
Regulatory Impact Analysis and Litigation Risk

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Economic Analysis & Judicial Review

➤ **Court:**

“The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary.” (Michigan v. EPA, 135 S. Ct. 2699, 2711)

➤ **Scholar:**

“[A]n agency’s failure to engage in a degree of quantification, and to show that the benefits justify the costs, will sometimes leave it vulnerable under arbitrariness review—at least when the governing statute authorizes those steps.” (Sunstein 2017, 6)

➤ **Agency:**

“[L]ow-quality economic analysis increases the risk that the agency will lose a case, but high-quality economic analysis reduces this risk. A good regulatory impact analysis helps demonstrate that a regulation is not arbitrary or capricious...” (Ellig 2019, interviews with agencies, 41)

Preview

Does a higher-quality regulatory impact analysis (RIA) help a regulation survive challenges in judicial review?

Findings:

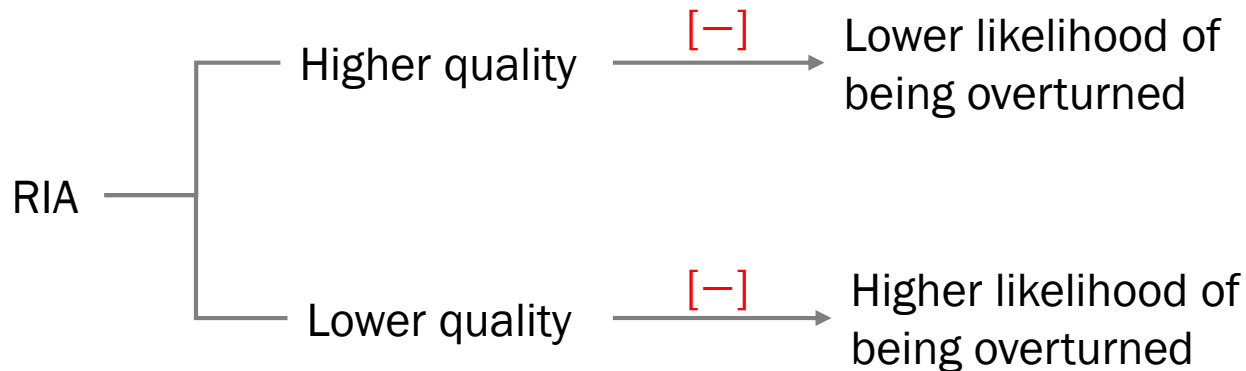
- 1) A better RIA is associated with a lower likelihood that the associated regulation is later invalidated by courts, provided that the agency explain how it used the RIAs in its decision-making.
- 2) When the quality of the RIA is low, an explanation of the RIA's role in the agency's decisions increases the likelihood that the regulation will be invalidated.

Prior Research

- When do courts consider agency economic analysis?
 - Statutory requirements (Bull and Ellig 2018)
 - Part of the record (Cecot and Viscusi 2015)
- How does economic analysis affect judicial review?
 - Regulations invalidated due to insufficient, contradictory RIAs (Cecot and Viscusi 2015; Bull and Ellig 2017)
 - No obvious bias in court decisions (Bull and Ellig 2017)
 - General beliefs but no uniform evidence (Ellig 2019)

