup> This article is a paradigmatic example of the application of lawyerly understanding of institutional and constitutional intricacies in CBA scholarship.

## 2. Moral Critiques

In the early 1980s, the law and economics scholars were engrossed in a period of reconsideration of the moral justifiability of their discipline.<sup>194</sup> The zenith of this debate was a 1980 symposium in the *Hofstra Law Review* debating *Efficiency as a Legal Concern*.<sup>195</sup> Not surprisingly then, some of the first, and indeed the most salient critiques of CBA attacked its moral foundations, and, in fact, some of the contributors to the symposium became CBA’s ardent critics and defenders.<sup>196</sup>

The moral critique of CBA began with a short work by Steven Kelman, then a professor at the Kennedy School of Government at Harvard University, in the January/February issue of the journal *Regulation*.<sup>197</sup> Kelman focused on CBA as applied to safety, environmental, and health regulation and applied formal ethical theory<sup>198</sup>—“the study of what actions it is morally right to undertake”<sup>199</sup>—to three premises implied in advocacy of CBA as a regulatory decisionmaking tool: (1) an act should not be undertaken unless it would result in net benefits to society; (2) in conducting CBA, it is advantageous to monetize all costs and benefits, even those not easily monetizable;<sup>200</sup> and (3) CBA is sufficiently worthwhile to incur the transaction costs associated with its full-scale implementation.<sup>201</sup> With respect to each point, he concludes that there are “right” decisions that do not result in net benefits,<sup>202</sup> that universal monetization may not be a good idea,<sup>203</sup> and

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193. Shane, *supra* note 87 (assessing the facial legality of the Order); Sunstein, *supra* note 189, at 1269.

194. David A. Hoffman & Michael P. O’Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 347 (2002).

195. Symposium, *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

196. Compare *id.* (containing works by Richard Posner, Guido Calabresi, Ronald Dworkin, Lewis Kornhauser, and others), with MATTHEW D. ADLER & ERIC A. POSNER, *COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES* (2000).

197. Kelman, *supra* note 29, at 33. While he does not represent the legal academy *per se*, his ideas would have broad-ranging effects in the CBA debate.

198. Interestingly, Kelman argues that CBA scholars are engaging moral philosophy as a necessary prerequisite to their position. *Id.* at 34. That is, the notion that an action should be undertaken if it maximizes net benefits is the answer to question of right or wrong “given by moral philosophers—that given by utilitarians.” *Id.* (“It is amazing that economists can proceed in unanimous endorsement of cost-benefit analysis as if unaware that their conceptual framework is highly controversial in the discipline from which it arose—moral philosophy.”). Other academics would continue to defend this position, and others still would continue to refute it.

199. *Id.* at 33.

200. Note that Executive Order 12,291 explicitly required balancing of costs and benefits not easily monetizable. Exec. Order. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

201. Kelman, *supra* note 29, at 33.

202. Kelman argued that there are innate notions of certain actions as right or wrong that predate calculations of costs and benefits. *Id.* at 34. For example, a person who would suffer great pecuniary loss

that, given the practicalities of implementing CBA in health, safety and environmental regulation, it is not worthwhile to devote the requisite resources to generating input variables; efforts required to ‘spread the gospel’ of CBA are likewise unjustified.<sup>204</sup> In conclusion, Kelman “d[id] not believe that the cry for more cost-benefit analysis in regulation [wa]s, on the whole, justified.”<sup>205</sup> Kelman’s arguments have resonated in the legal academy’s CBA debate—the field’s leading scholars have been and remain cognizant of his arguments.<sup>206</sup>

Lisa Heinzerling presents some representative, and particularly prominent, recent critiques in this vein.<sup>207</sup> In a recent book-length advocative work, co-authored with Frank Ackerman, she advances her argument in strong condemnatory terms: CBA is “incoherent. . . [and] rests on simplistic, implausible hypotheses.”<sup>208</sup> For Ackerman and Heinzerling, many of the values cost-benefit scholars attempt to monetize cannot be meaningfully valued in terms of dollars—life, health, and nature are “priceless.”<sup>209</sup> Heinzerling and Ackerman argue that, insofar as CBA has found a place in the regulatory bureaucracy, it obfuscates rather than clarifies the value choices that inhere in regulatory decisionmaking.<sup>210</sup> Under their perspective, the predominance of CBA threatens to, or does, undo “some of the proudest

by speaking out against injustice, but who must do so under circumstances that eliminate the effect of the speech (e.g., against anti-Semitism in Nazi Germany), should not speak out under a utilitarian model, but should under Kelman’s model. *See id.* at 34. Also, there is no utility in “doing the right thing” as the model seeks to determine what the “right thing” is. *Id.* Succinctly, “certain duties—duties not to lie, break promises, or kill, for example—make an act wrong, even if it would result in an excess of benefits over costs.” *Id.* at 35.

203. Kelman offered four critiques of monetization efforts: (1) monetization based on willingness to pay measures can be distorted by a number of factors, including heterogeneity of population, (2) willingness to pay fails to properly differentiate between cost to surrender and cost to procure, (3) willingness to pay operates under assumptions of private transactions, but government regulation is a public decision, and (4) “one may oppose the effort to place prices on a non-market thing and hence in effect incorporate it into the market system out of a fear that the very act of doing so will reduce the thing’s perceived value.” *Id.* at 38. Indeed, Lisa Heinzerling and Frank Ackerman would seize on the lattermost point. *See, e.g.,* ACKERMAN & HEINZERLING, *supra* note 56.

204. Kelman, *supra* note 29, at 33.

205. *Id.*

206. Numerous scholars whose works are discussed elsewhere in this Comment recognize Kelman’s position. *See, e.g.,* Matthew D. Adler, *Welfare Polls: A Synthesis*, 81 N.Y.U. L. REV. 1875 (2006); Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165 (1999); Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913 (2000); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001).

207. Heinzerling is an oddly credentialed leader in the CBA debate—she served as the Editor-in-Chief of the *Chicago Law Review* and clerked for one of CBA’s most prominent defenders: Richard Posner. She persistently argues that CBA is morally indefensible as a regulatory decisionmaking paradigm. Simon, *supra* note 21, at 119.

