

Cost Benefit Analysis and Public Sector Trust

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ABSTRACT

Eighty percent of Americans believe that government is run for “a few big interests” rather than the public interest. Rooted in notions of social welfare, cost benefit analysis might be seen as an analytical procedure to flush out and discourage at least the most egregious abuses in lawmaking authority, thereby encouraging citizens to view their government as essentially pursuing some plausible notion of the public interest. Yet the extent to which cost benefit analysis might fill this trust-building role is an unaddressed issue. Here, I conduct an experiment based on a (de)regulatory action in the environmental context to examine whether cost benefit analysis might yield trust dividends. I find that cost benefit analysis produces large increases in public sector trust, but only when paired with reasonableness review, and only among “elites”. This pattern of findings suggests that, without more, an agency declaration of cost justification is not credible, but that it may be made so through a form of reasonableness review. I discuss the contours of such review, and highlight perils if review is overly aggressive.

Few today trust the government. Consider, for instance, that only one-in-five report believing that the government is run for the public interest rather than “a few big interests,” down from close to seven-in-ten in the mid-1960s.² Remarkably, though administrative agencies represent the dominant lawmaking bodies in our society,³ we have very little sense of how administrative law or procedures might affect trust in the public sector.⁴ Rooted in notions of social welfare,⁵ cost benefit analysis, in particular, would seem to hold much promise as a way of substantively improving policy and, further, in improving the citizens’ assessment of the public sector. Cost benefit analysis, in other words, might be seen as an analytical procedure to flush out and discourage the most egregious abuses in lawmaking authority, thereby encouraging citizens to view their government as essentially pursuing some defensible notion of the public interest. Yet the extent to which cost benefit analysis might fill this trust-building role remains an unaddressed issue.⁶

The promise of cost benefit analysis is indeed great—some fifty years ago, President Johnson likened it to “space exploring.”⁷ But as with space programs, it is easy to let the imagination bound in front of reality. Many have thoughtfully criticized the application of cost benefit analysis: for example, that we have no consensus on how or whether to quantify many of the costs or, particularly, benefits of a regulation, such as human dignity and other non-market goods;⁸ or that we likewise have no consensus on

² American National Election Studies, Time Series Cumulative Data File, available at http://www.electionstudies.org/studypages/anes_timeseries_cdf/anes_timeseries_cdf.htm.

³ E.g., John de Figueiredo & Edward H. Stiglitz, *Democratic Rulemaking*, in OXFORD HANDBOOK OF LAW & ECONOMICS (forthcoming 2017).

⁴ A notable exception to this statement is AYRES & BRAITHWAITE, *infra* note 16, which articulates a civic republican vision of the regulatory state and postulates that trust follows from a cooperative enforcement scheme. More generally, to the limited extent scholars consider this connection, they tend to do so in the context of e-government or FOIA-type policies, e.g., Stephan Grimmelikhuijsen et al. *The Effect of Transparency on Trust in Government: A Cross National Comparative Experiment*, 73 PUB. ADMIN. REV. 575 (2013), or in light of e-rulemaking initiatives, Darrell M. West, *E-Government and the Transformation of Service Delivery and Citizen Attitudes*, 64 PUB. ADMIN. REV. 15 (2004); Caroline J. Tolbert & Karen Mossberger, *The Effects of E-Government on Trust and Confidence in Government*, 66 PUB. ADMIN. REV. 354 (2006). Yet administrative procedures and law clearly sweep far more broadly, calling for a more general examination of the connection. To give a sense of the limited attention given to cost benefit analysis, for example, consider that a Google Scholar search reveals that only five articles contain the terms (1) “5 U.S.C. §706(2)(A)”, which of course refers to the catch-all arbitrary and capricious standard of review under the Administrative Procedure Act (APA), (2) “trust in government”, and (3) “cost benefit analysis”, none empirical in nature, all touching on the issue in passing, and most in fact focusing on data transparency or e-government issues.

⁵ E.g., MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 9-24 (2006).

⁶ Elsewhere, I situate cost benefit analysis in a broader theory of trust and incomplete information, Stiglitz, *infra* note 20.

⁷ Lyndon B. Johnson, Press Conference at White House (Aug. 25, 1965) (introducing his Planning, Programming, and Budgeting System, which included as a part cost benefit analysis, and noting that “it will make our decision-making process as up-to-date, I think, as our space exploring program”).

⁸ See Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7 (1998); FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS* (2004); Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost Benefit*

how to think about future generations and their claims to current policies or more generally of how to discount the future.⁹ A difficult question that is likely to become increasingly important in the future is how well adapted cost benefit analysis is to “super” rules, such as the Clean Power Plan. This class of rules that appears on the rise, and one likely to be swept up in any reform of the regulatory process.¹⁰ Yet cost benefit analysis, which at core adopts a *ceteris paribus* conception of policymaking, may be ill suited to evaluating the merits of such rules, which likely set off difficult-to-predict dynamics in primary behavior.¹¹ On its own terms, therefore, much remains contested and uncertain when it comes to cost benefit analysis.¹²

Even as such debates properly continue, this entry seeks to open a new dimension in the discussion by questioning to what extent and under what conditions cost benefit analysis might affect the *public’s* trust of regulatory outputs. Though long concerned with the problem of “capture,” whereby regulated entities put administrative agencies to their own narrow ends, administrative law scholars have tended to study how, variously, administrative procedures, agency structure, or judicial review might dampen capture.¹³ The public stands as a normative anchor in these analyses, but otherwise essentially sits out in a drama involving agencies, regulated entities, and courts. By contrast, social scientists have long been concerned with the problem of trust in government, fielding survey questions on the topic since the consolidation of behavioralism in the 1960s.¹⁴ This literature, however, has largely not engaged with the concerns over administrative procedures and judicial review that animate the administrative law literature,¹⁵ and to my

Analysis of Environmental Protection, 150 U. PA. L. REV. 1553 (2002) [hereinafter, *Pricing the Priceless*]; Rachel Bayefsky, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 YALE L.J. 1732 (2013).

⁹ E.g., Amartya K. Sen, *Approaches to the Choice of Discount Rates for Social Benefit-Cost Analysis*, in *DISCOUNTING FOR TIME AND RISK IN ENERGY POLICY* (1982). Ackerman & Heinzerling, *Pricing the Priceless*, *supra* note 8 at 1570; Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in its Place: Rethinking Regulatory Review*, 65 U. MIAMI L. REV. 335, 348 (2011); Alexander Volokh, *Rationality or Rationalism? The Positive and Normative Flaws of Cost Benefit Analysis*, 48 HOUS. L. REV. 79 (2012).

