



UNIVERSITY OF LEEDS

This is a repository copy of *Despoina Mantzari, Courts, Regulators, and the Scrutiny of Economic Evidence*, Oxford: Oxford University Press, 272 pp, hb £70.00.

White Rose Research Online URL for this paper:

<https://eprints.whiterose.ac.uk/202674/>

Version: Accepted Version

Article:

Brook, O. orcid.org/0000-0001-7636-3615 (Cover date: January 2024) *Despoina Mantzari, Courts, Regulators, and the Scrutiny of Economic Evidence*, Oxford: Oxford University Press, 272 pp, hb £70.00. *The Modern Law Review*, 87 (1). p. 231. ISSN 0026-7961

<https://doi.org/10.1111/1468-2230.12832>

© 2023 The Author. This is the peer reviewed version of the following article: Brook, O. (2023), *Mantzari, Despoina, Courts, Regulators, and the Scrutiny of Economic Evidence*, Oxford: Oxford University Press, 272 pp, hb £70.00. *Mod Law Rev.*, 87: 231-235, which has been published in final form at <https://doi.org/10.1111/1468-2230.12832>. This article may be used for non-commercial purposes in accordance with Wiley Terms and Conditions for Use of Self-Archived Versions. This article may not be enhanced, enriched or otherwise transformed into a derivative work, without express permission from Wiley or by statutory rights under applicable legislation. Copyright notices must not be removed, obscured or modified. The article must be linked to Wiley's version of record on Wiley Online Library and any embedding, framing or otherwise making available the article or pages thereof by third parties from platforms, services and websites other than Wiley Online Library must be prohibited.

Reuse

Items deposited in White Rose Research Online are protected by copyright, with all rights reserved unless indicated otherwise. They may be downloaded and/or printed for private study, or other acts as permitted by national copyright laws. The publisher or other rights holders may allow further reproduction and re-use of the full text version. This is indicated by the licence information on the White Rose Research Online record for the item.

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.



eprints@whiterose.ac.uk
<https://eprints.whiterose.ac.uk/>

Despoina Mantzari, Courts, Regulators, and the Scrutiny of Economic Evidence, Oxford: Oxford University Press, 272 pp, hb £70.00

By: Or Brook, Associate Professor of Competition Law and Policy, University of Leeds

Economic evidence and economists play a growing role in the operation of regulatory agencies across the globe. Yet, the institutional structure, characteristics, and competencies of the courts tasked with ‘regulating the regulators’ were somewhat left behind (p 2). In *Courts, Regulators, and the Scrutiny of Economic Evidence*, Despoina Mantzari explores the ‘uncomfortable questions’ arising from the asymmetry between regulators and courts when assessing economic evidence. The book examines how should appellate courts, consisting of generalist judges, review decisions taken by highly expert regulators and what should be the role of judicial review in such institutional settings, what are the limits of judicial review, and how such limits should be addressed.

Mantzari provides a fascinating account of legal and social science theories relating to how the choice of institutions affects the substance of the law. She advocates using Komesar’s framework of comparative institutional analysis (Neil K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (Univ Chi Press 1997)) to inform the choice of the appropriate standards and intensity of review of economic evidence. Regulatory and adjudicative processes, according to this framework, merit a choice between ‘imperfect alternatives’. Hence, rather than searching for a perfect institutional design, Mantzari argues that the challenges posed by economic evidence should seek the ‘least imperfect’ option.

In search of the ‘least imperfect’ option, the book sheds light on the set of micro- and macro-level considerations that may affect the operation of both the regulators and courts. They include the institutional design of the regulatory decision-making processes and the incentives they create; their institutional capacity; the judges’ perception of their role; the socio-political contexts that shape the role-orientation of the actors within a regulatory space; the type of (generalist or specialist) reviewing courts or tribunals; the nature and the processes of the review bodies (i.e., adversarial or investigative); the relationship between courts of first instance and appellate courts; the rules of procedure; the form of delegated powers; and the nature of the regulatory decision being made, and the number of persons affected by it.

