Comment: cost-benefit analysis and the courts*

Comentário: análise custo-benefício e os tribunais

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ABSTRACT

The articles discussed here demonstrate the value of integrating administrative law, financial regulation, and securities law. Professor Coates analyzes the challenges of cost-benefit analysis (CBA) in regulatory management, while Professor Cox highlights its impact on securities regulation. This commentary asserts that regardless of one's stance on CBA's role in financial regulation, courts should have minimal involvement in its assessment. Part II outlines why courts are unsuitable for assessing the costs and benefits of financial regulation. Part III explains why policymakers should limit the courts' role in shaping CBA. Part IV suggests legislative actions to restrict the courts' influence on CBA in financial regulation. Part V provides a conclusion.

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KEYWORDS

cost-benefit analysis — administrative law — financial regulation — securities law — courts

RESUMO

Os artigos discutidos aqui demonstram o valor da integração do direito administrativo, regulação financeira e direito de valores mobiliários. O professor Coates analisa os desafios da análise custo-benefício (ACB) na gestão regulatória, enquanto o professor Cox destaca seu impacto na regulamentação de valores mobiliários. Este comentário afirma que, independentemente da posição sobre o papel da ACB na regulação financeira, os tribunais devem ter um envolvimento mínimo em sua avaliação. A Parte II delineia por que os tribunais são inadequados para avaliar os custos e benefícios da regulação financeira. A Parte III explica por que os formuladores de políticas devem limitar o papel dos tribunais na formação da ACB. A Parte IV sugere ações legislativas para restringir a influência dos tribunais na ACB na regulação financeira. A Parte V fornece uma conclusão.

PALAVRAS-CHAVE

análise custo-benefício — direito administrativo — regulação financeira — direito de valores mobiliários — tribunais

I. Introduction

I am grateful to all of the participants in this symposium for the enlightening scholarship featured in this issue. By bringing together scholars of administrative law, financial regulation, and securities law, the editors have given us a rare opportunity—at a critical moment in all three fields—to consider how lessons drawn from each area should inform policymakers grappling with regulating financial markets of dazzling complexity. The articles that I comment on here show why the enterprise of bringing these fields together is worth the candle. Professor Coates has offered a detailed analysis of the challenges that cost-benefit analysis (CBA) poses for regulatory management,[1]

[1] John C. Coates IV, *Towards Better Cost-Benefit Analysis: An Essay on Regulatory Management*, 78 LAW & CONTEMP. PROBS., no. 3, 2015 at 1.

and Professor Cox has described, in striking terms, the influence that the increased prominence of CBA will have on securities regulation in the years to come.[2]

This comment makes a much more modest claim. I argue only that, whatever position one takes about the appropriate role of CBA in financial regulation, all should agree that the courts should play virtually no role in conducting or reviewing that analysis. The argument is less my own, I think, than the inevitable consequence of a careful reading of the scholarship in this issue. But it is an important argument to make, because, as explained below, the law currently invites far more judicial participation in financial-regulation CBA than it should.

Part II of this comment reviews the now-familiar reasons why courts are ill-suited to assess, or even closely to review an agency's assessment of, the costs and benefits of financial regulation. Part III explains why any policymaker—whatever her views about the proper role of CBA in financial regulation—should prefer that courts not play a significant role in shaping that analysis. Part IV describes steps that lawmakers should take to limit the role the courts will play in shaping CBA in financial regulation in the future. Part V concludes.

Before proceeding, I note that both Professor Coates and Professor Cox sharply criticize the courts' recent contretemps with CBA, and especially the decision in *Business Roundtable v. SEC*.[3] Those critiques are important. But in this comment, I focus my attention elsewhere. In my view, courts are not to blame for having fared poorly in reviewing financial regulation CBA. Instead, Congress is to blame for having invited federal judges to a task for which they are so obviously ill-suited. Thus, my project is to convince lawmakers to limit the courts' role in an area where, all should agree, judges simply do not belong.

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[2] James D. Cox, *Iterative Regulation of Securities Markets after* Business Roundtable, 78 LAW & CONTEMP. PROBS., no. 3, 2015 at 25.