¹⁰ Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. § 103 (2017) (requiring agencies to conduct cost benefit analysis, and singling out major and “high impact” rules for greater scrutiny).

¹¹ E.g., Rose-Ackerman, *supra* note 9 at 335 (arguing that “CBA is suitable for many conventional policy issues that have limited but significant effects on society in the short to medium term,” but that it is not suited to “policies with a significant global impact”).

¹² For prominent defenses of CBA, see Kenneth J. Arrow et al, *Is There a Role for Benefit Cost Analysis in Environmental, Health and Safety Regulation?* 12 SCIENCE 221 (1996); ADLER & POSNER, *supra* note 5; RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008); SUNSTEIN, *infra* note 18.

¹³ E.g., Richard Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1685 (1975).

¹⁴ See American National Election Studies, *supra* note 2 (fielding trust in government questions since the 1960s); Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (1993); Valerie Braithwaite & Margaret Levi, *Trust and Governance* (1998); Joseph S. Nye, Jr. et al, *Why People Don’t trust Government* (1997); Mary E. Warren, *Democracy and Trust* (1999); Russell Hardin, *Trust and Trustworthiness* (2002); Bo Rothstein, *Social Traps and the Problem of Trust* (2005).

¹⁵ For exceptions, see *supra* note 4. I present my informational theory of administrative procedures and trust in Stiglitz, *infra* note 20. The more general idea that trust depends a sense that the government is acting fairly has received considerable attention. One close example in this regard to the present effort is Margaret Levi, *A State of Trust*, in *TRUST AND GOVERNANCE* 77, 90 (Valerie Braithwaite & Margaret Levi eds, 1998) (observing that “individuals need to have evidence that government is relatively fair ... if they

knowledge no study has systematically considered the relationship between cost benefit analysis and trust in the public sector.

Theoretically, a colorable connection exists between cost benefit analysis and the problem of public sector trust. The standard battery of questions that scholars ask the public when assessing trust in government, for example, includes the following: “would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for benefit of all people.”¹⁶ Cost benefit analysis, of course, embraces the idea that a regulation has winners and losers—few policies represent a pareto improvement—but it also is often understood as a way of at least roughly approximating the social welfare implications of a proposed regulation.¹⁷ In this sense, cost benefit analysis might be seen as a way of guarding against the possibility of government being run for a “few big interests,” aligning well with the a core element of trust in government. An important justification for cost benefit analysis, indeed, runs just along these lines. Sunstein, for instance, observes that cost benefit analysis might “reduc[e] interest group control and . . . increase[] both accountability and transparency.”¹⁸ Adler and Posner, similarly, observe that cost benefit analysis is a “tool that enhances transparency and thus reduces rent-seeking and other forms of misbehavior.”¹⁹

Empirically, however, the connection between cost benefit analysis and public sector trust is entirely unsubstantiated. As part of a project on administrative law and procedures and trust in the public sector,²⁰ this entry seeks to provide the first empirical evidence in this regard, reporting the results from an initial experimental study into how cost benefit analysis alters public views of regulatory activity.

Part of this analysis engages with a highly active debate over the proper role of judicial review in cost benefit analysis. On this point, scholars adopt a variety of positions, with some contending that courts should interrogate agencies’ cost benefit

are to have confidence that the state will harmonize the interests of otherwise competitive parties . . . [it] requires the perception that all relevant interests have been considered, that the game is not rigged”); see also MARGARET LEVI, *CONSENT, DISSENT AND PATRIOTISM* (1997), Martin Daunton, *Trusting Leviathan: British Fiscal Administration from the Napoleonic Wars to the Second World War*, in *TRUST AND GOVERNANCE* 102 (Valerie Braithwaite & Margaret Levi eds, 1998); IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992). This entry’s perspective on cost benefit analysis and public sector trust aligns well with Levi’s more general perspective on trust and the fairness of government decisions. The present effort also aligns with the psychological literature on obedience to the law, which likewise points to the centrality of perceptions of fairness, TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990), Tom R. Tyler, *Trust and Democratic Governance*, in *TRUST AND GOVERNANCE* 269 (Valerie Braithwaite & Margaret Levi eds, 1998). For a general review of the literature on political trust, see Margaret Levi & Laura Stoker, *Political Trust and Trustworthiness*, 3 *ANN. REV. POL. SCI.* 475 (2000).

¹⁶ See American National Election Study, *supra* note 2.

¹⁷ ADLER & POSNER, *supra* note 5.

¹⁸ CASS R. SUNSTEIN, *THE COST BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* 27 (2002).

¹⁹ ADLER & POSNER, *supra* note 5, at 123.

²⁰ See Edward H. Stiglitz, *Delegating for Trust*, *U. PA. L. REV.* (forthcoming).

choices,²¹ perhaps as in the D.C. Circuit’s recent decision in *Business Roundtable v. SEC*,²² and others arguing that arbitrariness review does not embrace a requirement for agencies to engage in cost benefit analysis or that courts should otherwise adopt a highly deferential position on this question.²³ The contours of this debate roughly follow those of the broader debate over cost benefit analysis, though with an overlay of concern about the competence of courts as effective managers of the analytical process. However, judicial review may matter along another margin: to the extent the public is skeptical of an agency’s integrity, we might expect judicial review to increase the credibility of the cost benefit analysis.²⁴ Judicial review, therefore, may be critical to the ability of that analytical procedure to increase public faith in the welfare consequences of a regulatory decision.

I conduct a simple experiment involving three conditions to examine the relationship between cost benefit analysis and public sector trust. The “baseline” condition involves the Environmental Protection Agency (EPA) relaxing pollution controls, without any reference to cost benefit analysis or judicial review. The “cost benefit condition” adds to this baseline language indicating that the EPA engaged in a cost benefit analysis and determined the action to be cost-benefit justified. The third condition, “judicial review”, layers judicial review on top of this last scenario, such that opponents of the action have an opportunity to seek judicial review of the cost benefit choices. Throughout, the outcome of interest is whether the respondent believes that government is run by “a few big interests” or instead for the “benefit of all the people”—that is, I employ a standard trust in government question.