208. ACKERMAN & HEINZERLING, *supra* note 56, at 10–11.

209. *Id.* at 8. The authors are careful to draw a distinction between their “priceless” and economic pricelessness: by priceless, Ackerman and Heinzerling do not intend to intimate that infinite sums should be spent to protect life, health, and nature. *Id.* at 9. What they do mean, however, is that no meaningful price can be attached to the values of life, health, and nature. *See id.*

210. *See id.* at 9 (arguing that “formal cost-benefit analysis often hurts more than it helps: it muddies rather than clarifies fundamental clashes about values.”) *Priceless* argues that the esoteric methodology and language of cost-benefit analysis conceal larger issues from, and so exclude, untrained observers. *Id.*

accomplishments of the past thirty years;” CBA is nothing less than an “attack.”<sup>211</sup> For Heinzerling, the Clean Air Act represents the proper paradigm. It represents not a new formula,<sup>212</sup> but a recognition of the impossibility of an adequate formulaic approach—a recognition that “public debate and participation” are the only way to regulatory wisdom.<sup>213</sup> She urges a holistic cost-benefit analysis, a focus on moral imperatives rather than benefits and costs, a precautionary approach to indeterminate risks, and a policymaking paradigm that promotes fairness.<sup>214</sup> This paradigm, like the Clean Air Act, would “restore[] old-fashioned values like humility, fairness, and a sense of moral urgency” into the decisional process, whereas CBA trivializes these very ideals.<sup>215</sup>

The Kelman-Heinzerling critiques are not *sui generis*. Prominent among the other critical assessments are those advanced by the moral philosopher Martha Nussbaum, who is an excellent example of the interdisciplinary nature of CBA scholarship,<sup>216</sup> and the economist Amartya Sen.<sup>217</sup> Nussbaum criticizes CBA for overlooking the “distinctive nature” of some costs—some costs are “bad in a distinctive way. No citizen should have to bear them.”<sup>218</sup> In addressing CBA’s monetization through willingness to pay, Sen argues that the “very idea that [individuals] treat the prevention of an environmental damage just like buying a private good is itself quite absurd.”<sup>219</sup>

### 3. Other Critiques

Scholars have advanced a number of non-moral critiques of CBA as well. One group attacks the monetization procedures necessary to a comprehensive CBA. Prominent among these attacks are arguments that CBA faces an ineradicable incommensurability problem—that reducing divers

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211. *Id.* at 7. *Priceless* frames the attack this way: “The attackers do not *explicitly* advocate pollution, illness, and natural degradation; instead, they call for more ‘economic analysis.’” *Id.* at 8 (emphasis added). The clear (if not “explicit”) implication is that economic analysis is tantamount to advocacy of “pollution, illness, and natural degradation.” See *id.* The strength of this accusation highlights the deep and persistent divisions in the scholarly literature.

212. *Id.* at 208–09.

213. *Id.* at 209. For this proposition, *Priceless* cites Arrow’s proof, which “proved that the results of democratic decision making cannot be reproduced by a mathematical formula.” *Id.*

214. *Id.* at 210.

215. *Id.* at 234; cf. Kelman, *supra* note 29.

216. Martha Nussbaum holds appointments in the Law School, the Department of Philosophy, and the Divinity School at the University of Chicago. ADLER & POSNER, *supra* note 196, at 169.

217. See Martha C. Nussbaum, The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis, 29 J. LEGAL STUD. 1005 (2000); Amartya Sen, The Discipline of Cost-Benefit Analysis, 29 J. LEGAL STUD. 931 (2000).

218. Nussbaum, *supra* note 217, at 1036; cf. Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1213–14 (1997) (arguing that “the passion for science and simplicity frequently lead highly intelligent people into conceptual confusion and an impoverished view of the human world” and has left law and economics (and by extension CBA) impoverished—unable to grapple with some of the toughest moral and sociological questions).

219. Sen, *supra* note 217, at 949.

costs and benefits to dollar terms is facially fallacious.<sup>220</sup> In other words, incommensurability “occurs when the relevant goods cannot be aligned along a single metric without doing violence to . . . considered judgments about how the[] goods are best characterized.”<sup>221</sup> Critics have also argued that CBA may not produce clear outcomes because of methods for valuing non-market goods, for which there are no objective data on individual preferences.<sup>222</sup> Other critiques reason from pragmatic or equitable concerns and argue that CBA is biased toward effecting the preferences of the wealthy or the status quo,<sup>223</sup> depends on flawed input data,<sup>224</sup> or has simply performed poorly under real-world conditions.<sup>225</sup>

#### 4. Defenders: A Beleaguered Minority

As the preceding materials make clear, critics of CBA are not in short supply, but, as the materials in the footnotes illustrate, CBA’s defenders persist. Eric Posner and Matthew Adler, themselves persistent, but qualified, defenders of CBA, summarize the present academic attitude this way:

The reputation of [CBA] among American academics has never been as poor as it is today . . . . Defenders of CBA form an increasingly beleaguered minority . . . [and] [m]odern textbooks on CBA . . . frankly acknowledge its serious flaws and the inadequacy of the standard methods for correcting these flaws.<sup>226</sup>

By contrast, use of CBA by administrative agencies is at an all time high<sup>227</sup>—“[t]he academics’ skepticism appears to have had no influence.”<sup>228</sup> In any event, much of the academic literature post-1981 has been a colloquy between skeptics and defenders of CBA.

Representing the “beleaguered minority,” scholars like Posner and Adler present persistent defenses of CBA—many of which directly respond to the more significant critiques of the anti-CBA scholars. For example, *Rethinking Cost-Benefit Analysis*<sup>229</sup> rebuffs three well-received criticisms of CBA: (1) that it produces morally unjustified outcomes; (2) that it will produce accurate results only if executed properly; and (3) that CBA presumes

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220. See, e.g., Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371 (1998); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

221. Sunstein, *supra* note 220, at 796 (emphasis omitted).

222. Edward Sherwin, *The Cost-Benefit Analysis of Financial Regulation: What the SEC Ignores in the Rulemaking Process, Why It Matters, and What To Do About It* 10 (Dec. 19, 2005) (unpublished manuscript, available at <http://www.law.harvard.edu/faculty/hjackson/pdfs/CBA.article.doc.pdf>).

223. *Id.* at 11.

224. *Id.* at 11–12; see also *Scientific Factfinding*, *supra* note 150.

225. Sherwin, *supra* note 222, at 11.

226. Adler & Posner, *supra* note 2, at 167.

227. *Id.*

228. *Id.*

229. *Id.*

a certain utilitarian theory of government.<sup>230</sup> *Rethinking Cost-Benefit Analysis* responds to each, respectively, by asserting that (1) CBA is a decisional mechanism, not a moral standard; (2) agencies should be allowed to depart from CBA when necessary to produce accurate results; and (3) CBA is consistent with all political theories that expect government to care about the overall well-being of its citizens.<sup>231</sup>

Adler and Posner do not stand alone in defense of CBA. Prominent among the other defenders is Cass Sunstein, who views CBA as the only choice for a rational agency decisionmaker to use when solving concrete problems.<sup>232</sup> Sunstein argues that CBA is (1) an effective way to force decisionmakers to consider all relevant factors when making a regulatory decision;<sup>233</sup> (2) a much-needed offset to regulators' cognitive biases;<sup>234</sup> and (3) a fundamentally valuable tool for the promotion of democratic governance.<sup>235</sup>

As this juxtaposition illustrates, despite over forty years of effort by both sides, it is no less true than ever to say that "one can view cost-benefit analysis as anything from an infallible means of reaching the new Utopia to a waste of resources in attempting to measure the unmeasurable."<sup>236</sup>

#### IV. WHY COST-BENEFIT ANALYSIS SCHOLARSHIP SPREAD AS IT DID

Whereas Part II detailed how and why CBA found prominence in U.S. regulatory philosophy, and Part III described how CBA scholarship developed within the legal academy, this Part exposits a theory of why CBA scholarship developed as it did—slowly, almost imperceptibly before 1981, and with striking quickness thereafter.<sup>237</sup> The standard, short, and easy answer is the obvious one: President Reagan issued Executive Order 12,291—because administrative agencies were suddenly busy conducting CBAs, so too were legal scholars critiquing their methods and the methodology's normative defensibility. While Executive Order 12,291 certainly precipitated the interest CBA garnered subsequent to 1981, and is probably the *sine qua non* of this body of scholarship, the following illustration, which displays the data from Part I, together with graphical representations of cita-

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230. *Id.* at 167–68.