[3] 647 F.3d 1144 (D.C. Cir. 2011) (vacating an SEC rule because the SEC "failed once again … adequately to assess the economic effects of a new rule"); *see, e.g.*, Coates, *supra* note 1, at 11 (arguing that "[the appropriate] degree of deference has increasingly not been afforded" by the D.C. Circuit to cost-benefit analysis conducted by agencies); Cox, *supra* note 2, at 28 ("The *Business Roundtable* decision is a model of injudicious decisionmaking."); James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1840 (2012).

II. Courts' institutional competence to conduct financial-regulation CBA

Arguments about the institutional limits of the judiciary are well-worn, and a comprehensive assessment of those claims is both beyond the scope of this comment and unnecessary for our purposes.[4] Instead, in this part, I simply offer three reasons why the institutional design of the courts renders them incapable to conduct or carefully review financial-regulation CBA.

First, generalist federal judges and their law clerks obviously lack the expertise necessary to closely review the type of CBA that would justify a particular regulatory choice in today's financial markets. Of course this is an objection that can be—and has been—raised about all judicial review of specialized agency rulemaking.[5] Whether financial-regulation CBA is particularly complex, and hence especially beyond the grasp of the courts, is debatable.[6] For purposes of this comment, however, I take no position on whether financial-regulation CBA is sui generis in this respect. My claim is only that federal judges and their law clerks are ill-suited to conduct or even to carefully review CBA in the area of financial regulation.

To briefly recount three reasons why this is so, note that Article III personnel have little background even in basic principles of microeconomics, to say nothing of the training in dynamic macroeconomic systems necessary to conduct financial-regulation CBA.[7] Few have meaningful

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[4] For an especially influential presentation of these arguments, *see, e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); *see also* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996).

[5] Many commentators, for example, have criticized the courts' interventions in the area of environmental law, where judicial review frequently entails weighing competing, complex and contested analysis of regulatory choices. *See, e.g.*, B. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 343-45 (1983) (arguing that, in the context of EPA rules, there have been significant "unintended and undesirable consequences of court action").

[6] My colleague Jeffrey Gordon has argued that, because financial regulation is uniquely complex and legally constructed, judicial review of CBA in this area is especially quixotic. Jeffrey N. Gordon, *The Empty Call for Cost-Benefit Analysis in Financial Regulation*, 43 J. LEGAL STUD. S2, S351 (2014). *But see, e.g.*, Ryan Bubb, Comment, *The OIRA Model for Institutionalizing CBA of Financial Regulation*, 78 LAW & CONTEMP. PROBS., no. 3, 2015 at 48-52 (although Professor Gordon's "objection boils down to a concern that it is hard to quantify the benefits and costs of financial regulation" in particular, Professor Bubb "share[s] [Professor Gordon's] skepticism about judicial review of CBA" more generally).

[7] *See, e.g.*, Gordon, *supra* note 6, at S351-55 (describing financial regulatory systems as, by their nature, dynamic).

previous experience at *any* federal regulatory agency, never mind the training at a significant federal financial regulator that should inform judgments about costs and benefits in this area.[8] And even fewer have professional background in the financial-services industry, which could provide a basis for critical consideration of industry's arguments regarding the costs and benefits of a particular rule. Federal judges and their law clerks have virtually none of the training or expertise that would prepare them for the challenging analytical task of conducting or reviewing financial-regulation CBA.

Second, even if judges were sufficiently expert to review CBA in this area, the adversarial nature of litigation is unlikely to produce the kinds of analysis amenable to such a review. The reason is that any thoughtful analysis of costs and benefits of financial regulation will necessarily change over time as market actors respond to shifting conditions and more data become available. In litigation defending their regulatory choices, however, agencies are rightly loath to change their position, lest the regulator's shifting conclusions toll the bell of arbitrariness.[9] Litigation over costs and benefits is not the same as analysis of costs and benefits, and courts have the opportunity to review only the former, not the latter.[10]

Finally, as Professor Coates has cogently explained in this issue, careful review of CBA requires an assessment not only of the CBA itself but the organizational choices that produced it.[11] To involve judges in the review of CBA, he has shown, implicates them in the management of the agency. The *Business Roundtable* decision, for example, has often been interpreted as

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8 *See, e.g.*, ADRIAN VERMUELE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006) (identifying this fact as one of many reasons why judges should be particularly deferential to expert agency interpretations).