Several suggestive results emerge from this analysis. First, on this basis of this experiment, it appears that cost benefit analysis, by itself, has virtually no effect on public sector trust. This is true for every obviously relevant cell of respondents—for example, it is equally true of Democrats and Republicans, of elites and non-elites. This non-result may derive from a number of sources, but two seem particularly relevant. People may not have faith in the ability of *agencies* to honestly or competently carry out cost benefit analysis, or they may have more fundamental mistrust in the idea of cost benefit analysis itself, along the lines of many scholars. The third condition helps us to parse this issue by

²¹ E.g., Reeve Bull & Jerry Ellig, *Judicial Review of Regulatory Impact Analysis* (Mar. 2017, unpublished working paper). See also Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Cost Benefit Analysis*, 22 GEO. MASON L. REV. 575 (2015) (surveying cases reviewing agency CBA and concluding, in part, that review has “some prominent virtues ... A robust judicial review provides another check on agency BCA and catches errors not addressed by the OIRA because of an oversight or political expediency. Courts have also encouraged agencies to provide detailed explanations of the underlying methodology and to quantify as many effects as possible, making BCA more transparent to the public and allowing for more meaningful review going forward. Finally, our review of thirty-eight cases involving BCA does not demonstrate any inability of the courts to grasp the economic issues, despite the judges’ professed lack of expertise.”).

²² 647 F.3d 1144 (D.C. Cir. 2011).

²³ E.g., John C. Coates IV, *Cost Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015) (providing a compelling case that judicial review does more harm than good, at least if done aggressively with respect to financial regulations); ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 170-78 (2016).

²⁴ Stiglitz, *supra* note 20.

introducing judicial review as a check on the agency’s analysis. Judicial review plausibly attenuates concerns about the honesty or competency of agencies, making cost benefit determinations more credible in this sense, but does little to attenuate the deeper substantive concerns that some scholars have with respect to cost benefit analysis—indeed, to the extent the public views courts as themselves incompetent in economic analysis, it might even reduce trust in government. Introducing judicial review, it turns out, seems to substantially improve public assessments of regulatory outputs, at least among “elites.”

This pattern of findings is consistent with the idea that, as the public perceives it, the procedural integrity of agency decision-making is highly contingent on the availability of meaningful judicial review. To the extent that one hopes to improve public sector trust through cost benefit analysis, or sees the merit of cost benefit analysis to turn on its effects on public perceptions, as would be the case for many of the arguments based on its democratic properties, it may therefore be important to accept some form of relatively energetic reasonableness review. As discussed below, however, the precise nature of that judicial review remains an open question; it may well accommodate many of the substantive concerns about review of economic analysis in the literature.

The remainder of this essay proceeds in four parts. First, I outline the debate over cost benefit analysis, and connect it with the literature on trust in government. Second, I describe and present results from an experiment designed to illuminate the possible connection between cost benefit analysis and public sector trust. Third, I discuss limitations of this analysis and steps forward. My conclusions follow.

I. Cost Benefit Analysis and Trust

From President Johnson’s Planning, Programming, Budgeting System (PPBS), which included cost benefit analysis as a component, to President Reagan’s Executive Order 12,291,²⁵ to President Clinton’s Executive Order 13686,²⁶ to President Obama’s Executive Order 13,463,²⁷ the executive branch has encouraged agencies to engage in cost benefit analysis. Congress, too, has required agencies to conduct cost benefit analysis, though more selectively.²⁸

On their face, these efforts tend to be built on the social welfare foundations of cost benefit analysis. President Reagan’s Executive Order 12,291, for instance, declared that, “regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society.”²⁹ From the earliest days, however, opponents of cost benefit analysis have argued that it is an engine of deregulation, with

²⁵ Exec. Order No. 12,291, 46 Fed. Reg. 13193 (1981).

²⁶ Exec. Order No. 12,866 (1993).

²⁷ Exec. Order No. 13,563 (2011).

²⁸ See generally MAEVE P. CAREY, COST BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULEMAKING PROCESS, CONGRESSIONAL RESEARCH SERVICE.

²⁹ Exec. Order No. 12,291 at 13193.

merely a patina of scientific rigor.³⁰ That both Democratic and Republican presidents, those on the left and the right, have supported cost benefit analysis suggests a further rationale—that, as President Johnson hoped long ago, it represents an effective, if less than ideal, tool to help manage and perhaps even rationalize the sprawling bureaucracy. A well-developed and truly vast literature debates the substantive merits and demerits of cost benefit analysis, and I do not attempt a rehearsal of those lines in this short essay.³¹

I do want to emphasize two points, however, about contemporary cost benefit analysis. First, despite the series of executive orders calling for greater use of cost benefit analysis—at least for executive agencies—existing empirical studies suggest that agency non-compliance may be rampant.³² For instance, an Office of Management and Budget (OMB) study of “major” rules issued in fiscal year 2012 indicated that executive agencies conducted cost benefit analysis for only about half of non-transfer rules.³³ That same study indicated that independent agencies—a set of agencies not bound by the executive orders—did not conduct cost benefit analysis in any of the seventeen major rules that they produced in the fiscal year.³⁴ On the basis of these numbers alone it is difficult to tell if agencies simply avoided the analysis out of neglect or the like, or, instead, thought it impossible or ill advised to attempt to quantify the costs or benefits of the rule. If the former, one might engage the question of how agencies can be prodded into cost benefit analysis; if the latter, that might indicate a fundamental substantive flaw in cost benefit analysis as applied to modern regulation.

Not without controversy, some courts seem to have taken the former view. The D.C. Circuit decision in *Business Roundtable v. SEC*,³⁵ for instance, set aside the SEC’s Proxy Access rule as arbitrary and capricious for failing to conduct an appropriate cost benefit analysis. The SEC, according to the panel, “inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify certain costs or to explain why they could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.”³⁶ This decision, along with other signs that courts might be leaning toward reading cost-benefit considerations into statutes, e.g., *Michigan v. EPA*,³⁷ have ignited a debate over the proper role of judicial review. On one side, scholars argue that courts should, at least

³⁰ E.g., Philip Shabecoff, Reagan Order on Cost Benefit Analysis Stirs Economic and Political Debate, *New York Times* (Nov. 6, 1981) (noting that “opponents of the measure, including those concerned with the Administration’s efforts to reduce environmental, health and safety programs, view the cost-benefit requirement as little more than a justification for deregulating business and industry. They also complain that the rule requires assigning dollar values to things that are essentially not quantifiable: human life and health, the beauty of a forest, the clarity of the air at the rim of the Grand Canyon.”).

³¹ See notes 8-12.

³² E.g., Robert W. Hahn et al, *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J.L. & POL’Y 859 (2000).

³³ CAREY, *supra* note 28, at 24.

³⁴ *Id.*

³⁵ 647 F.3d 1144 (2011).

³⁶ *Id.* at 1148

³⁷ 576 U.S. _____ (2015).

presumptively, require agencies to conduct cost benefit analysis and that any rule that does not do so, or does so without sufficient rigor.³⁸ On the other side of the debate, scholars question the ability of courts to competently manage cost benefit analysis, calling on courts to take a hands-off or at least highly deferential view toward the question.³⁹ The experiment below suggests an important role for reasonableness review, and the discussion takes up the more nuanced question of the shape of that review.