231. *Id.*

232. *See generally* SUNSTEIN, *supra* note 1.

233. *Id.* at 21–22.

234. *See id.* at 26.

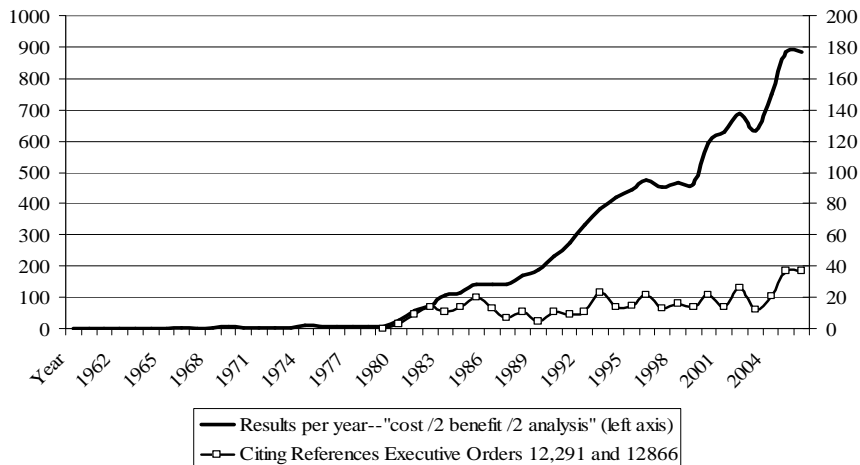
235. *Id.* at 9.

236. Prest & Turvey, *supra* note 5, at 728. This quote, offered in 1965 as a statement of fact rather than a prognostication, was and is apt in either role. While the debate remains diametric, the contemporary colloquy is largely among lawyers and lawyer-economists rather than among mid-century welfare economists.

237. *See supra* illustration accompanying Part I. This is a question distinct from the development of expertise within the government—CBA requirements have undoubtedly created a "machinery and the expertise" for conducting CBAs within nearly every administrative agency. *See* KOCH, *supra* note 70, at 495.



tions to Executive Order 12,291 and its successor, Executive Order 12,866,<sup>238</sup> begins to reveal just how incomplete the obvious answer is:



A full account of why CBA scholarship spread as it did is more nuanced than the easy answer admits, and this Part explores what it is about CBA—CBA as an idea within the academy—that lead to the growth in interest depicted in the illustrations.<sup>239</sup>

This Part argues that CBA has certain attributes, some of which are largely removed from its substantive merits, that, when combined with extant environs, caused academic interest in CBA to grow as it did. It proceeds in four subparts. First, the relationship between CBA scholarship and law

238. The methodology used to derive the graphical representations of interest in the executive orders differed in some respects from that used in Part I. *See supra* note 6. First, whereas the data-gathering in Part I involved textual searches, *see supra* note 6, this data was derived from Westlaw's "citing references" function limited by date (in the same manner as in Part I) and by publication type (to ALR Annotations and Law Reviews). The data is accurate as of January 14, 2008. Furthermore, because of Westlaw's idiosyncrasies, the range of documents included in the searches in Part I is not coterminous with the documents used to derive the lines depicting interest in the executive orders. To wit: the results from Part I were derived from the JLR database, which is more inclusive than the sources used for the other results (which, again, included only law reviews and ALR Annotations). As a result, it is important not to draw an inference that interest in CBA was of a greater magnitude than interest in Executive Order 12,291 (because of the different scales on each Y axis), though, as one moves temporally further from 1981, the inference becomes safer to draw. Moreover, if one looks closely at the time period 1981 to 1983 it might appear as though interest in the executive order lagged behind interest in CBA. This appearance is probably also due to the differences in methodology—the sources included in the citing references-based data for the executive orders (ALR and law reviews) are among the "slowest" of the sources included in the JLR database. That is, the JLR database includes non-academic, practitioner-oriented and rapidly available sources such as legal newspapers which do not undergo the rigorous and time-consuming selection and editing process attendant to law reviews. As in Part I, this chart is intended to be illustrative rather than definitive, and the important thing to note is that interest in CBA and Executive Order 12,291 rose at a very similar rate initially, but, whereas interest in CBA continued to grow, commentary regarding the executive order leveled off.

239. To be clear, this Comment is not interested in the spread of CBA as a decisional methodology within the regulatory apparatus. Its inquiry is into why academics focus so much attention on CBA—why CBA has received all the attention it has within the academy.

and economics is briefly explored. Second, it gives short shrift to supply and demand determinants of CBA scholarship and takes a closer look at the incentives affecting legal academics when choosing a subject of study. The third subpart draws on some lessons of evolutionary biology to help explain how CBA scholarship has flourished in the environment of the legal academy, and, finally, the inquiry turns to the “Tipping Point” analytic to help explain the precise manner in which interest in CBA grew. The subparts are, respectively, intended to explain what made the rise of CBA scholarship possible; why, when faced with an array of possible subjects on which to write, academics might choose CBA; what it is about CBA that makes it an effective competition for academic attention (this is in some ways the other side of the prior question); and, finally, just exactly why CBA is among a select group of ideas that has engendered a significant debate with a constant growth rate.

#### *A. The Enabling Development: Law and Economics*

The fact that CBA is a subset of law and economics explains a great deal of why the academy exerts so much effort on the CBA inquiry. While this connection is multi-faceted and not wholly tractable, this subpart sets out one of the most obvious connections; several others appear interspersed in the subparts that follow.<sup>240</sup> Most basically, law and economics enabled the development of—or was a condition precedent to—CBA scholarship.<sup>241</sup> As discussed in Part III. B, law and economics emerged as a distinct interdisciplinary field in the 1960s.<sup>242</sup> Additionally, CBA started to appear with increasing frequency in the 1970s, and became a universal regulatory decisionmaking paradigm in 1981,<sup>243</sup> by which time law and economics was

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240. That is, some of its explanatory power plays out in the following subparts, and the reader would be well served to bear it in mind as a unifying concept.

241. Law and economics was also “enabled” by another paradigm shift in academic legal thinking—the legal realism movement. See Garoupa & Ulen, *supra* note 170. Legal realism, simply defined, urges analytical focus on the actual effects of law. See generally Neal Duxbury, *A Century of Legal Studies*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 950, 950–74 (2003); Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50, 50–66 (Martin P. Golding & William A. Edmundson eds., 2005). “Law and economics . . . is attractive to those who have an interest in law’s actual effects because the economic analysis of law is a powerful tool for predicting and evaluating the actual consequences of law on targeted behavior.” Garoupa & Ulen, *supra* note 170. So, if the legal realist movement enabled the development of law and economics and the law and economics movement enabled the rise of CBA scholarship, then legal realism scholarship leads syllogistically to, and is important in understanding the development of, CBA scholarship. It therefore merits this brief mention.