This approach situates the book as a truly interdisciplinary endeavour. A strand of legal scholarship and jurisprudence has already explored matters related to the standards of judicial review, including the review of complex economic analysis. This book goes beyond such insights because it is not limited to black-letter standards of review. It carefully analyses the evolution of ‘judge-made’ standards, crafted by interpreting the open-ended standards of review and selecting grounds. Such study highlights, for example, the courts’ own assumptions about the tasks and scope of judicial review as manifested in the judge-made standards.

The book is rich in theory and detail. The selection of methods and the normative arguments deeply engage with various strands of scholarship ranging from the theories and history of regulation to the philosophy of judicial review and comparative institutional analysis. Such debates are presented clearly and informatively, friendly also to those who are not fully immersed in those discussions. Moreover, while the book chapters build on one another to develop the thesis, they can also be read on a stand-alone basis to explore each sub-topic.

The book is of eight chapters. The first three set the scene. After an introduction in Chapter 1, Chapter 2 presents the concept of economic evidence and the challenges they give rise to in the regulatory process. Those two chapters make a compelling case for why economic evidence is a noteworthy study area. The book embraces a broad definition of economic evidence, including the theories, methods, and tools used by the discipline of economics to advance normative claims on matters of regulatory policy (p 3). Such theories, methods, and tools influence the content of hard law, provide standards and principles to assess the open-ended provisions of economic regulation, and inform the welfare effects of various regulatory interventions. Mantzari submits that economic evidence and the expert economists advancing it pose unique challenges because they serve both a positive (explanatory-predictive) function and a normative (perspective) one: like evidence based on natural science, economic evidence is used to draw up and test hypotheses; differing from the natural science, economists also prescribe what outcomes would be more beneficial for social welfare. The normative statements made by economists, in other words, cannot always be mathematically supported or refuted.

This argument is intriguing and may inform how we think about economic evidence even beyond the direct scope of the book. Economics expertise is ever too often perceived as an objective-technical assessment, which does not require value judgment or making difficult policy choices. By highlighting the normative-perspective role of economists and economic

evidence, this discussion already hints at the myriad of challenges arising from regulation and the judicial review of such assessments.

To study the imperfect alternatives emerging from the comparative institutional analysis, the book focuses on the review of economic evidence in appeals launched against decisions of sector-specific regulators in the US (federal level) and the UK. Chapter 3 introduces the actors and processes for judicial review of economic evidence in those two jurisdictions. It demonstrates that the review of economic evidence in the US is ‘internal’ in the sense that it is performed in the same regulatory agency adopting the decision subject to review. The chapter discusses the characteristics of the American adjudicative institution - the Administrative Law Judge (ALJ) – that is embedded in the regulatory agency, albeit with functional separation. It shows that while a second ‘external’ review by the US federal courts is possible, it is considerably more limited. Much of the complex fact-finding process is subject to internal review alone. In the UK, by comparison, the review of economic evidence is ‘external’. In most cases, the first instance review is performed by the Competition and Markets Authority (CMA), and in the second instance either by the Competition Appeal Tribunal (CAT) - a specialist tribunal that reviews the assessment also on its merits - or by the generalist High Court.

Chapters 4-6 develop those introductory observations using a mix of empirical-comparative methods, most notably a systematic review of all appeals launched against the decisions of selected regulators. The review covers the period from the enactment of each regulator’s statute (in the US from the mid-1980s, in the UK during the early 2000s) to 2021. Each of the three chapters focuses on one aspect of the judicial review of economic evidence by using a combination of methods. The presentation of each chapter is fully clear in itself, yet an overall presentation of the methods and choices guiding these chapters and a description of the data gathered could have made the analysis even clearer.

Chapter 4 explores how the assessment of economic evidence influenced the discretionary assessment of economic evidence, by using three British utility regulators - the Office of Communications (Ofcom), Office of Gas and Electricity Markets (Ofgem), and Office of Water Services (Ofwat) - as an example. Mantzari calls to shift away from a court-centered approach to understanding the relationship between economic evidence and discretion in the regulatory state, and to explore how those undertaking regulatory tasks perceive their discretion. She makes use of Parsons’ typology of political action (Craig Parsons, *How to Map Arguments in Political Science* (OUP 2007)), to identify the structural, institutional, and

ideational (psychological) constraints placed on the influence of economic evidence in discretionary assessments. The chapter is based on three case studies, one from each regulator, which are further explored by interviews with members of the sector regulators. The case studies explore how economic evidence entered the realm of discretionary decision-making and the influence it had in practice.