Second, scholars often note the “democratic properties” of CBA as one reason to support the practice.⁴⁰ CBA, that is, promises to lessen the advantages that special interest groups commonly have in the policymaking process by compelling the decision-makers to “show their work” in an analytically transparent way.⁴¹ The analytical process, in other words, “promot[es] public attention to what is really at stake in a way that increases both accountability and transparency.”⁴² Even if the transparency and analytical regularity of cost benefit analysis cannot deliver on the promise of reliably maximizing social welfare, it at least plausibly makes it more difficult for agencies to engage in the most abusive and ill-advised regulatory efforts. Given the tendency for highly interested, narrow concerns to be most active in the policymaking process,⁴³ this means that cost benefit analysis may hold promise as a technique for re-balancing interest representation before agencies. However, as with many other forms of administrative procedures that we suspect have some effect on public perceptions or democratic values, we have virtually no evidence on how those procedures, in fact, influence public perceptions or democratic values. This essay interrogates this question.

This special-interest hemming rationale for cost benefit analysis fits naturally with a standard view of why people may not trust the public sector—inequitable and unfair domination by special interest groups. Since 1964, for instance, the National Election Study has asked respondents, “Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all the people?” Though close to seven-in-ten felt that government was run for the “benefit of all the people” in in mid-1960s, more recently only roughly one-in-five hold this view.⁴⁴

A lack of public sector trust is a topic of long standing interest in the social sciences,⁴⁵ and for good reason.⁴⁶ A trusted and trustworthy public sector enlarges the set

³⁸ See note 21.

³⁹ See note 23.

⁴⁰ SUNSTEIN, *supra* note 18, at 27.

⁴¹ SUNSTEIN, *supra* note 18, at 27-28; ADLER & POSNER, *supra* note 5, at 123 (“Cost benefit analysis enhances transparency, and in this way can be defended as a partial solution to the principal agent problem”).

⁴² SUNSTEIN, *supra* note 18, at 27.

⁴³ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

⁴⁴ See ANES, *supra* note 2.

⁴⁵ See notes 14-15.

⁴⁶ Legal academia has invested less attention to this topic, but see Susan Rose-Ackerman, *Trust, Honesty and Corruption: Reflection on the State Building Process*, 42 ARCHIVES EUR. J. SOC. 526 (2001); TYLER, *supra* note 15; AYRES & BRAITHEWAITE, *supra* note 15. Note that other areas of public law, such as election law, have devoted more resources to the question of trust, perhaps because the Court itself seems

of welfare-enhancing policies that might be pursued, for example by increasing voluntary compliance with tax policy.⁴⁷ As a corollary of this point, trust in government may further liberty interests, as a trusted state has less of an incentive to turn to coercion to achieve its objectives. More dramatically, but plausibly, observers have suggested that distrust in government may be eroding the very foundations of liberal democracy, giving rise to an illiberal populist politics.⁴⁸ The question of immediate interest is whether cost benefit analysis holds any potential to produce a more trusted public sector.

Theoretically, as I suggest, a plausible connection exists between cost benefit analysis and public sector trust. Writing in another context, Weingast, for instance, argues that “trust results when institutions make it far less likely that one group will be able to capture the state and take advantage of other[s]. Trust can ... be constructed and institutionalized.”⁴⁹ As noted above, many find cost benefit analysis attractive precisely because it makes it more difficult for special interests to capture the regulatory apparatus, suggesting it as a helpful institution in building a trusted government. However, for trust to accrue, cost benefit analysis needs to do more than, in fact, deter special interest capture—it must also do so in a publicly credible way.

If an agency declares a regulation to be cost-justified, the public may believe it. Or for a variety of reasons it may not. Perhaps the special interests corrupted the scientific process,⁵⁰ or perhaps unscrupulous political appointees jawboned those conducting the analysis,⁵¹ similarly thereby corrupting it. Here, it is helpful to think of courts as a possible vehicle for countering such forces and delivering public credibility. Elsewhere, I argue that the availability of judicial review is important to thinking about the credibility of administrative procedures, and hence to the ability of those procedures to generate values of fairness, transparency, and—ultimately—public trust.⁵² Though generalist courts plainly have far less expertise than agencies in their domains, courts stand in a far better position than the public generally to evaluate the reasonableness of a cost benefit analysis, particularly given the information properties of our adversarial legal

to do so in those areas. E.g., David M. Primo & Jeffrey Milyo, *Campaign Finance Law and Political Efficacy: Evidence from the States*, 5 ELECTION L. J. 23 (2006).

⁴⁷ See, e.g., LEVI, CONSENT, DISSENT, AND PATRIOTISM, *supra* note 15; NICHOLAS R. PARILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013).

⁴⁸ ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2016: REVENGE OF THE ‘DEPLORABLES’ (noting that “[b]y tapping a deep strain of political disaffection with the functioning of democracy, Mr. Trump became a beneficiary of the low esteem in which US voters hold their government”, and placing the United States in the “flawed democracy” category due to low levels of trust in the public sector).

⁴⁹ Barry R. Weingast, *Constructing Trust: The Political and Economic Roots of Ethnic and Regional Conflict, in INSTITUTIONS AND SOCIAL ORDER* 165 (eds. Karol Soltan et al, 1998).

⁵⁰ See Wendy E. Wagner, *The CAIR RIA: Advocacy Dressed Up as Policy Analysis, in REFORMING REGULATORY IMPACT ANALYSIS* (eds. Winston Harrington et al, 2009); Douglas A. Kysar, *Politics by Other Meanings: A Comment on Retaking Rationality Two Years Later*, 48 HOUS. L. REV. 43, 47 (2012) (arguing that the “‘game’ of cost benefit analysis is just that, a structured exercise in which competing interests pursue policy outcomes not through direct argument and suasion, but through use of alternative assumptions, valuation techniques, discount rates, and other seemingly technical trappings of the cost benefit methodology”).

⁵¹ *Id.*

⁵² Stiglitz, *supra* note 20.

system.⁵³ As institutions, moreover, the public trusts the judiciary more than any other branch of government.⁵⁴ All of this suggests that subjecting agencies cost-benefit determinations to judicial review—perhaps under the arbitrariness standard—may hold promise in rendering those determinations publicly credible.