Some have also argued that because American legal scholars are products of a utilitarian tradition, they are pre-disposed to engage and accept law and economics. For a version of this argument, see Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT’L L. 602, 610–20 (2006). See also Garoupa & Ulen, *supra* note 170 (“[o]n this understanding, utilitarianism implies a thoroughgoing cost-benefit analysis applied to legal issues.”).

242. See *supra* notes 102–124 and accompanying text; see also Garoupa & Ulen, *supra* note 170 (“law and economics has been warmly received in law schools . . .”).

243. See *supra* notes 61–92 and accompanying text.

genuinely mature and well-equipped (and staffed) to engage in the legal, administrative and technocratic challenges presented by widespread CBA.<sup>244</sup> But for the growth in law and economics shortly prior to and concurrent with the arrival of widespread CBA, fewer academics would have had both the legal and technical economic backgrounds to effectively engage the subject.<sup>245</sup> Or, conversely, law and economics stocked the legal academy with scholars whose skill set was well-suited to work on CBA.<sup>246</sup> In this way, the advent of law and economics in the 1960s made possible the strong growth in CBA scholarship in the decades that followed.

Being thus enabled, academics were still left with the choice of how to spend their time and the freedom to decide which questions they think are important. This meant choosing what to research and what to write.<sup>247</sup> The influences on these choices were certainly many, and the following subparts travel the spectrum of reasons in an attempt to explain both the “good” (i.e., well justified and sensible from a disinterested, post hoc position) reasons why academics study CBA, as well as some of the arguably “less good” ones.<sup>248</sup>

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244. In other words, law and economics provided the tools and methodology necessary for robust interdisciplinary CBA scholarship. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 3 (5th ed. 2007) (discussing law and economics as a methodological approach involving microeconomics, econometrics and other quantitative economic tools to analyze legal problems).

245. The actual course of events led to an academic environment in which law and economics proficiency is pervasive—“law and economics has become a prominent and perhaps predominant part of the tool set of the majority of law professors . . .” Garoupa & Ulen, *supra* note 170.

246. The increase in the number of qualified academics (i.e. law and economics scholars) rose by as much as 70% between 1992 and 2003. See RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* 204–06 (2004) (tabulating the growth in the number of legal academics who self-identified as law and economics specialists); Oren Gazal-Ayal, *Economic Analysis of Law and Economics*, 35 *CAP. U. L. REV.* 787, 787 (2007) (“Many law scholars and economists direct much of their time and energy . . . to L&E[.]”). Even this striking number may underestimate the significance of the growth in qualified scholars—there may be an important contingent of professors who are capable of, or even actively engage in, serious law and economics work but who also would not self-identify as law and economics scholars. See Garoupa & Ulen, *supra* note 170; see also Gazal-Ayal, *supra*, at 793 (noting that lawyers use economic arguments without being part of the international L&E movement).

The increasing number of faculty members holding both the J.D. and a Ph.D. in economics further supports this argument, as persons so qualified are well-equipped to grapple with both the technocratic economic and bureaucratic legal issues required for modern CBA scholarship. See *supra* notes 172–174 and accompanying text. For example, one-fifth of the faculty at the University of California at Berkeley School of Law (Boalt Hall) holds a Ph.D. in economics, and the University of Pennsylvania School of Law has seven economics Ph.D.s on its faculty. Garoupa & Ulen, *supra* note 170; see also *id.* (noting that nearly half of entry-level hires hold doctoral degrees in fields other than law).

247. See Gazal-Ayal, *supra* note 246, at 787.

248. Professor Cass Sunstein has also reached the conclusion that academics focus their attention both because their chosen work, in their view, “has much more to offer[.]” and for other reasons disconnected from the “worth” of their subject. See Cass R. Sunstein, *Foreword: On Academic Fads and Fashions*, 99 *MICH. L. REV.* 1251 (2001) (discussing the effect of information and reputational cascades on the spread of scholarly work). This suggestion that academic interest may be driven by mixed motives is not intended as a qualitative judgment of the value of the debate or of any position internal to it. Indeed, one would expect that “[t]he processes of publication, promotion, evaluation, and consideration for positions at other universities and in private employment [would]. . . weed out ‘good’ from ‘bad’ scholarly innovations.” Garoupa & Ulen, *supra* note 170. This, however, is something different from the process’s adeptness at weeding out good or bad reasons for chiming in to a debate.

### B. *The Economics of Cost-Benefit Analysis*

Perhaps, in the true spirit of the dismal science, lawyer-economist academics are merely responding to incentives when they decided to write on CBA.<sup>249</sup> An evaluation of this hypothesis requires an understanding of exactly what those incentives are and how CBA scholarship might be a response to them. The next two subparts explore distinct, but not wholly independent sets of incentives.

#### 1. *Of Supply and Demand*

With respect to CBA scholarship, it is clear that some of the academic attention is indeed merited, or good in the prescribed terminology. Insofar as some large part of the legal system—administrative agencies—is busy conducting CBA, legal academics are warranted in studying, critiquing, and suggesting opportunities for improvement. This might be termed the practical, or even altruistic, justification—CBA scholarship is an academic attempt to better the workings of government.<sup>250</sup> Inasmuch as this is what motivates CBA scholars, their motives are quite noble. In this way, then, politics and developments in the administrative state created a “real” demand for CBA scholarship that astute academics rose to meet. This is basically an elaboration on what was earlier termed the “standard, short, and easy” answer, and, like most conventional wisdom, is part of the whole story.<sup>251</sup>

There is another side to this coin, however. While the increasing prevalence of CBA in regulatory decisionmaking in a sense created a demand for CBA scholarship, the growing number of law and economics scholars created a supply of labor well-suited to the task.<sup>252</sup> Although this is not wholly distinct from the explanations offered in the last and next subparts, it remains the case that CBA provided a convenient and controversial subject on which they could cut their academic teeth.<sup>253</sup> As a practical matter, then, some of the prevalence of CBA scholarship is explained by the growing number of academics who, during the relevant period, needed something of the sort about which to write. This, it seems clear, is a somewhat less good justification, and it leaves much to be desired if the answer to the question “Why?” is something more than simply “Because they could.”

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249. Cf. Gazal-Ayal, *supra* note 246, at 787–88.

250. Or, otherwise stated, to some extent, CBA scholars are drawn to their work by “[their] interest in promoting knowledge for the benefit of all.” See Gazal-Ayal, *supra* note 246, at 787 (discussing why academics are drawn to law and economics).

251. See *supra* text accompanying notes 237–238.

252. See *supra* Subpart IV.A.

253. See Garoupa & Ulen, *supra* note 170 (“scholars identify legal innovations, such as law and economics [or CBA], as a gold mine opportunity for new topics (theoretical and empirical) that could be used by capable individuals to enter the market for ideas and scholarship.”).