9 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-42 (1983) (for purposes of the Administrative Procedure Act, 5 U.S.C. §553 (2012) (APA), "rescission or modification of" a previously promulgated regulation is subject to similar judicial scrutiny as the agency's initial adoption of its rules).

10 That is why it is unsurprising that, in *Business Roundtable*, the court concluded that the SEC had assessed costs and benefits "opportunistically." *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011). All litigants shape their arguments opportunistically. There is no reason to expect that a federal agency, when required to defend its regulatory choices in episodic litigation, will behave differently from any other litigant.

11 *See generally* Coates, *supra* note 1 (explaining that, in light of the complexity of financial markets, financial regulators should depart from traditional models of regulation, including through an unusual level of transparency, flexibility, and willingness to experiment with relatively new regulatory approaches such as randomization). *See also* Robert Bartlett, *The Institutional Framework in Cost-Benefit Analysis in Financial Regulation: A Tale of Four Paradigms?*, 43 J. LEGAL STUD. S379 (2015).

suggesting that the SEC employ more staff with formal training in economics[12] and that economists should have far more influence on the Commission's decisions than they have had in the past.[13] That is a policy recommendation with which, as it happens, I agree. But the federal judiciary is in no position to make that judgment.

For the reasons that Professor Coates has given, it is no answer to say, as the courts sometimes have, that concluding that a particular regulatory choice is not justified by the agency's underlying analysis is not the same as dictating particular analytical choices to that agency.[14] As he has shown, when the law invites judges to examine a financial regulator's policy decisions, that examination will necessarily implicate the agency's managerial choices. For that reason, what is troubling about *Business Roundtable* is not so much the decision itself. Instead, it is the fact that our Nation's central securities regulator, responsible for markets that store trillions of dollars of Americans' wealth, has reorganized its approach to economic analysis of regulation based not on its own expert judgment but on the views of three randomly selected, unelected generalist judges.[15]

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[12] *See generally* Coates, *supra* note 1 (explaining that, in light of the complexity of financial markets, financial regulators should depart from traditional models of regulation, including through an unusual level of transparency, flexibility, and willingness to experiment with relatively new regulatory approaches such as randomization). *See also* Robert Bartlett, *The Institutional Framework in Cost-Benefit Analysis in Financial Regulation: A Tale of Four Paradigms?*, 43 J. LEGAL STUD. S379 (2015).

[13] *See, e.g.*, *Fixing the Watchdog: Legislative Proposals to Improve and Enhance the Securities and Exchange Commission: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 77 (2011) (testimony of Prof. J.W. Verret) (describing the "low priority the Commission places on economic analysis").

[14] *See* Coates, *supra* note 1, at 10-13.

[15] In the wake of *Business Roundtable*, the Commission announced a significant restructuring of its approach to economic analysis of rulemaking in the form of guidance issued by its General Counsel at the direction of the Chairman. *See* Memorandum from the SEC's Office of the General Counsel to SEC Staff of Rulewriting Divisions and Offices (Mar 16, 2012), *available at* https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf. As noted above, such a reorganization may well have been warranted. In fact, many have argued that one benefit of *Business Roundtable* was to convince the Commission to engage in much-needed rethinking about its approach to economic analysis. *See, e.g.*, John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015). Others have contended that the changes are mere window dressing designed to better prepare the Commission for litigation in the D.C. Circuit. *See, e.g.*, Comment, Leen Al-Alami, *Business Roundtable v. SEC: Rising Judicial Mistrust and the Onset of a New Era in Judicial Review of Securities Regulation*, 15 U. PA. J. BUS. L. 541 (2014). This comment does not focus on whether the SEC's response to *Business Roundtable* was, in fact, desirable. Instead, my claim is that, if such a reorganization was in fact warranted from a policy perspective, a reorganization of the Nation's principal securities regulator would have better been identified and structured through analysis by an institution other than the federal judiciary.