II. Experimental Application

From this discussion, two main hypotheses fall out. The first is that cost benefit analysis improves the public's trust in government. This view, however, predicates on a contention that the public has some faith both in cost benefit analysis as an abstract analytical procedure, and in the integrity with which agencies carry out that analytical procedure. Absent either predicate, cost benefit analysis may have no effect on public beliefs. One view is that judicial review enhances the credibility of procedures. This leads to the second hypothesis: that cost benefit analysis improves the public's trust in government, but only when the analysis is subject to judicial review.

a. The Experiment

To examine these hypotheses, consider a survey experiment involving the EPA, cost-benefit analysis, and judicial review. The experiment involves randomizing participants over three vignettes regarding a (de)regulatory action by the Environmental Protection Agency (EPA): a baseline condition, a cost benefit condition, and a judicial review condition. Participants then provide responses to a standard trust in government question; they also respond to several demographic questions, and an attention-checking question.

The baseline condition is designed to assess participants' views of regulation and trust in government absent considerations of cost benefit analysis or judicial review. It provides respondents with a description of the regulatory action, but does not mention cost benefit analysis or judicial review. The cost benefit condition was designed to assess the influence of that form of analysis, in isolation, and replicates the baseline condition, but adds information regarding a cost benefit analysis conducted by the agency. The judicial review condition replicates the cost benefit condition, but adds information regarding the availability of judicial review, thereby allowing us to parse whether review affects the credibility of agency cost benefit determinations. Notably, the judicial review condition only speaks to the *availability* of review, and does not refer to any judicial determination with respect to the regulation at issue. Still, as available, it is a relatively searching form of review, with courts reviewing the reasonableness of the agencies' estimates of cost and benefit. The text of the vignettes was as follows:

Baseline condition. The Environmental Protection Agency (EPA) regulates the emission of pollutants from power plants and other sources. Recently, the EPA issued a new rule

⁵³ Mathias Dewatripont & Jean Tirole, *Advocates*, 107 J. POL. ECON. 1 (1999).

⁵⁴ E.g., Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 703 (2006).

that relaxed emissions requirements for power plants. This means that power plants can produce electricity more cheaply, but also that they can pollute more.

Cost benefit condition. The Environmental Protection Agency (EPA) regulates the emission of pollutants from power plants and other sources. Recently, the EPA issued a new rule that relaxed emissions requirements for power plants. This means that power plants can produce electricity more cheaply, but also that they can pollute more. Before the EPA issued the rule, the agency estimated the costs of the new rule (for example, increases in sickness from pollution) as well as the benefits of the new rule (for example, cheaper electricity). The EPA said the benefits outweigh the costs.

Judicial review condition. The Environmental Protection Agency (EPA) regulates the emission of pollutants from power plants and other sources. Recently, the EPA issued a new rule that relaxed emissions requirements for power plants. This means that power plants can produce electricity more cheaply, but also that they can pollute more. Before the EPA issued the rule, the agency estimated the costs of the new rule (for example, increases in sickness from pollution) as well as the benefits of the new rule (for example, cheaper electricity). The EPA said the benefits outweigh the costs. Those opposed to the rule have the option of asking a federal court to review whether the EPA's estimates of the new rule's costs and benefits are reasonable.

Participants were randomly assigned to one of these prompts. After reading the prompt, participants responded to a standard trust in government question: "Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all the people?" They chose from the following, also standard, options: "Run by a few big interests", "For the benefit of all the people", or "Don't know". I also asked for information about the participants' age, state of residence, sex, party identification, ideology, education, and race. Before ending the survey, I included an attention-checking question to guard against the possibility that participants were blindly careening through the survey.

b. Administration

I fielded this survey experiment in early January 2017 to a sample of 403 U.S. adults who took the survey online.⁵⁵ They were recruited via Amazon's Mechanical Turk (mTurk) service, through which they received a small payment for their time. Recently, scholars have debated the validity of mTurk convenience samples. On one side, scholars point to: the speed and affordability of this recruitment method; studies showing mTurk samples approximate the representativeness of other convenience samples;⁵⁶ and studies that replicate results based on more traditional sampling approaches using mTurk

⁵⁵ I drop any respondent from the analysis who failed the attention-checking question at the end of the survey. A total of six participants failed the question, which consisted of a relatively long question that contained unambiguous instructions for which answer to select in the prompt that followed.

⁵⁶ E.g., Adam J. Berkinsky et al., *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351 (2012).

samples.⁵⁷ On the other side, scholars question the validity of mTurk samples, pointing to: selection bias in recruitment (it may be a very odd person who responds to a survey regarding legal or political views for mere pennies);⁵⁸ to the fact that these respondents may participate in many experiments, leading them to become too savvy;⁵⁹ and to studies that show differences in results among mTurk samples and other convenience samples.⁶⁰

Recognizing the potential problems with mTurk convenience samples, we can take certain steps to minimize the relevant validity concerns. Most significantly, we can attenuate concerns regarding selection bias by paying participants a reasonable amount of money.⁶¹ It may be true that, if paid mere pennies, only legal or political junkies respond to requests for a survey on legal or political topics. But if paid a decent (implicit) hourly wage, one is likely to draw in a much broader cut of the population. So here, I paid participants an implicit hourly wage of \$10-20: they received \$1 to respond to a survey that took all but the slowest 10 percent of them less than five minutes to complete. Consistent with the idea that the mTurk payment was relatively generous and therefore likely drew in a range of respondents, the request appeared almost immediately on several blogs that track attractive mTurk jobs. One entry on the relevant reddit.com thread, “HITSWorthTurkingFor,” for instance, thanked the original poster by saying, “thanks easiest money i have earned in forever.” The other concern often cited for mTurk samples—their savviness—seems most relevant when trying to coax implicit attitudes from respondents about, say, race or gender.⁶² It may be harder to do so with vigilant and savvy respondents. However, the present study makes no effort to elicit such responses and it is not at all clear how respondent savviness bears on the current experimental design—trickery is absent from this study.

That said, one should not confuse this sample with a nationally representative sample. It is not. As discussed below, the sample is more educated and younger than the national population, for example. Still, the sample includes respondents from a wide range of ages, political affiliations, and educational levels.

c. Preliminaries: Summary Statistics and Randomization

I report summary statistics for the sample in table 1. It is useful to compare these numbers to those from the most recent National Election Study (NES), which contains a nationally representative sample. This comparison indicates that the sample used for the present experiment is more male (NES proportion = 0.48), younger (NES mean = 48), with fewer blacks (NES proportion = 0.11), more educated (NES proportion with BA = 0.36), slightly more likely to identify as a Democrat (NES = 0.42), and slightly more

⁵⁷ *Id.*

⁵⁸ E.g., Yanna Krupnikov & Adam S. Levine, *Cross-Sample Comparisons and External Validity*, 1 J. EXPERIMENTAL POL. SCI. 59 (2014).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ In addition, I take a number of smaller steps to improve sample validity: I collect the sample during the weekday, and after the west coast business day begins.

