

JUDICIAL REVIEW OF REGULATORY IMPACT ANALYSIS Why Not the Best?

One of the most controversial issues in comprehensive regulatory process reform is the role of courts in reviewing the quality of the regulatory impact analysis (or other similar economic analysis) that agencies conduct to inform their regulatory decisions. Proponents of judicial review of regulatory impact analysis see it as a much-needed enforcement mechanism to ensure that agencies have an adequate factual basis for their regulatory decisions. Critics argue that judicial review of this analysis would allow judges to impose their own policy preferences on regulatory agencies and strike down necessary regulations for trivial reasons.

In “[Judicial Review of Regulatory Impact Analysis: Why Not the Best?](#),” Research Chief of the Administrative Conference of the United States Reeve Bull and Mercatus Senior Research Fellow Jerry Ellig explain how judicial review of agencies’ regulatory impact analysis could motivate agencies to base regulatory decisions on the best available evidence about the problems they seek to solve, the proposed regulation and alternative solutions, and the likely consequences. They offer a proposal for limited but consistent court review that would allow courts to remand regulations for material errors in the agency’s analysis but would prevent courts from remanding regulations because of trivial errors or omissions.

A KEY TO EVIDENCE-BASED REGULATION: JUDICIAL REVIEW

Assessments by independent scholars and government agencies have identified serious deficiencies in agency regulatory impact analyses for major regulations. Though agencies are often required by statute or executive order to conduct economic analysis to inform regulatory decisions, the quality of this analysis is often relatively poor. Though this deficiency may derive from several sources, a major cause is limited judicial oversight. Under existing law, it is unclear whether non-statutorily-mandated RIAs are subject to judicial review, and whether those RIAs are included in the evidentiary record can make all the difference to a reviewing court.

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The rigor of judicial review also varies greatly from case to case. The current “arbitrary and capricious” standard governing judicial review is vague, leading to highly inconsistent court decisions. Courts may be capable of giving regulatory impact analysis a careful review, but they don’t always do so.

To establish judicial review as an effective incentive for improved analysis, regulatory reform legislation must do more than simply state that regulatory impact analysis will be subject to judicial review. A truly effective reform should specify the major elements the analysis should include and establish a clear standard to guide judicial review. A complete regulatory impact analysis should include the following elements:

- An evidence-based assessment of the problem a regulation seeks to solve
- Alternative solutions that address the root cause of the problem
- Estimates of the benefits or other desired outcomes expected from the regulation and alternatives
- Estimates of the costs of the regulation and alternatives

JUDICIAL REVIEW OF AGENCY ANALYSIS

To assess whether courts can competently evaluate agency economic analysis, this paper examines a reasonably complete sample of cases in which federal appeals courts have evaluated an agency’s regulatory impact analysis. Four clear findings emerge from this review:

- Courts have capably reviewed all major aspects of regulatory analysis: assessment of the problem, development of alternatives, and estimates of benefits and costs.
- Courts do not appear to be biased against regulation. In 57 percent of the sample cases, the appeals court sided with the agency and rejected all challenges to the regulation. When the courts overturned regulations because of deficiencies in the underlying analysis, in 56 percent of those cases the court implied that flaws in the analysis led to too little regulation; in only 44 percent of the cases did the court imply that the agency regulated too much.
- Agencies tend to improve their analysis in response to their defeats in court. The most striking example is the Securities and Exchange Commission, which measurably improved its economic analysis after 2012 in response to several high-profile losses in court.
- The thoroughness of court review of agency analysis under the Administrative Procedure Act’s “arbitrary and capricious” standard is highly inconsistent. Courts sometimes evaluate the quality of evidence in an agency’s analysis, but other times they simply allow the agency to assert a pro forma rationale for its decisions.

ENSURING LIMITED BUT CONSISTENT JUDICIAL REVIEW OF AGENCY REGULATORY ANALYSIS

The paper suggests three legislative changes that would give courts a limited role in reviewing agency analysis and ensure that courts carry out that role consistently. Specifically, it recommends reforming the Administrative Procedure Act in the following respects:

- Specify by statute the topics a regulatory impact analysis must cover—analysis of the problem, alternatives, benefits, and costs.
- Require agencies to base their regulatory impact analysis on the best available evidence.
- Make the agency’s regulatory impact analysis or other economic analysis part of the rulemaking record, reviewable by courts only if a deficiency in the analysis made a material difference in a regulatory decision.

These changes would help ensure that courts scrutinize significant analytical deficiencies that affect regulatory decisions, but the changes would also prevent courts from remanding regulations for trivial errors or omissions in the agency’s analysis.