III. The irrelevance of the desirability of CBA to the role of the courts

Having explained why the courts are ill-suited to review CBA of financial regulation, in this part I contend that, regardless of the position one takes as to the appropriate role of CBA, all should agree that the judiciary is not the institution that should conduct that analysis. As the articles featured in this symposium have shown, views about the appropriate approach to CBA, and what we can hope for CBA to achieve in the area of financial regulation, vary widely. Whatever one's views on these questions, however, it is hard to see why policymakers should prefer giving the judiciary a prominent role in this area.

A wide range of experts are deeply divided with respect to how prominent a role CBA should play in financial policymakers' decisions. Some argue that CBA proving that benefits exceed costs should be a legal prerequisite to financial regulatory authority.[16] Others contend that CBA in this area is often necessarily indeterminate, and so regulatory choices can and often should be made in the absence of conclusive evidence.[17] Several authors in this issue find themselves in between.[18] Whatever view of this question a lawmaker adopts, however, it is unclear why she should want the judiciary to have a significant role in the review of CBA prepared by financial regulators.

To begin, consider lawmakers who take the view that convincing CBA should be required for any new rulemaking. At first blush, it may seem that these lawmakers should favor robust judicial review of CBA. The theory would be that, deterred by the prospect of such judicial review, financial regulators would conduct careful, objective CBA, as the lawmaker wishes them to do, before proceeding with new regulatory initiatives. For two reasons, however, lawmakers who advocate requiring convincing CBA for any new rulemaking should still not favor extensive judicial review of CBA in this area.[19]

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[16] *See, e.g.*, Financial Regulatory Responsibility Act, S. 1615, 112th Cong. §3(b)(4)(A) (2011) (providing that an agency may not issue a final rule if the agency "determines that [the rule's] quantified costs are greater than [its] quantified benefits").

[17] *See, e.g.*, Gordon, *supra* note 6, at S374-75.

[18] *See, e.g.*, Coates, *supra* note 15, at 898-902 (examining previous case studies regarding the effects of CBA throughout the American administrative state).

[19] As explained below, that is not to say that these lawmakers should not favor requiring *the agency itself* to conduct extensive CBA in connection with new rulemaking. Of course they should. My comment, however, focuses on whether lawmakers with these views should favor giving the judiciary the power to oversee the analysis the agency pursues in service of that statutory mandate. For the reasons given in the text, they should not.

First, as noted in part I, the prospect of judicial review is not likely to produce methodologically sound CBA. Instead, it is likely to produce CBA designed to serve the purposes of agency litigation. These are, of course, rather different things. In fact, the prospect of litigation may well *curb* the agency's use of truly objective CBA, which is frequently ambiguous as to the desirability of any particular rule and which is likely to evolve over time. Thus, for this lawmaker, extensive judicial review risks undermining the very CBA she hopes to encourage the financial regulator to use.

Second, as Professor Cox has explained in this issue, lawmakers should not expect agencies to respond to the prospect of judicial review by continuing to regulate in the same manner despite repeated judicial rejection of their rulemaking efforts.[20] Instead, lawmakers should expect agencies to respond as the SEC has to *Business Roundtable*: by pursuing alternative types of regulation that are not subject to close judicial scrutiny. Lawmakers who advocate the use of CBA should not want to give agencies reason to reduce the incidence of formal rulemaking that triggers CBA requirements in the first place. Nor is it clear why they would prefer for more financial regulation to occur through those alternative regulatory channels.[21]

So there is little reason for lawmakers who favor the use of CBA in financial regulation to want judges to play a significant role in reviewing such analysis. What about those who prefer, as a matter of policy, that CBA play a *less* prominent role in the work of financial regulators?[22] It is even harder to see why these legislators would want judges to have extensive authority to review the work of financial policymakers. For one thing, as noted in part I,

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[20] *See* Cox, *supra* note 2, at 35-36 (noting that the SEC can, and by all accounts will, respond to *Business Roundtable* by emphasizing its regulatory powers in the form of enforcement and informal safe harbors; for that reason, Professor Cox explains, "[w]hile it is correct to say that *Business Roundtable* imposes a significant restraint on SEC rulemaking, it is not correct to conclude that the decision has the same degree of restraint on the SEC as a regulator"). If there was any doubt as to whether the SEC and other financial regulators would use this tactic in response to *Business Roundtable*, Professor Cox has eliminated it by showing them the way.