⁶² Krupnikov & Levine, *supra* note 58, at 62.

liberal ideologically (NES = 0.45).⁶³ This comparison confirms what we knew—that this is not a nationally representative sample—but also suggests that it is not far from the national figures on important demographic, partisan, and ideological dimensions.

Table 1: Sample Summary Statistics

	Mean	SD	Min	Max
Male	0.56	0.5	0	1
Age	37.7	11.14	20	78
Black	0.07	0.25	0	1
Degree (4-yr)	0.49	0.5	0	1
Party	0.38	0.39	0	1
Ideology	0.4	0.29	0	1
Gov't trust	0.13	0.34	0	1

Note: "Party" re-codes the standard three-party choice (Democrat, Republican, Independent) to range between 0 and 1, with 0 assigned to Democrats, 0.5 to Independents, and 1 to Republicans. "Ideology" re-codes the standard five-choice (Very Liberal, Liberal, Moderate, Conservative, Very Conservative) to range between 0 and 1, with 0 assigned to Very Liberal, and 1 assigned to Very Conservative, with the intermediate responses assigned to uniform increments within that interval.

Another preliminary matter involves pre-treatment covariate balance over the experimental conditions. If the randomization worked properly, the covariates should be roughly balanced over the manipulated conditions; if not, then we might find the covariates bunching in one or another condition. To holistically assess balance, I adopt the following logistic regression approach: regress treatment assignment against the pre-treatment covariates and first order interactions, regress treatment assignment against an intercept, then conduct a likelihood ratio test of the two models to test whether the covariates jointly predict treatment assignment; if the conditions have balance over covariates, the test should return with an insignificant p-value.⁶⁴ I do this exercise twice, first as between the baseline condition and the cost benefit condition, and second as between the cost benefit condition and the judicial review condition. In both cases, the test suggests that lack of balance is not a concern.⁶⁵

⁶³ Note that I re-code Party ID and Ideology in the manner described in the note for table 1. For a similar re-coding scheme for these variables, see, e.g., PAUL M. SNIDERMAN & EDWARD H. STIGLITZ, *THE REPUTATIONAL PREMIUM: A THEORY OF PARTY IDENTIFICATION AND POLICY REASONING* (2012).

⁶⁴ See Kosuke Imai, *Do Get-Out-the-Vote Calls Reduce Turnout? The Importance of Statistical Methods in Field Experiments*, 99 AM. POL. SCI. REV. 283, 292 (2005); see also Costas Panagopolous & Donald P. Green, *Field Experiments Testing the Impact of Radio Advertisements on Electoral Competition*, 52 AM. J. POL. SCI. 156, 159 (2008).

⁶⁵ For the first test, the X^2 statistic is 5.9, with 21 degrees of freedom, for the second the statistic is 6.4, with 21 degrees of freedom, both far off the mark of statistical significance.

a. Full Sample Results

To evaluate the effects of these experimental conditions, I estimate the following: $y_i = \Lambda(\Gamma Z_i + \beta_0 + \beta_1 CBA_i + \beta_2 REV_i)$, where y_i takes a 1 if the respondent said the government is run in the public interest and a zero if for “a few big interests”, Λ denotes the logistic function, Z_i is a vector of pre-treatment covariates,⁶⁶ CBA_i is an indicator for whether the respondent was in the cost benefit condition, and REV_i is an indicator for whether the respondent was in the judicial review condition. Our interest is in the β coefficients: β_0 informs us of the average response of those assigned to the baseline condition (with covariates at their means), β_1 informs us of how the average response among those assigned to the CBA condition differs from the baseline, and β_2 does the same with respect to those assigned to the judicial review condition.

This analysis suggests that, by itself, cost benefit analysis is unlikely to change public views of government integrity. I report the results of this exercise graphically in figure 1,⁶⁷ which plots the predicted probability of trusting government for each of the experimental conditions, along with gray bars showing the (90 percent) confidence intervals for those estimates.⁶⁸ The point estimates for the baseline condition and the cost benefit condition are almost identical: at baseline, the probability of viewing government as run for the public interest is 12.17 percent; with cost benefit analysis, the proportion with that view is 11.95 percent. Naturally, this difference is not close to statistically significant.⁶⁹ This initial finding suggests that merely telling the public that an agency has engaged in cost benefit analysis and determined the regulation to be cost justified is unlikely to materially change public views of trust in government.

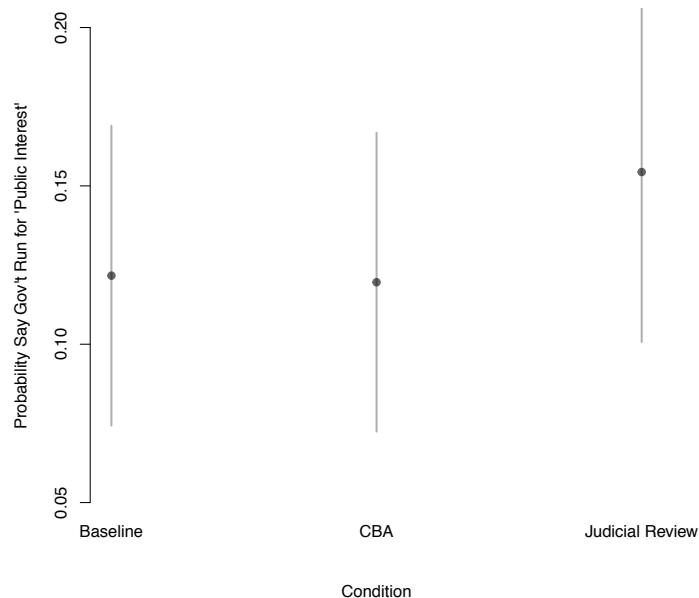
Figure 1: Full Sample Results

⁶⁶ The covariates are: indicators for black, male, and bachelor’s degree, as well as age and its square, ideology, and party identification.

⁶⁷ Regression tables available on request.

⁶⁸ To be clear, these point estimates reflect simulated probabilities via the logit regression, as adjusted for covariates. Here, covariate adjustment makes the estimates slightly more precise, but does not notably affect the point estimates.

⁶⁹ The p-value on the CBA coefficient, β_1 , is 0.96.



This non-result may derive from several possible sources. One possibility is that the public has little faith in even the *possibility* of meaningful cost benefit analysis. That is, much as with many scholars, the public may have an intuition that the procedure is intrinsically flawed. Another possibility is that the public views agencies as untrustworthy in the execution of cost benefit analysis—they fear, for instance, that the agency will manipulate the analysis to reach the outcome it desires. They might view, in other words, the analysis as not credible. One method of making procedures credible—including CBA—is to subject them to review by an independent entity, here, the courts.⁷⁰ The judicial review condition allows us to probe this view.