## 2. *The Other Economics of Cost-Benefit Analysis*

There is a set of incentives that may help explain academics' attention to CBA and adds richness and depth to the preceding account.<sup>254</sup> As an initial matter, a drastically oversimplified, but nevertheless accurate, statement of academic motivations is found in the oft-repeated maxim of "publish or perish"—an academics success is strongly and positively correlated with both the quality and quantity of essays, reviews, articles and monographs he publishes.<sup>255</sup> Consequently, at least a substantial part of the incentives bearing on an academic's choice of what to write derive from (a) their ability to write well in the area, (b) the receptiveness of well-respected law reviews and academic publishers to materials on the subject, and (c) tenure committee perspectives on the worth and respectability of scholarship in the area.<sup>256</sup> As such, if it can be shown that CBA scholarship is (a) well suited to the skills and talents of an increasingly large number of legal academics, (b) well-received by top law reviews and academic publishers, and (c) revered and lauded by tenure committees, the inescapable conclusion will be that at least a partial answer to the question of why will be that academics write about CBA because it is good for their careers in ways that publication in some other less-favored areas of legal scholarship (the often neglected legal history, for example)<sup>257</sup> may not be.

First, CBA scholarship is a close fit with the academic training and skills of an increasing number of law professors. As has been detailed elsewhere, law training has, over the period of the observed rise, become less doctrinal and more interdisciplinary. The most pervasive change has been the full-scale integration of economics into legal education and a consequent rise of law and economics scholars. As has also been noted, many of the early scholars were trained separately in law and in economics, whereas these disciplines are now less distinct than ever. One would expect that as

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254. Professor Oren Gazal-Ayal has used a similar analysis of incentives to determine why different countries have received law and economics. See Gazal-Ayal, *supra* note 246. That use differs from the present one in a number of respects, chief among them that his methodology is comparative and this one is local. Nevertheless, his exercise is supportive of the logic in this subpart, as two of his basic premises are that academics respond to incentives and that publication and the values underlying a strong publication record are a principal incentive affecting legal academics. See *id.* at 777–78, 790–93. In short, both projects look to “other, more direct and self-serving explanations” for why legal academics chose a particular topic on which to work or to determine the extent to which “academic incentives” drive academics to work in a particular area. See *id.* at 787.

255. See, e.g., Gazal-Ayal, *supra* note 246, at 788–89 (“What affects academic researchers’ prestige and promotion? Almost all around the world academicians are rewarded for publication. The publish-or-perish mantra has become a household motto for faculty members . . . .”); Garoupa & Ulen, *supra* note 170 (“[T]he central determinant of the promotion decision will be a solid record of original scholarship.”); see also Association of American Law Schools, AALS Handbook, Statements of Good Practices, [http://www.aals.org/about\\_handbook\\_sgp\\_eth.php](http://www.aals.org/about_handbook_sgp_eth.php) (last visited Apr. 22, 2008).

256. The last two factors here are uncertain and ambiguous, but are nevertheless central to academic success. See Gazal-Ayal, *supra* note 246, at 789; *id.* at 804 (“The regulation of academic appointments, promotion, and tenure shape the incentives to participate in the [CBA] discourse.”).

257. See Alfred Brophy, *The Relationship Between Law Review Citations and Law School Rankings*, 39 CONN. L. REV. 43, 58 n.37 (2006) (noting reasons why law review editors might select out articles on “esoteric” subjects like legal history).

the lines between the disciplines collapsed, so too would the distinctions among scholars. So not only did law schools begin training increasingly large numbers of lawyer-economists through both the ad hoc integration of economics into the curriculum and formalized law and economics foci and dual degree programs,<sup>258</sup> but the economics academy also began to produce more economist-lawyers. These two effects—more academic cross-over and the persistent increase in prominence of law and economics programs—led to an increasing number of legal writers who were well equipped to study CBA. Also helpful in this regard is the fact that CBA is itself so controversial.<sup>259</sup> By one view this makes for a healthy academic colloquy, or, by another, easy make-work for legal academics.<sup>260</sup>

The second point is closely intertwined with the first—CBA scholarship, as a subset of law and economics scholarship, was, over the period of the observed rise, more readily accepted by leading law reviews and academic publishers.<sup>261</sup> As law and economics became more mainstream, two things happened in the world of academic publishing: first, mainstream law reviews and publishers, always ready to jump at the latest, if enduring, fad in legal scholarship, became increasingly voracious consumers of law and economics—and so CBA—literature;<sup>262</sup> second, specialty journals arose around the time the rise began as a new, dedicated forum for law and economics scholarship.<sup>263</sup> These receptive traditional, and newfound specialty, journals provided ready fora for law and economics discourse, which naturally created publication opportunities for academics willing to write CBA articles.

Finally, the third point follows from the second and first—faculty promotion and tenure committees generally look favorably on law and economics publications.<sup>264</sup> Some substantial part of this is due no doubt to the second point—these publications are generally more apt to be accepted by leading reviews than some other types of scholarship. In this way the two effects are somewhat inseparable. However, law and economics scholarship

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258. See, e.g., Vanderbilt University School of Law, Ph.D. Program in Law and Economics, <http://law.vanderbilt.edu/academics/academic-programs/phd-program-in-law--economics/index.aspx> (last visited Apr. 22, 2008).

259. See Robert H. Frank, *Why is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913 (2000); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 11–16 (1995) (“Executive Order 12291 proved extremely controversial.”).

260. To be clear, the argument here is that, all else equal, it is simply easier to write about something (here, CBA) that engenders great controversy. Whether that is a good thing or simply a fact that makes this an easy path for an academic to tread is, as the sentence indicates, an open question.

261. See Gazal-Ayal, *supra* note 246, at 792 (“[T]he highly rated law reviews are very amenable to L&E papers, much more than they are to local doctrinal papers.”); see also Dau-Schmidt & Brun, *supra* note 241, at 608–09 (noting the important role student-edited law reviews have played in the success of law and economics); cf. Garoupa & Ulen, *supra* note 170 (discussing the importance of student-edited law reviews to legal innovation).

262. See Gazal-Ayal, *supra* note 246, at 792; *supra* Part I.

263. See, e.g., Chicago Journals, The Journal of Law and Economics, <http://www.journals.uchicago.edu/toc/jle/current> (last visited Apr. 28, 2008); Chicago Journals, The Journal of Legal Studies, <http://www.journals.uchicago.edu/toc/jls/current> (last visited Apr. 22, 2008).

264. Cf. Gazal-Ayal, *supra* note 246, at 798.

has generally been viewed favorably by the legal academy—and increasingly so over the time of the observed rise—and the patina of value and validity enjoyed by law and economics papers certainly covers CBA papers, which are consequently seen as more valuable by tenure and promotion committees—law faculties certainly want to promote those within their ranks who work at the cutting edge.

These three indistinct propositions satisfy the criteria set out as supportive of the hypothesis that legal academics publish on CBA because it is for them—and for their careers—more expedient than many alternatives. In some measure, the undeniably large corpus of CBA scholarship is a response, enabled by interdisciplinary law and economics education, to the incentives created by law review editors (and some faculty at peer-edited journals) and law faculty tenure and promotion committees. These lawyer-economists, it seems, are merely rational actors responding to incentives—a great mass of CBA scholarship exists, at least in part, because there is a demand for it within the academy.<sup>265</sup> Whether this is a good justification is a bit hazy because, while these incentives reflect the collective value judgments of a significant population of law students, professional editors and faculty, they are notably detached from the substantive merit and worth of the scholarship itself. This theme is echoed in the next two subparts, neither of which provides a particularly “good” justification.