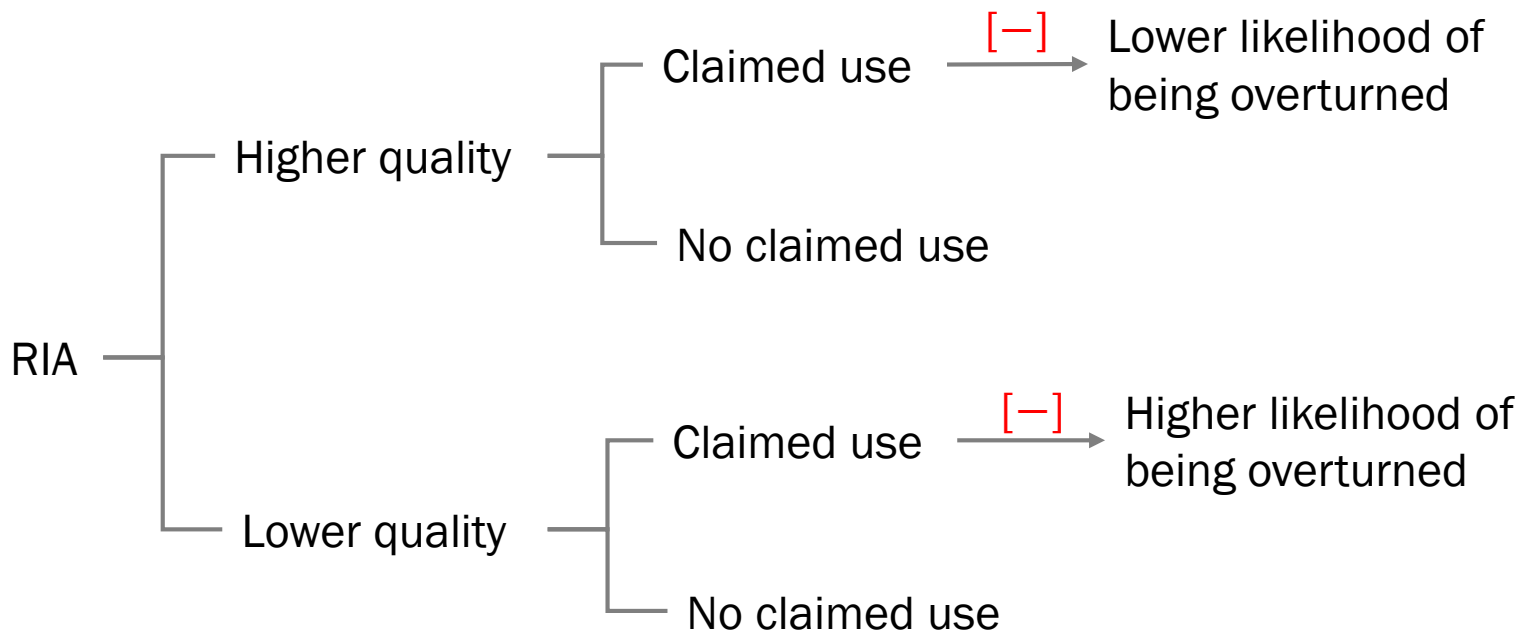
Hypothesis 1

A higher-quality economic analysis will generally reduce the likelihood that a regulation is overturned in court.



Hypothesis 2

Hypothesis 1 holds, only if the agency states that it relied upon the analysis to make decisions about the regulation.



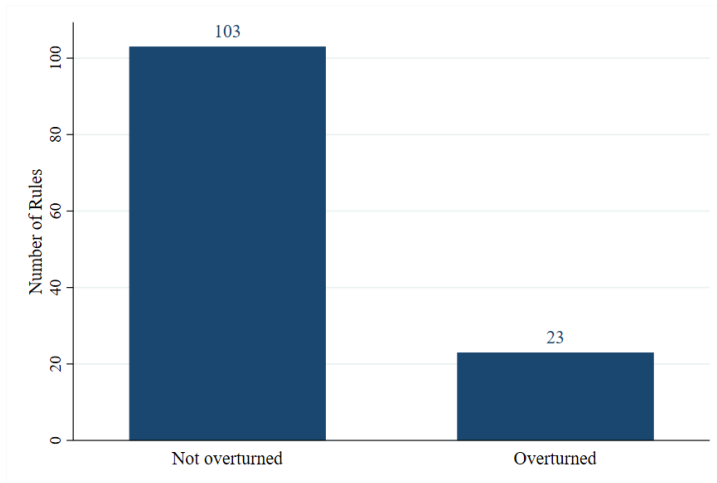
Data: Judicial Review & RIA

Data coverage:

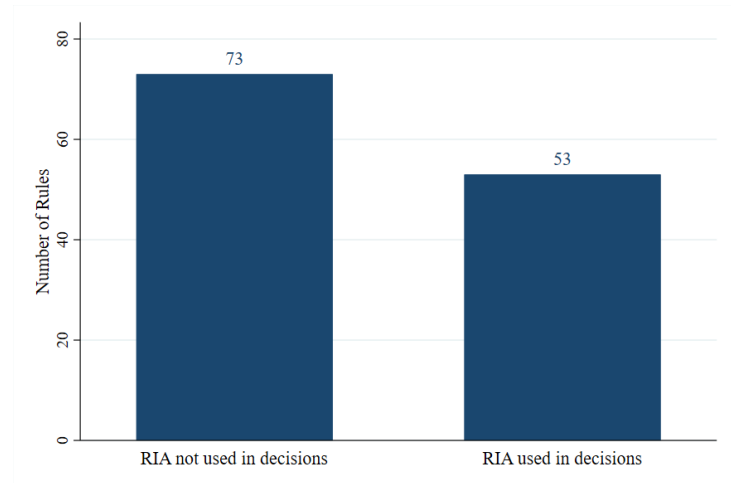
- 126 economically significant, prescriptive regulations
- 2008-2013 (OIRA concluded date)