In this full sample, however, we have only modest evidence that courts enhance the credibility of agency cost benefit determinations. The probability of trusting government as run in the public interest increases to 15.43 percent with judicial review, up about three percentage points over both the baseline and cost benefit conditions. But the difference over the baseline is not statistically significant ($p = 0.46$). It is possible that this increase is meaningful and that the present study is merely limited by power.⁷¹ Even still, at least in this full sample, the magnitude of the increase is modest and suggests a limited role for cost benefit analysis in building trust.

b. “Elite” Results

⁷⁰ Stiglitz, *supra* note 20.

⁷¹ Power calculations indicate that a sample with roughly 1,000 respondents in each condition would be required to detect an effect of this size at the conventional statistical threshold.

Prior studies suggest that more educated people have more confidence in the judicial system.⁷² If this is right, the ability of courts to endow administrative procedures—here, cost benefit analysis—with public credibility may condition importantly on a respondent’s level of education. To explore this view, I re-run the analysis, but interact the experimental treatments of cost benefit analysis and judicial review with the indicator for whether the respondent has a bachelor’s degree.⁷³

As shown in figure 2, in isolation, elite status has virtually no influence on how respondents view cost benefit analysis. For both elites and non-elites, that is, a declaration by the agency that it has conducted cost benefit analysis and found the regulation to be cost-justified does nothing to influence how captured they view government to be by “big interests.”

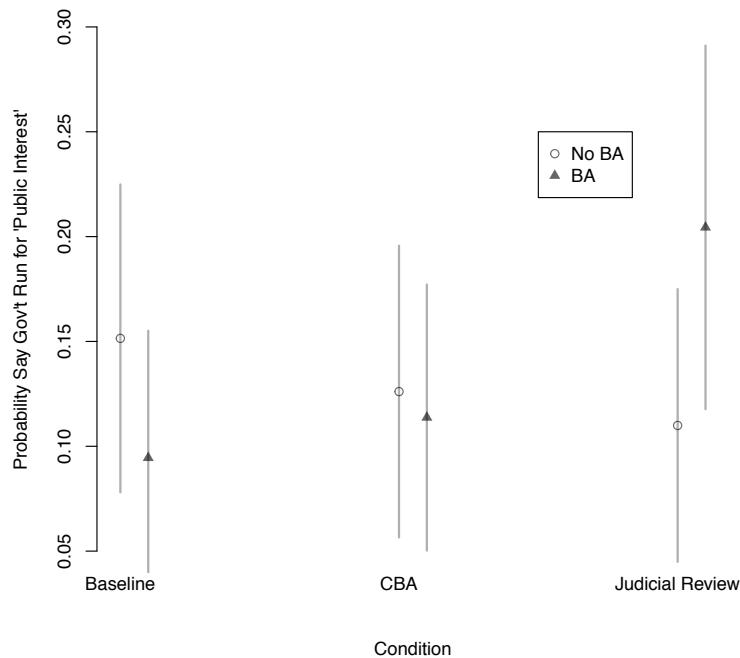
The effect of judicial review, however, appears heterogeneous with respect to elite status—it matters for elites, but not for non-elites. For non-elites, judicial review produces essentially no change in public views. But elites seem to respond to judicial review: they show a large increase in public sector trust when cost benefit analysis is followed by the availability of judicial review. For elites, the probability of saying they believe government is run in the public interest more than doubles from the baseline condition, from about 10 percent to over 20 percent. The coefficient on the relevant interaction is statistically significant at the 10 percent level. This suggests that, for a critical component of society—roughly speaking, the most educated third of the population—the availability of judicial review may be a critical component of cost benefit analysis if it is to be credible, that is, if it is to have any consequence for trust in public institutions.⁷⁴

Figure 2: Elite and Non-Elite Results

⁷² E.g., Sara C. Benesh, Understanding Public Confidence in American Courts, 68 J. Pol. 697, 703 (2006).

⁷³ I also exclude any participant who is younger than 22, the typical age that one might graduate from a four-year college program, though this exclusion has very little effect on the results.

⁷⁴ Also notable, apart from education, the effect of experimental conditions do not appear to condition on covariates—for instance, conditioning on party identification and ideology does not change the magnitude or significance of the estimates reported for the full sample.



III. Discussion

To the extent we care about public sector trust—and I suggest we should care about it—these results indicate that cost benefit analysis may play a meaningful role in producing a more trusted government, but only when agencies’ cost benefit determinations are subject to judicial review. This conjunction of conditions is sensible. Cost benefit analysis may theoretically provide a constraint on regulatory behavior that would make it more difficult to engage in at least the most egregious abuses of authority. Yet this constraint is theoretical only, and many citizens appear not to take unchecked declarations by regulatory agencies as credible. Public trust in government, as a result, does not change when agencies announce that their regulatory actions are cost justified. At least for more educated citizens, however, knowing that the analytical procedure might be reviewed for reasonableness by a court appears to make it more credible. As such, cost benefit analysis, if subject to judicial review, seems to meaningfully change citizens’ views of how trustworthy the government is—indeed, for elites, it doubles the probability that an individual views the government as run for the public interest.

This is a promising finding. But it also raises many questions. One might question, for instance, whether the public regards regulatory and deregulatory actions in the same way—here, I consider a deregulatory action, but regulatory actions plainly might also arouse suspicions of interest group capture. One might question how the public regards agency actions in other policy domains. The administrative state is

incredibly heterogeneous, and the public may trust agencies more in some areas than in others, may find their statements more credible in some areas than others. Particularly in light of *Business Roundtable* and the ensuing debate, the financial regulatory agencies represent an important set to consider. We might also be interested in context in which the agency fails to engage in cost benefit analysis, but offers reasons for this choice— does the mere presumption of cost benefit analysis change public views, and how does any such effect condition on judicial review. Future research might, likewise, devote more resources to decomposing the effect of judicial review generally and the effect of judicial review of cost benefit analysis in particular.