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265. An ardent economist would probably argue that the proposition that academics publish in the area of CBA because they are responding to incentives is both obvious, and the whole answer to the question. This Comment enlists the proposition that academics are responding to incentives not in the broadest sense urged by the ardent economist, but in a weaker sense that serves simply to isolate several specific incentives to which these academics might be responding. Nevertheless, it submits, as the following subparts seek to explain, that there are reasons beyond incentives and merit that have explanatory power here.

Note also that this explanation in some ways spans (or blurs) the divide between justified (i.e. the practical/pragmatic (or altruistic) justification) and unjustified (i.e. some aspects of both the Tipping Point and Memetic explanations, though the latter one particularly) explanations for the rise of cost-benefit analysis. That is, some part of the corpus can and should be explained by a legitimate desire and need for the analysis done by the academics. The practical/pragmatic justification falls squarely on this side of the divide. However, a noteworthy aspect of this Comment’s hypothesis is that the volume of the corpus cannot wholly be justified—some of the academic literature results not from a legitimate need therefore, but from something else. The memetic analysis in Subpart IV.C falls squarely on this side of the divide. What is also clear is that the incentives are mixed. That is, some of the receptiveness of the law reviews and faculty committees derives from reasons squarely on the legitimate, justifiable side of the divide, and some of their receptiveness derives from explanations on the other side of the divide. Parties on law review article selection committees and faculty promotion committees are part of the system described here, and so are not separable from it. As such, they are subject to all the influences, justified and not, present in the system. In this way, law review editors and faculty committee members are reflective of the system, and its mixed motives.

A corollary to this hypothesis is that the incentives explanation is not wholly independent of any of the other explanations, but is a synthesis of them. Though presented as a part of the explanation, it is the whole explanation with some of its parts left to other subparts. In part, then, this Comment’s project is to tease out the constituent parts of the incentives that drive these academic projects, the balance of which it is not possible to discern.

*C. Evolutionary Theory and Replicatory Advantage*

While the previous subparts focused on CBA's rise attributable to factors largely external to the idea itself, this subpart looks to concepts developed in the field of evolutionary biology to understand the attributes of the idea which predisposed it to success (defined here as prevalence) within the academic community. The invocation of evolutionary metaphors to explain the development of legal concepts has a rich and well-pedigreed history,<sup>266</sup> and more recently, a small body of legal scholarship has emerged that draws on Oxford evolutionary biologist Richard Dawkins' concept of "memes" to understand how legal concepts evolve and compete for attention.<sup>267</sup> Dawkins' memes are analogous to biological genes, and his theory posits that memetic ideas replicate and evolve according to the laws of natural selection.<sup>268</sup> This subpart draws on one aspect of Dawkins' theory, termed "replicatory advantage,"<sup>269</sup> to help explain why CBA has been an adept warrior in the marketplace of ideas. Under the memetic paradigm, ideas that have a replicatory advantage will increase in predominance over time.<sup>270</sup>

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266. Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Perspective*, 39 JURIMETRICS J. 291, 303–04 (1999). John Henry Wigmore theorized that societal conditions should shape the development of the law—that law evolves not toward a set ideal form, but adapts to prevailing societal forces. *Id.* at 304. Holmes endorsed this view, arguing that “[t]he felt necessities of the time’ shape a society’s legal system ‘a good deal more . . . than the syllogism.’” *Id.* (quoting O.W. HOLMES, *THE COMMON LAW* 5 (M. Howe ed., 1963)). Arthur Corbin expanded the thesis, arguing that, in addition to the societally driven affects, variation among legal principles provided combatants in a “struggle [for life] among competing ideas.” *Id.* (quoting Fredrich Kessler, *Arthur Linton Corbin*, 78 YALE L.J. 517, 522–23 (1969)).

267. Thomas F. Cotter, *Memes and Copyright*, 80 TUL. L. REV. 331, 346 (2005). *But see* Brian Leiter & Michael Weisberg, *Why Evolutionary Biology is (So Far) Irrelevant to Law* (Univ. of Tex. Sch. of Law Pub. Law & Legal Theory Working Paper Group, Paper No. 89), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=892881](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892881). An idea may be a meme if (1) it is passed vertically or horizontally (in the case of scholarly ideas, from professor to student, or professor to professor, respectively), (2) it experiences variation incident to transmission, and (3) all of this occurs in a social environment. Cotter, *supra* note 267, at 338. There are several competing conceptions of what a meme is, exactly. One definition holds that a meme is substrate neutral—memes “includ[e] ideas, the brain structures that instantiate those ideas, the behaviours these brain structures produce, and their versions in books, recipes, maps and written music[.]” *id.* at 340 (citing SUSAN BLACKMORE, *THE MEME MACHINE* 66 (1999)), or “the sort of complex ideas that form themselves into *distinct memorable units*[.] . . . the smallest elements that replicate themselves with reliability and fecundity[.]” *id.* at 340 (quoting DANIEL C. DENNETT, *DARWIN’S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE* 344 (1995)), or quite authoritatively, “an element of a culture that may be considered to be passed on by non-genetic means, esp. imitation[.]” *id.* at 340 n.43 (quoting 3 OXFORD ENGLISH DICTIONARY: ADDITIONS SERIES 293 (Michael Proffitt ed., 1997)). Another view argues that memes do not include the articles of transmission, but may be only a mental phenomenon—“a unit of information residing in a brain[.]” *Id.* at 340 (quoting RICHARD DAWKINS, *THE SELFISH GENE* 109 (1976)). Another view still argues the contrary conception: that memes are only cultural, not mental phenomena. *Id.* at 341. This Comment will, for the sake of avoiding this philosophical debate, adopt the broadest conception, presented here first.

268. Cotter, *supra* note 267, at 334. An attribute must meet several conditions to be subject to natural selection. First, the attribute must not be uniform across members of the population, and the variation must be relevant to reproductive success—bearers of the trait must vary in “fitness.” Fried, *supra* note 240, at 293. Additionally, the attribute must be heritable. *Id.*

269. Cotter, *supra* note 267, at 337.

270. *Id.*



Memes may create replicatory advantage by developing “good tricks”—attributes that increase their chances of replicating.<sup>271</sup> Examples of good tricks include: being genuinely useful to the agent of transmission, being easily replicable or transmissible, being resonant, apparently valid or elegant, or being transmitted by certain individuals widely respected or admired.<sup>272</sup> Additionally, as a gene has a replicatory advantage if part of a larger organism, a meme has an advantage if part of a memeplex—memes may be joined with other memes symbiotically, such that the likelihood that the entire memeplex will replicate is heightened.<sup>273</sup> Memes may also gain replicatory advantage negatively, rather than positively—a meme that diminishes the chances of replication of competing memes betters its own replicative prospects.<sup>274</sup> Significantly, memes naturally select without necessary regard for the interests of their hosts—their human disseminators.<sup>275</sup>

Cost-benefit analysis exhibits superior replicatory advantage, as it enlists most of the good tricks to its advantage.<sup>276</sup> For example, the dominance of law and economics lent apparent validity to early CBA scholarship—CBA scholarship drew on principles which were, at the time, meeting widespread acceptance.<sup>277</sup> Additionally, CBA is part of the memeplex (the larger organism) of law and economics—the various economic analyses of law add to each other’s apparent validity, enhancing each individual meme’s (here, CBA’s) replicatory advantage. CBA’s replicatory advantage was enhanced furthermore because, to lawyer-economists, CBA was an elegant answer to the problems of regulatory governance.<sup>278</sup> Because of the beneficial effects CBA could have on the careers of academics who wrote about it, CBA enjoyed the replicatory advantage of being genuinely useful to its agents of transmission.<sup>279</sup> Moreover, CBA employs the “good trick” of terming competing models “irrational,” further enhancing its replicatory

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271. *Id.* at 338–39.