Variable Name	Description	Type	Source
<i>Invalidated by court</i>	Whether any part of the final rule was invalidated through judicial review	Dummy	Westlaw
<i>RIA quality</i>	Assessed RIA quality scores	Ordinal [0, 20]	Regulatory Report Card
<i>Claimed RIA use</i>	Whether the agency explained how the RIA affected its rulemaking decisions	Dummy	Regulatory Report Card

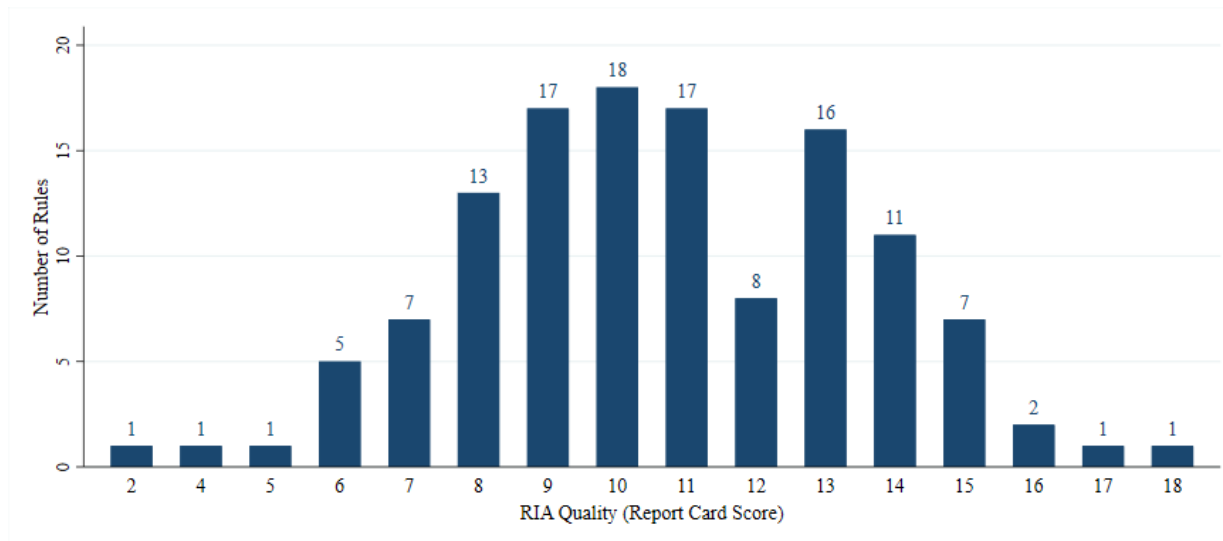
Invalidated by Court



Claimed RIA Use



RIA Quality



Data: Control Variables

Rule complexity and controversy	Rulemaking work group	Agency characteristics	Statutory requirements	Others
<ul style="list-style-type: none"> ▪ Review-to-rule time ▪ Preamble length ▪ Billion impact ▪ Comments ▪ Interest group meetings 	<ul style="list-style-type: none"> ▪ Rule contacts ▪ Contact groups 	<ul style="list-style-type: none"> ▪ Effective independence ▪ Policy concentration ▪ Ideology 	<ul style="list-style-type: none"> ▪ Cost prohibited ▪ Benefit-cost consideration ▪ Economic feasibility ▪ Technological feasibility ▪ Regulation required ▪ Stringency prescribed ▪ Form prescribed ▪ Coverage prescribed 	<ul style="list-style-type: none"> ▪ Statutory and judicial deadlines ▪ Obama

Regression Results

Dependent Variable: Invalidated by court	(1) Probit	(2) Probit	(3) Probit
RIA quality	-0.0485 (0.051)	-0.0537 (0.051)	0.0261 (0.084)
Claimed RIA use		0.2703 (0.373)	2.0948* (1.093)
RIA quality X Claimed RIA use			-0.1764** (0.087)
N	126	126	126
Pseudo R ²	0.266	0.270	0.283