[21] It might be argued that legislators could respond to the agency's strategy by expanding the types of regulation that are subject to CBA to include matters such as enforcement decisions and informal regulatory guidance. This argument, however, is unpersuasive, because the manifestations of federal regulatory power in financial markets are many, and lawmakers are not so naïve as to believe that they can identify every alternative method of financial regulation and subject it to stringent CBA. Lawmakers attempting to do this will find that agencies respond simply by focusing their activities on another mode of regulation.

[22] Lawmakers may take this position because, for example, they have concluded that financial regulation CBA is so indeterminate as to be unlikely meaningfully to improve regulatory outcomes. *See, e.g.*, Gordon, *supra* note 6, at S371-75.

judicial review of this type has significant implications for the management of the agency, focusing its resources on economic analysis that, at least for this lawmaker, are of limited value. For another—and, for this lawmaker, more importantly—the agency's attempts to create rules that can be defended in subsequent CBA litigation may skew financial regulation in an undesirable fashion.

Whatever the lawmaker's view as to the feasibility and importance of CBA in financial regulation, then, it is hard to see why she should favor giving the judiciary a significant role in this area. Two more arguments why some lawmakers might prefer this arrangement, however, are worth considering. The first is that robust judicial review of CBA helps to preserve the status quo by increasing the costs of changing the existing regulatory scheme. The second is that extensive review of CBA shifts power from financial regulatory agencies to Congress, for the latter institution is the only one that can enact financial regulation that can survive judicial review. For the reasons that follow, however, neither claim should lead lawmakers to favor giving the courts a significant role in reviewing financial-regulation CBA.

The argument that extensive judicial review of CBA is valuable to lawmakers because it preserves the status quo proceeds in a fashion that is very familiar to experts in administrative law.[23] Elected officials worry that, when their party is out of power, regulators appointed by their opponents will adopt policies contrary to the interests of the minority's constituents. Lawmakers averse to this risk therefore seek limits on majoritarian regulatory authority. Judicial scrutiny of CBA is, on this view, a useful check on the majority's control of the administrative state.

Judicial review of CBA, however, is a rather ineffective antimajoritarian check on financial regulation. For one thing, it does nothing to address policies that the majority is able clearly to justify as a matter of CBA—however objectionable those policies may be to the minority. For another, it is unreliable: the majority's lawmaking is halted only if a randomly selected panel of D.C. Circuit judges concludes that the CBA in question is inadequate. It also pales in comparison to the checks already in place in this area: Senate confirmation of every senior financial regulator and Congressional control over most of their budgets. These institutional arrangements give the minority far more

[23] *See, e.g.*, Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1318 (1999) ("Judicial review of administrative rulemaking builds in a substantial ... status quo bias.").

comfort regarding majoritarian control of financial regulation than judicial review of CBA can.

Nor does the claim that judicial review of CBA shifts regulatory power from federal agencies to Congress establish the desirability of such review. It is true that, in response to judicial intervention in this area, Congress has enacted increasingly detailed statutes that dictate regulatory choices, shielding those choices from judicial scrutiny of CBA.[24] But requiring more policy choices to be memorialized before the fact in the United States Code is very unlikely to improve the quality of financial regulation. For one thing, as my colleagues in this symposium have noted, effective financial regulation often takes the form of ex post application of standards rather than ex ante rules. For another, Congress lacks the expertise necessary to make even those ex ante rules that would reflect sound policy judgments. And as recent experience has shown, policy mistakes committed by statute are far more difficult and expensive to reverse than those committed by rulemaking.[25]