272. *Id.* at 339.

273. *Id.* at 339–40. To draw on the truth of a cliché, this is an example of the whole being greater than the sum of its parts.

274. *Id.* at 340. One example of this phenomenon is religious memes which contain inherent condemnation of religion-switching. *Id.*

275. *Id.* Critics of CBA would no doubt seize on this point, and a detailed look at whether CBA took on “a mind of its own” would be very interesting, but is beyond the scope of this work.

276. Some other “good tricks” are present, like ease of replicability, but would not give CBA a relative advantage over other ideas in the legal academy.

277. *See supra* Parts II & III.

278. Richard Posner has argued that politics played a significant role in the transformation of legal scholarship and his logic makes clear how CBA could be seen as an elegant solution. *See* Posner, *supra* note 20, at 765–66. After the attack of the legal realists, but prior to the 1960s, law and legal issues were not politically charged. *Id.* at 766. However, beginning in the 1960s, the spectrum of opinion broadened, and it became the case that two scholars reasoning from the same principles on the same issue would reach diametric results. *Id.* at 766–67. It became apparent that legal reasoning alone could not resolve the most contentious issues. *Id.* Interdisciplinary scholarship promised to add an objective way to resolve these conflicts, and in this regard CBA was an elegant solution to problems which the Right and the Left, or the Industrialists and the Environmentalists could not agree on—CBA offered a way to reach a result justified by more than legal reasoning, which could lead to either diametric position. *Id.*

279. *See supra* Part IV.B.

advantage.<sup>280</sup> Finally, the fundamental ideas underlying CBA scholarship were transmitted by individuals highly respected and admired.<sup>281</sup> As such, the memetic paradigm seems to hold explanatory power, though as a justification it seems to mix the good and the less good.

*D. The “Tipping Point” Analytic: An Epidemic Idea*<sup>282</sup>

The legal academy is an environment in which diverse individuals and occurrences continuously interject new ideas. Some such ideas meet steady, consistent success, others quickly fade, and still others enjoy abrupt ascendancy to popularity and influence.<sup>283</sup> The foregoing subparts do not make entirely clear why CBA was of the lattermost sort. In order to understand these different destinies, the Tipping Point analytic<sup>284</sup> urges an understanding of the lattermost subset of ideas—those met with popularity and influence—as possessing particular traits of a “social epidemic”—traits that do not obtain within the other two subsets.<sup>285</sup>

Epidemics, social or viral, “are a function of the people who transmit infectious agents [(a virus or a viral idea)], the infectious agent itself, and the environment in which the infectious agent is operating.”<sup>286</sup> The people whose efforts drive social epidemics are exceptional in terms of “how so-

280. See *supra* Subpart III.E.

281. See *infra* note 284.

282. The material in this subpart draws on Malcom Gladwell’s book *The Tipping Point*, which argues that

the best way to understand the emergence of fashion trends, the ebb and flow of crime waves, or . . . the transformation of unknown books into bestsellers, or the rise of teenage smoking, or the phenomena of word of mouth, or any number of the other mysterious changes that mark everyday life is to think of them as epidemics. Ideas and products and messages and behaviors spread just like viruses do.

MALCOM GLADWELL, *THE TIPPING POINT* 7 (2000). This subpart argues that CBA is one of the “other mysterious changes” well understood as an academic epidemic—that the best way to understand the academy’s interest in CBA, is to understand it as an idea that “spread just like [a] virus[.]” *Id.* This Comment will refer to this way of thinking about the spread of ideas as the “Tipping Point” analytic. There is a related idea in the academic literature which might also have explanatory power. Cass Sunstein has theorized that the appearance, spread and ultimate success or failure of academic fads can be explained by the phenomena of informational and reputational cascades. See Cass R. Sunstein, *supra* note 248. In Sunstein’s words:

Academics, like everyone else, are subject to *cascade effects*. They start, join, and accelerate bandwagons. More particularly, they are subject to the *informational signals* sent by the acts and statements of others. They participate in creating the very signals to which they respond. Academics, like everyone else, are also susceptible to the *reputational pressures* imposed by the (perceived) beliefs of others. They respond to these pressures, and by so doing, they help to amplify them. It is for these reasons that fads, fashions, and bandwagon effects can be found in academia, including the academic study of law.

*Id.* at 1251. He goes on to note that “[t]here is even a tipping point phenomenon here, in which a certain pressure, from the perceived views of others, can produce a sudden ‘rush’ toward a particular methodology or point of view.” *Id.* at 1252 (citing GLADWELL, *supra* note 277).

283. See GLADWELL, *supra* note 282, at 7–14.

284. See *supra* note 282.

285. *Id.* at 9.

286. *Id.* at 18. Social epidemics are characterized by sudden and often chaotic changes from one state to another. *Id.* at 7. Ideas that meet the two former fates lack the necessary requisites to be social epidemics. See *id.*

ciable they are, or how energetic or knowledgeable or influential [they are] among their peers.”<sup>287</sup> Additionally, in order to create an epidemic, the infectious idea must be resonant, and is often counter to conventional wisdom.<sup>288</sup> Finally, social epidemics are strongly influenced by the extant situation<sup>289</sup>—situational variables enhance or diminish an idea’s resonance, impact, and participants’ interest in the idea.<sup>290</sup> Small change in one (or two or three) of these areas can cause an epidemic to tip—to tip suddenly and unexpectedly, rather than gradually.<sup>291</sup>

As Part I illustrated, CBA is an idea that came to prominence suddenly; this subpart argues that the Tipping Point analytic teaches much about why the idea spread through the legal academy as it did—why academics’ interest in CBA reached a boil that continues to roll. Most obviously, the analytic reinforces the importance of Executive Order 12,291. Whereas graphical representations make the correlation obvious, the Tipping Point analytic emphasizes the causal relationship. Specifically, because the Executive Order had a marked effect on the environment in which fledgling CBA ideas were operating, the Order increased the resonance of and interest in CBA scholarship—Executive Order 12,291 affected the academic climate in such a way that CBA scholarship was more likely to become epidemic than to meet steady smoldering success or outright failure.<sup>292</sup> Moreover, the analytic underscores the importance of the propagators of CBA scholarship—prodigious, energetic and highly respected scholars who’s academic energy helped CBA realize its potential as an epidemic idea. Finally, partially because they were, like *The Regulation of Natural Monopoly*, contrary to conventional wisdom,<sup>293</sup> partially because they were timely and contentious,<sup>294</sup> and partially because they gave work to the new lawyer-economists who