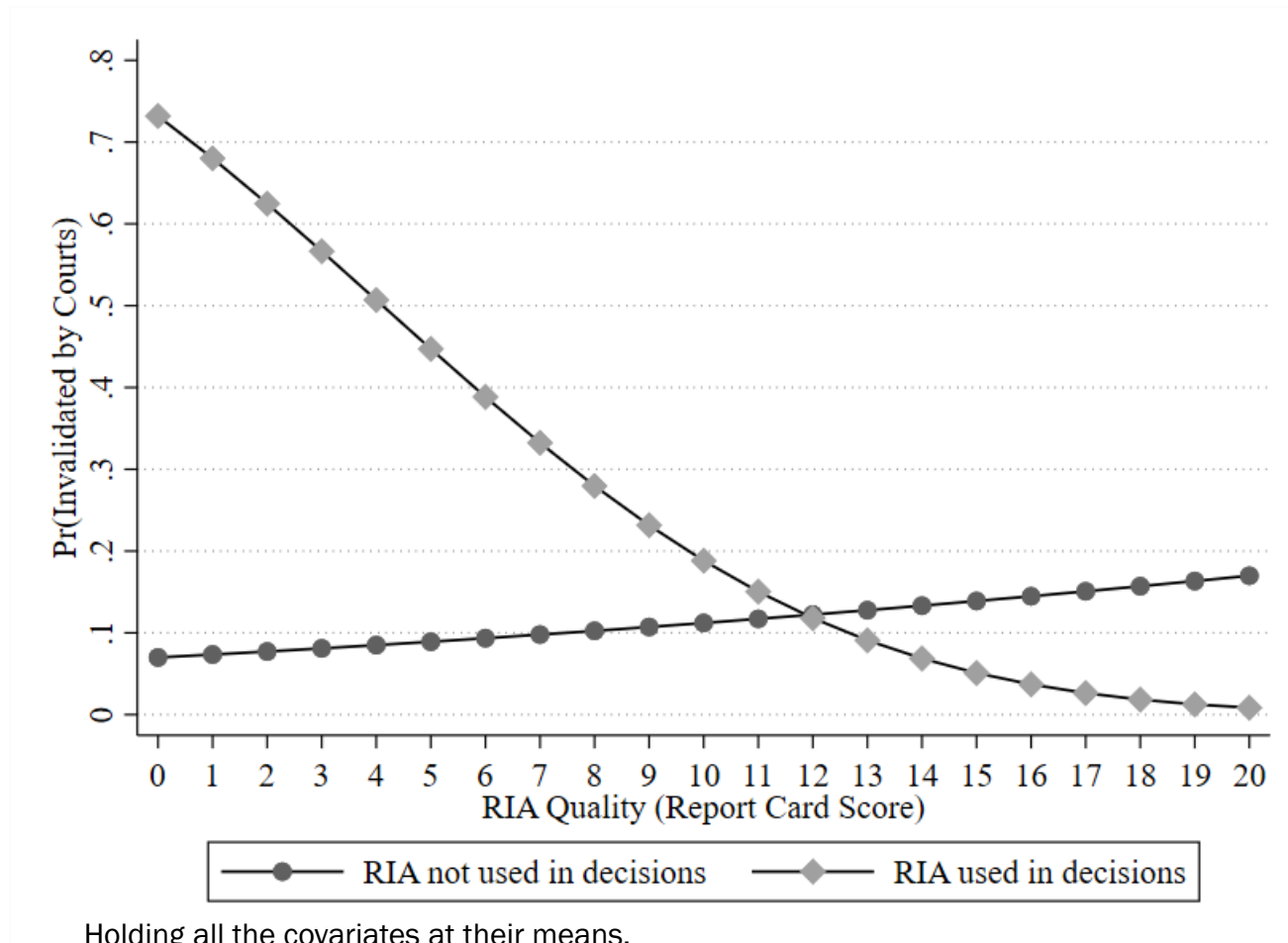
Standard errors are clustered by department. Standard errors are in parentheses. *** p<0.01; ** p<0.05; * p<0.1.