IV. Implications for the law of financial regulation

So the case for close judicial review of financial-regulation CBA is exceptionally weak. The courts lack required expertise; litigation is ill-suited for the purpose; regardless of one's views of CBA in this area, judicial scrutiny of CBA is unlikely to be helpful; and even political economy offers little basis for thinking judicial review is desirable. At this point, the reader could be

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[24] For a recent example, *see, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376-2223, §953 (2010) (codified as amended in scattered sections of 2, 5, 7, 11, 12, 16, 18, 19, 20, 22, 25, 26, 28, 29, 30, 31, 41, 42, 44, 49, and 112 U.S.C.). In that controversial provision, which required the SEC to make rules requiring public companies to disclose the ratio of the Chief Executive Officer's pay to the pay of the company's median employee, Congress statutorily fixed the definition of "total compensation," leaving the Commission unable to make adjustments to that definition that would have reduced the costs of compliance with that rule. *Id.* §953(b)(2) ("For purposes of this subsection, the total compensation of an employee … shall be determined in accordance with [SEC regulations] *as in effect on the day before the date of enactment of this Act*." (emphasis added)).

[25] Consider, for example, the SEC's limited freedom to address commentators' concerns regarding the costs of implementing §953 of Dodd-Frank. *See* Securities and Exchange Commission, Pay Ratio Disclosure, Release Nos. 33-9452, 34-70443, *available at* https://www.sec.gov/rules/proposed/2013/33-9452.pdf ("Many commentators raised concerns about the significant compliance costs that could result from requiring the use of 'total compensation' as defined in the statute," but the Commission was required to "comply with the statutory mandate.").

forgiven for wondering: How did we get here? That is: Given that the case for judicial intervention in this area is so flawed, why do Article III judges play such a prominent role in the modern financial regulatory state?

The answer is that this is what Congress has asked the courts to do. As misguided as the D.C. Circuit's decision in *Business Roundtable* may or may not be, it cannot be said to be without statutory basis. For the law requires, and indeed has long required, the Securities and Exchange Commission to bear a "unique obligation" with respect to CBA of its rules.[26] The National Securities Market Improvement Act of 1996 mandates that the Commission, "*[w]henever* … engaged in rulemaking … *shall* also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation".[27] Although it is far from clear on the text of the statute alone that this provision imposes additional CBA obligations on the Commission, the D.C. Circuit made clear a decade ago that it intends to read the law in this way.[28] And Congress—even in connection with its recent overhaul of financial regulation—left that statute untouched, inviting judges to continue to play a significant role in financial-regulation CBA.[29]

Lawmakers concerned about the role of CBA in financial regulation should limit the courts' authority in this area. Rather than requiring financial regulators to satisfy judicial definitions of impossibly capacious statutory language,[30] the law should expressly limit judicial review of financial-regulation CBA.

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[26] Business Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

[27] 15 U.S.C. §§78c(f) (2012) (emphases added).

[28] *See* Chamber of Commerce v. SEC, 412 F.3d 133, 142 (D.C. Cir. 2005) (invalidating an SEC rule on the basis of this statutory language and the court's conclusion that the Commission's analysis reflected an inadequate consideration of certain costs).

[29] Strikingly, the House of Representatives' principal response to the *Business Roundtable* decision was to hold hearings on whether the law should require *further* judicial intervention in this area. *See, e.g.*, SEC Regulatory Accountability Act, H.R. 2308, 112th Cong. (2012). Among other things, that bill would have required the SEC to conduct more extensive CBA, to choose the regulatory approach that, in light of that CBA, "maximize[s] net benefits", and to review all of its existing regulations for compliance with that approach. *See id.* §2. Although the bill did not become law, at related congressional hearings observers offered still other bases on which federal judges might be invited to intervene with respect to financial-regulation CBA. *See, e.g.*, *Fixing the Watchdog: Legislative Proposals to Improve and Enhance the Securities and Exchange Commission: Hearing Before the H. Comm. on Fin. Servs*., 112th Cong. 77 (2011) (testimony of Prof. J.W. Verret) (arguing that federal law should also require the Commission to evaluate, subject to judicial review, the effects of its rules on "the traditional role of states" in corporate law).