Next, Chapters 5 and 6 identify and critique the limits of judicial scrutiny of economic evidence by systematically exploring judicial review by American and British courts. The (raw) output of such analysis is reproduced at the end of each chapter, identifying for each judgment, the nature of the decision appealed, the grounds of review (e.g. statutory interpretation, arbitrary or capricious), and the outcome or remedy.

Chapter 5 is dedicated to the review of economic evidence in the US, using the Federal Communications Commission (FCC) and the Federal Energy Regulatory Commission (FERC) as a case study. It describes the reaction of the US federal courts to the regulators' increased reliance on expert economic evidence and analysis, and how such reaction transformed the scope and nature of judicial review. The chapter demonstrates that while, in the 1980s, the courts applied an intrusive 'hard look' review, they gradually shifted to a 'thin rationality' standard. Paying deference to the regulators' expertise, the thin rationality review merely asks regulators to establish a rational connection between the facts found and the choices made, even without accounting for all the relevant variables that strike judges as reasonable. This standard of review is not about correctness. It does not require regulators to pick the optimal or the most accurate policy. Rather, this standard affirms the institutional competence and historical considerations of the regulators and courts, and according to the author is more attentive to the interplay of the values that inform regulator actions.

Chapter 6 turns back to the UK. Its main argument is that while the US transformation to thin review was largely inadvertent, the British response to the growing role of economic evidence was an incremental, evolutionary transformation, mirroring the transformation of the British regulatory state. It involved a conscious two-pronged institutional reform. On one hand, the introduction of statutory appeals led to the marginalisation of judicial review as a primary means to challenge British regulators' decisions. Yet, on the other hand, the establishment of the specialist CAT largely replaced the High Court as the primary venue for hearing such challenges.

The final two chapters are dedicated to a normative debate on the appropriate scope of judicial review and the optimal institutional response. Chapter 7 advances the main thesis of the book, namely that judicial review of economic evidence should become attentive to institutional competencies. Building on the findings of the previous chapters, it discusses the institutional characteristics of the courts that may warrant a high degree of deference to the regulators' assessment. It concludes that courts suffer from institutional disadvantages compared to regulators when assessing economic evidence, ranging from lack of economic expertise, to limited access to information, lack of requisite institutional legitimacy (especially for the evaluation of broad public policy considerations and value-led choices), and a 'minoritarian' bias (room for influencing and manipulating the operation of courts, for example by lobbying groups, forum shopping, or selective settlements).

The chapter further argues that some of these disadvantages are weakened in the face of the design and characteristics of certain courts. The author explores two attenuating elements: the courts' specialisation in regulatory matters and their rules of procedure which may enhance the information available to the court and allow for the better representation of affected interests. Based on this analysis, the chapter concludes, that "specialist courts, enjoying both subject-matter specialisation and professional background specialisation in economics, could be the optimal solution for addressing the epistemic asymmetry that exists between the judge and the expert agency in regulatory disputes and could minimise the likelihood of error" (p 187).

Chapter 8, the epilogue, concludes by taking stock of the future of courts and economic evidence in the post-Industrialism regulatory state. The author suggests that two main challenges lie ahead: first, the advent of behavioural economics in utility regulation; and second, the rise of informational capitalism, disrupting the prevailing paradigm of utility regulation.

The book's insights, analysis, and conclusions are easily generalisable to the assessment of economic evidence in other fields of regulation and other jurisdictions. In addition, the book makes notable contributions beyond its immediate research questions and would be of great interest to the study of the institutional development of regulatory authorities and their governance, the history and evolution of the studied regulators, theories on the roles of institutions and courts, the limits of administrative discretion and its interpretive, operational, and enforcement elements. The book's broad scope and true interdisciplinary references certainly made my reading list much longer.