Moreover, even taking the finding at face value, it is not clear what the appropriate form of judicial review might be. It suggests that the availability of review is important, that is, and in this sense weighs against the idea that courts should abstain from reviewing agencies' cost benefit choices. Some check on the reasonableness of agency choices seems valuable. The precise nature of that check, however, remains unclear. How exhaustive must the agencies' analyses be for courts to deem them reasonable?⁷⁵

On the aggressive side of spectrum, for instance, we have *Business Roundtable*, which set off a vigorous debate on judicial review of agencies' economic analyses.⁷⁶ There, the court considered the SEC's proxy access rule,⁷⁷ which required companies to include the board nominations of qualified shareholders in its proxy materials. The court faulted the agency analysis both with respect to costs and benefits. On the cost side, the court concluded that the SEC had not adequately analyzed the costs incurred by companies in challenging the shareholder nominees they would now be required to include with their proxies. The agency provided no empirical evidence, the court observed for example, that companies would forebear from challenging such nominations,⁷⁸ thus undermining the agency's assessment of the limited costs of the rule. On the benefits side, the agency focused on enhanced board performance and shareholder value, and on these issues the court faulted the agency for relying on "two relatively unpersuasive studies," and for discounting contrary studies.⁷⁹

At least absent statutory requirements for more, however, the more classic doctrinal posture in the D.C. Circuit is deferential with respect to cost benefit analysis.

⁷⁵ Cecot and Viscusi, *supra* note 21 survey the cases reviewing cost benefit analysis and classify them into three broad categories: (1) whether the agency is allowed or required to conduct cost benefit analysis under the relevant statute, (2) the adequacy of the cost benefit analysis, and (3) whether the agency properly accounted for the cost benefit analysis in the rule, even where the agency did not rely on the analysis. The present effort and discussion fits most cleanly into the second category in their taxonomy.

⁷⁶ For other examples of aggressive review of agency cost benefit analysis, see, e.g., *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991), *Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133 (D.C. Cir. 2005).

⁷⁷ 75 Fed. Reg. 56,667

⁷⁸ 1150 (noting that the agency "did nothing to estimate and quantify the costs it expected companies to incur; nor did it claim estimating those costs was not possible, for empirical evidence about expenditures in traditional proxy contests was readily available.")

⁷⁹ *Id.* At 1151.

For example, in *Center for Auto Safety v. Peck*,⁸⁰ then-Judge Scalia characterized cost benefit analyses as “epitomiz[ing] the types of decisions that are most appropriately entrusted to the expertise of an agency,” and therefore that, on review the court’s “role is to determine whether the decision was based on consideration of the relevant factors and whether there has been a clear error in judgment.”⁸¹ Likewise, more recently, in *National Ass’n of Home Builders v. EPA*,⁸² the court observed that a “serious flaw” in cost benefit analysis “can render [a] rule unreasonable,” even if the economic analysis is not required by statute. But the court noted that it reviews such analysis “deferentially . . . [a]nd in view of the complex nature of economic analysis . . . the petitioners’ burden to show error is high.”⁸³ Notably, the court decided *Home Builders* in the term following *Business Roundtable*, yet did not cite that more intrusive decision. Along the same lines, in *NAM v. SEC*,⁸⁴ the court considered the SEC’s so-called blood diamonds rule, which required firms using conflict minerals to disclose the source of the minerals. Petitioners challenged the rule, in part, on the basis of the agency failing to quantify the “social benefits” of the rule,⁸⁵ including “reducing violence and promoting peace and stability in the Congo.”⁸⁶ The agency argued it could not “readily” quantify those benefits, which was sufficient for the court, noting that the agency is not “required to measure the immeasurable.”⁸⁷

Thus, even within the D.C. Circuit, and even within the space of a few years, we see what seem to be quite different attitudes towards review of cost benefit analysis. The present analysis suggests that, to be credible, it is important to subject agency cost benefit determinations to some form of judicial review for reasonableness. But as between the more and less intrusive varieties of review, the empirics of this study have less to say. It may well be that even the more classic deferential posture of the D.C. Circuit, as articulated by then-Judge Scalia, *Center for Auto Safety v. Peck*,⁸⁸ akin to the clearly erroneous standard of review used for trial courts’ findings of facts, is sufficient to induce credibility at the agency level. Given the inevitable indeterminacies of cost benefit analysis and the problem of judicial competence in economic analysis that Judges Scalia and Garland acknowledge respectively in *Center for Auto Safety* and *Home Builders*, it may be that the more aggressive forms of review would do little to improve the public credibility of regulatory analysis.

Indeed, if review is overly aggressive—as I suggest it was in *Business Roundtable*—it may not only fail to render cost benefit analysis credible, it may also undermine the credibility of the courts themselves, and thereby destroy the most plausible vehicle for delivering credible cost benefit analysis. As future-(Chief) Justice Charles Hughes warned a century ago on the related question of how courts should review agency findings of fact, “I have the highest regard for the courts . . . I do not want to see any

⁸⁰ 751 F.2d 1336

⁸¹ 752 F.2d 1336, 1342

⁸² 682 F.3d 1032, 1040 .

⁸³ *Id.*

⁸⁴ 748 F.3d 359

⁸⁵ 364

⁸⁶ *Id.*

⁸⁷ 369

⁸⁸ 751 F.2d 1336

direct assault upon the courts, nor do I want to see any indirect assault upon the courts. And ... no more insidious assault could be made up on the independence and esteem of the judiciary than to burden it with these [detailed] questions of administration ... it would swamp the courts with administrative burdens and expose them to the fire of public criticism.”⁸⁹ Hughes’ warning rings true enough today.⁹⁰

IV. Conclusion

In this analysis, I have sought to understand the conditions under which cost benefit analysis might improve public perceptions of trust in government. A lack of trust in government is significantly driven by a view that it is not run for the public interest, and cost benefit analysis, a rough way to approximate the social welfare implications of a policy, might in principle do much to both improve public policy and perceptions of it. Based on the early experiments of this analysis, however, the public seems not to have much faith in the unchecked cost benefit determinations of administrative agencies. But if paired with some form of reasonableness review, cost benefit analysis seems to produce large improvements in the perceived trustworthiness of regulatory policymaking—for more educated citizens, it roughly doubles the probability that they view the government as run in the public interest. This pattern indicates that judicial review is an important component of economic analysis, even as the question of how best to conduct reasonableness review in this context remains contested.

⁸⁹ Charles E. Hughes, Speech Before the Elmira Chamber of Commerce, in *Addresses and Papers of Charles Evans Hughes, Governor of New York* 139-41 (ed. Hamilton Holt, 1908); *see also* DANIEL ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* 36 (2014).

⁹⁰ E.g., Coates, *supra* note 23; Bo Becker et al, *Does Shareholder Proxy Access Improve Firm Value? Evidence from Business Roundtable’s Challenge*, 56 J. L. ECON. 127 (2013); Grant M. Hayden & Matthew T. Bodie, *The Bizarre Law and Economics of Business Roundtable v. SEC*, 38 J. CORP. L. 101 (2012); Jill E. Fisch, *The Long Road Back: Business Roundtable and the Future of SEC Rulemaking*, 36 SEATTLE U. L. REV. 694 (2013).