[30] One commentator has likened the statutory requirement that the Commission consider "efficiency, competition, and capital formation" in connection with rulemaking to requiring regulators carefully to consider "apple pie and puppies." J.W. Verret, *Efficiency, Competition,*

Although the precise nature of those limits is beyond the scope of this comment, I note that Congress has ample institutional capacity to circumscribe judicial review in this area. For example, Congress could clarify that courts evaluating financial-regulation CBA are bound to accept the agency's factual determinations and the weight the agency assigns to competing evidence.[31] In addition, in light of the scholarship in this issue showing that CBA in financial regulation is at least as analytically indeterminate as CBA in other contexts, it is hard to see why financial regulators should bear a "unique[ly]" heavy burden of proof regarding CBA. Now that Congress is aware that the language it chose to guide financial-regulation CBA has imposed that burden, it is incumbent upon Congress—not the courts—to remove it. Congress should make clear what the scholars in this issue have so clearly shown: that courts are no better suited to intervening in CBA in the area of financial regulation than in any other.

Before concluding, I note that this comment has not considered whether Congress should, when modifying the judicial standard of review for CBA, simultaneously direct financial-regulatory agencies to engage in more extensive CBA, for example by making such CBA a prerequisite to rulemaking. Such an arrangement might reflect an appropriate political compromise among lawmakers with varying perspectives on the value of CBA in this area.[32] And, in fact, *that* arrangement, unlike the status quo, might well achieve the laudable end of encouraging financial regulators to take the costs and benefits of their choices more seriously. At a minimum,

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Capital Formation, Investor Protection, Apple Pie and Puppies, TRUTH ON THE MARKET: ACADEMIC COMMENTARY ON LAW, BUSINESS, ECONOMICS AND MORE (Aug. 4, 2011), http://truthonthemarket.com/2011/08/04/ efficiency-competition-capital-formation-investor-protection-apple-pie-puppies/. Although bemoaning the indeterminacy of the statutory language that governs judicial review of CBA, however, that commentator – and others – have nevertheless attempted to divine its true meaning. *See id.*; *see also* Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 N.Y.U. L. REV. 1983 (2013). In my view, Congress should change these words rather than invite nonexpert federal judges to endow them with meaning in CBA litigation.

31 As a matter of administrative law the courts are already bound to accept factual findings of agencies with a substantial basis in the record. *See, e.g.*, CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 32-33 (1992). But in the context of financial regulation the courts do not appear prepared to give the SEC that deference, perhaps in light of the statutory language imposing a "unique obligation" on the Commission to justify its rules, *compare id. with Business Roundtable*, 647 F.3d at 1151 (deeming "relatively unpersuasive" the studies the Commission relied upon to justify the rules struck down in that case).

32 *See supra* text accompanying notes 18-23 (considering lawmakers with heterogeneous views regarding the value of CBA in the financial-regulatory context).

however, this approach would vest responsibility for conducting that analysis in the institution best suited to the myriad analytical challenges of financial--regulation CBA. As this comment has shown, the judiciary is comparatively ill-suited to conduct that work.

V. Conclusion

The scholarship in this symposium adds a great deal to our understanding of the organizational, analytical, and legal challenges of conducting meaningful analysis of the costs and benefits of financial regulation in today's markets. Professor Coates's work shows why meaningful CBA in this area demands new methods of regulatory management,[33] and Professor Cox has explained how and why such analysis is likely to shape securities regulation in the years to come.[34]

By contrast, this comment has offered a far narrower view. I have argued only that, whatever one's view about the value of CBA in financial regulation, the judiciary is institutionally ill-positioned to conduct that analysis. For that reason, lawmakers should move promptly to clarify the limits of judicial review of financial-regulation CBA. It is no surprise that Article III judges have struggled to produce satisfying review of CBA in the increasingly complex area of financial regulation. What is surprising is that Congress continues to invite extensive judicial intervention in this increasingly important area of the modern regulatory state.

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[33] *See* Coates, *supra* note 1.
[34] *See* Cox, *supra* note 1.