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287. *Id.* at 21. A related idea found in the literature is termed the “great man” or “great woman” (or “great men” or “great women”) theory. The argument would be that CBA flourished because of the work of a “great” person. *Cf.* Gazal-Ayal, *supra* note 246, at 789–90 n.5 (discussing (and dismissing) this theory as an explanation for the spread of law and economics); Garoupa & Ulen, *supra* note 170 (“Another theory that we sometimes hear is that law and economics has prospered . . . because it has been championed . . . by a great man or woman . . .”). Or, more fully:

The argument is that in any given time period there are many scholarly innovations, only a few of which survive. Those that survive typically have a noteworthy champion who, even if he or she was not the originator, has recognized the value of the innovation and has thrown his or her prestige and entrepreneurial abilities behind it. That champion may have taken the time and effort to organize the scattered sticks and branches of the innovation into a coherent whole, thereby allowing others to see the innovation in its entirety and, not unimportantly, enabling others to teach the new material.

Garoupa & Ulen, *supra* note 170. This theory is fully consistent with (and might even be incorporated into) the theory expressed here, as the Tipping Point Analytic rightly puts significant emphasis on the prominent persons who precipitate social epidemics.

288. *See* GLADWELL, *supra* note 282, at 22–25.

289. *Id.* at 26.

290. *Id.* at 25.

291. *Id.* at 9, 18.

292. It is interesting to note that the order itself, as well as its successor, met with “smoldering success,” not epidemic growth. *See* illustration accompanying Part IV.

293. *See supra* Subpart III.D.

294. *See supra* note 260.

were building the interdisciplinary field of law and economics,<sup>295</sup> CBA scholarship's attendant ideas were resonant.

Hence, applying the Tipping Point analytic, the best way to explain the spread of CBA scholarship is to think of it as within that category of ideas showing traits of a "social epidemic." That the CBA epidemic spread within a "perfect storm" constituted of a hospitable environment (a regulatory state required to conduct CBAs in conjunction with every major rule), energetic and respected advocates (the prominent law and economics scholars), and a highly, if primarily situationally, relevant idea, helps explain the startling quickness with which CBA scholarship spread after 1981.<sup>296</sup>

## V. CONCLUSION

Cost-benefit analysis has become a mainstay of academic legal discourse. As the federal government grew following the New Deal, calls for rationalized decisionmaking became louder, and Ronald Reagan capitalized on those calls by campaigning on a deregulatory platform in 1980. In attempting to interject rationality into the federal government's administrative programs, Reagan's Executive Order 12,291 required agencies to conduct a cost-benefit analysis in conjunction with the contemplation or promulgation of all major rules. This new requirement occurred contemporaneously with a paradigm shift that was taking place within the legal academy. Lawyers and economists were coming together—indeed the distinction was beginning to blur—to address the systemic issues created by the regulatory state. Prominent among these efforts were attempts to optimize cost-benefit procedures to the realities of administrative governance. This new sub-population of an increasingly interdisciplinary legal academy rose to meet the legal, political and technical challenges presented by ubiquitous cost-benefit analysis.

This new genre of legal scholarship was not without antecedents and would not have developed as it did subsequent to Executive Order 12,291 were it not for the pioneering work done first in discrete doctrinal areas by economists, and then by lawyer-economists attempting to address what they identified as the broader systemic issues. These early legal scholars argued that lawyers were uniquely situated to process and critique the distinctive issues arising at the confluence of technocratic economic analysis, politically designed institutions, and legal modes of operation—the cost-benefit analysis scholarship that followed Reagan's order unquestionably bore this out.

Executive Orders alone, however, cannot fully explain the spread of, and interest in, cost-benefit scholarship—the standard explanation for why much of the legal academy has been fixated on cost-benefit analysis is in-

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295. See *supra* note 257 and accompanying text.

296. See *id.*

adequate and incomplete. As Part IV showed, the development of law and economics as a distinct interdisciplinary field enabled the flourish of cost-benefit analysis scholarship that continues to the present. The rapid expansion in the ranks of lawyers trained in economics and economists trained in law (and, indeed, a new generation trained in law and economics) created a supply of academics that were well prepared to undertake rigorous interdisciplinary work on cost-benefit analysis. The acute demand created by President Reagan's executive order activated this pool of potential labor. Together with the supply of suited academics, the demand for analysis of regulatory cost-benefit analyses created a market for cost-benefit scholarship.

The development of this market can be explained in three principal ways. First, capable academics decided to write about cost-benefit analysis not only "because they could," but also because of their desire to capitalize on the coincidence of their abilities and the subject's availability. Specifically, this subject has been viewed favorably by both publishing outlets and tenure committees, thus making cost-benefit analysis a relatively attractive subject to one who is able. Academic disinterestedness and altruism, it seems, do not fully explain scholars' decisions to write about cost-benefit analysis. But, then, neither does this incentives story.

Second, cost-benefit analysis carries certain traits that predisposed it to success as an academic idea. Consequently, cost-benefit analysis enjoyed superior replicatory advantage—to say nothing of substantive superiority—along nearly every metric, and, therefore, revealed itself as an adept warrior in the marketplace of ideas. The tendency of cost-benefit analysis scholarship to be advanced by some of the most well-respected and lauded personalities in the academy, when combined with the idea's enlistment of the full panoply of "good tricks" meant that it did well in the competition for academics' attention. This success defined as prevalence is something altogether different from success defined as truth, a distinction which draws the unjustifiability of the level of activity in this field into relief.

Finally, the academy's interest in cost-benefit analysis was predisposed to epidemical growth, which contributed to the disproportionality between the actual incidence of cost-benefit analysis scholarship and what the Executive Orders alone could (or should) explain. Cost-benefit analysis was resonant because it was timely, contentious, and contrary to conventional wisdom. This resonance meant cost-benefit analysis had the potential for epidemic growth, and the efforts of a number of well-respected and energetic scholars working in an environment hospitable to epidemic spread actualized this potential.

A number of other factors are certainly in play, and at least one other phenomenon operated to increase the prevalence of cost-benefit analysis as such. "Cost-benefit analysis" became a term of common usage and understanding—it became a distinct lexical unit that could convey a set of ideas and ideals succinctly and precisely. That is, at least some of the rise of cost-benefit analysis scholarship discussed in this Comment is due merely to the

2008]

## Why Cost-Benefit Analysis?

45

term itself coming into vogue, and becoming commonly used—“cost-benefit analysis” became part of the academic legal lexicon, and scholars used it for a number of purposes not directly related to the administrative methodology. No doubt a term that respected academics spent a great deal of time and mental energy legitimizing began to carry a legitimacy other scholars were willing to capitalize on, even if only to buttress their own work in unrelated or loosely related areas.

Whatever else may be true, what is most clear is that many of the best and most creative minds in the legal academy were drawn to this particular inquiry, and there is no question that it was these outstanding and innovative personalities, working with an adept idea in a conducive environment, that did make all the difference.

*Don Bradford Hardin, Jr.*