Estimated Marginal Effect: $d(\text{Pr}(\text{invalidated}))/d(\text{RIA quality})$

At Claimed RIA use = 0	0.0051
At Claimed RIA use = 1	-0.0369**

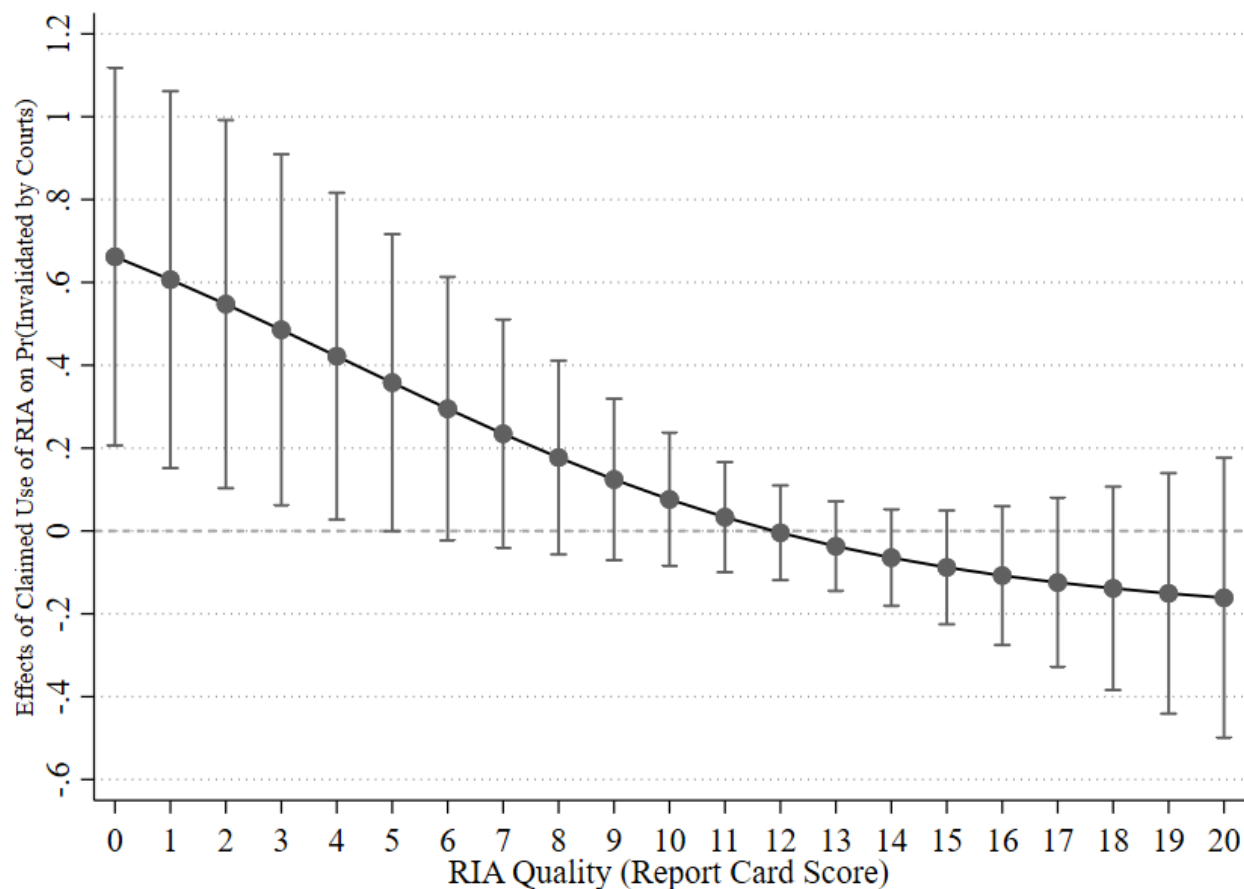
Holding all the covariates at their means.

Adjusted Predictions of the Probability that a Rule Is Invalidated



Holding all the covariates at their means.

Conditional Marginal Effects of Claimed Use of RIA on the Probability that a Rule Is Invalidated



Holding all the covariates at their means.

Conclusion

The quality of the regulatory agency's RIA can affect the outcome of judicial review.

- When the agency explained how it used the RIA in its regulatory decisions, high-quality analysis → fewer rule overturns, and low-quality analysis → more successful court challenges.
- An explanation of the RIA's role in the agency's decision appears to increase the litigation risk, and the quality of the RIA must be sufficiently high to offset this effect.

Implications:

- Determinants of judicial review outcomes
- Administrative procedural constraints on agency rulemaking

Thank you!

Working paper available:
RegulatoryStudies.gwu.edu