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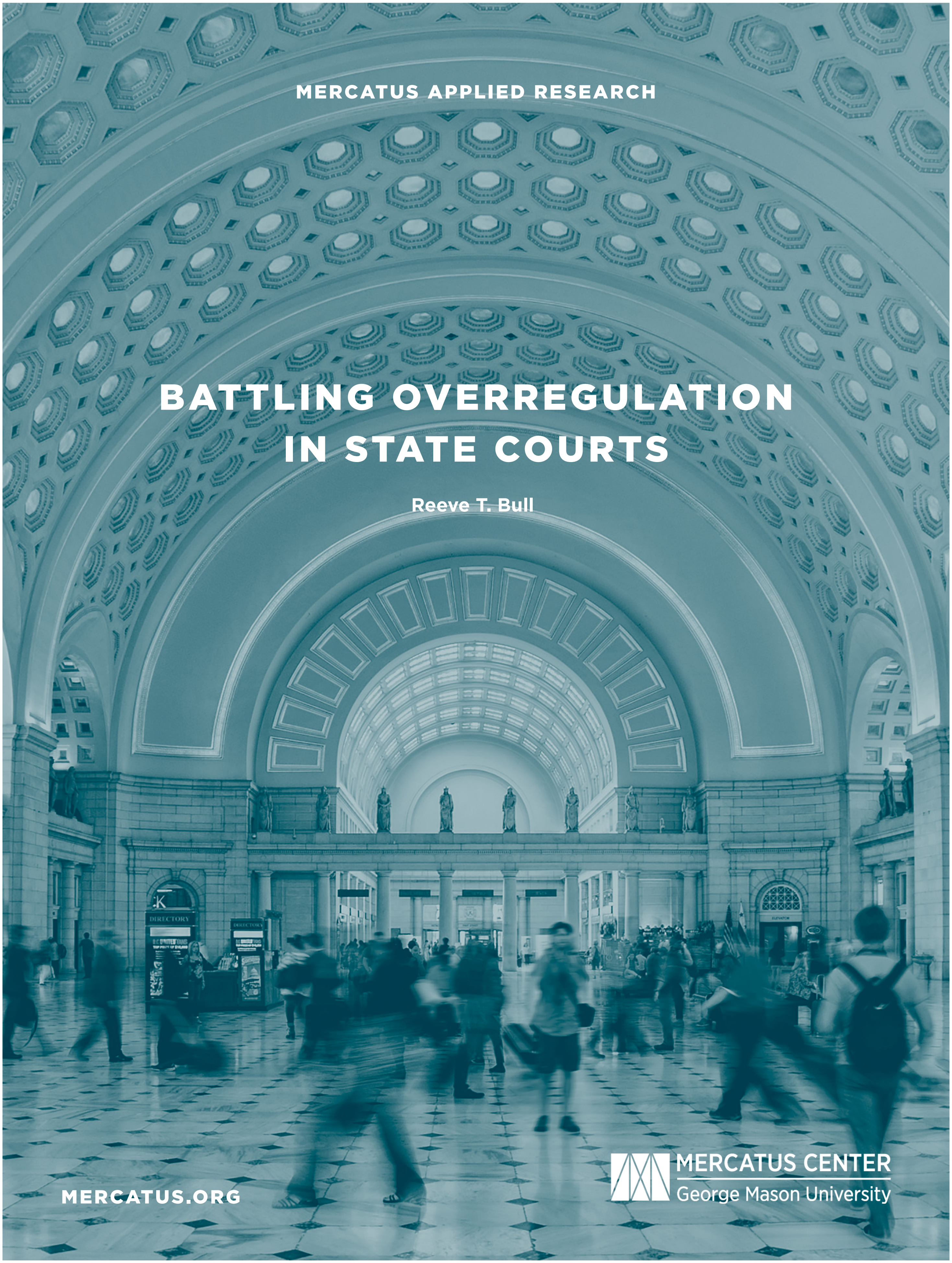

BATTLING OVERREGULATION IN STATE COURTS

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ABSTRACT

Litigants have increasingly begun to challenge federal regulations, alleging that the underlying economic analysis is flawed in some respect. A similar opportunity exists in many states. Forty-one states have enshrined some form of economic-analysis requirement in their statutory law. In at least 32 of these states, the state-level Administrative Procedure Act (APA) includes a judicial-review provision that is substantially identical to that contained in the federal APA, and another five states include essentially identical judicial-review provision outside of the APA.

In this paper, I explore the extent to which similar litigation could be brought at the state level. I begin by cataloging the states that have both a judicial-review provision that is substantially similar to that of the federal APA and a statutory economic-analysis requirement. I then consider the extent to which litigants in the various states have brought challenges to the rules issued by state agencies, alleging that the underlying economic analysis is deficient. I show that, with a couple of unremarkable exceptions, no state litigant has ever successfully challenged a rule on the basis of deficient economic analysis under a cross-cutting statutory economic-analysis requirement. Finally, I explore possible routes to mounting challenges modeled on litigation that has been undertaken at the federal level.

JEL codes: K, K2

Keywords: Administrative Procedure Act, benefit-cost analysis, economic analysis, judicial review, regulation, state agencies, state courts

In 1946, the United States Congress enacted a law known as the Administrative Procedure Act (APA).[1] The APA provides a structure to govern the decision-making process of the massive regulatory state that had emerged over the course of the New Deal and the preceding decades. Recognizing the enormous policy-making power of the regulatory state, the APA gave agencies the power not only to enforce the laws and decide individual cases but also to pass sweeping statute-like pronouncements known as *rules*.[2] At the same time, it also placed certain limits on agency power.

Among the most important limits was a requirement that all agency action be subject to review by the federal courts, a process known as *judicial review*.[3] Once an agency promulgated a rule, the courts would review it not only to ensure its constitutionality but also to police its fidelity to the statutory requirements Congress had set forth. In providing a role for the courts, Congress partially restored the separation of powers that had been eroded when it placed such enormous powers in the regulatory agencies. Though agencies still wield enormous powers and can pass expansive regulations, individual litigants can challenge those rules in court, and the courts can set aside any agency action deemed to go beyond what Congress has authorized.

As has been true for well over a century, the situation at the state level tends to resemble a microcosm of the federal level. Though several states actually enacted an APA prior to the emergence of the federal version, most state APAs were passed after the federal counterpart, and many states explicitly modeled their state APAs on the federal version. States have also amended their APAs over the years, often updating them to account for changes at the federal level.[4]

1. Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (1946).
2. Administrative Procedure Act, 5 U.S.C. §§ 553.
3. Administrative Procedure Act, 5 U.S.C. §§ 704, 706.
4. Brian Baugus, Feler Bose, and James Broughel, "A 50-State Review of Regulatory Procedures" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, April 2022).

Like the federal APA, most state APAs provide for judicial review in some form. Indeed, many parrot the language of the federal APA exactly, allowing agency action that is "arbitrary" or "capricious" to be struck down by a reviewing court.

Nevertheless, many state APAs have gone beyond the federal counterpart in various respects. One area in which states have been at the forefront is in imposing substantive economic-analysis requirements on state agency action.

At the federal level, regulatory economic-analysis requirements have emerged in fits and starts and have never become a comprehensive feature of the regulatory state. Beginning with Lyndon Johnson, presidents required various regulatory actions to undergo economic analysis.[5] President Carter eventually formalized this process at an executive-branch level,[6] and subsequent presidents have all reaffirmed the basic framework.[7] In the meantime, Congress has imposed economic-analysis requirements on certain regulatory programs or with respect to specific types of regulated parties (e.g., small businesses), but it has not adopted any cross-cutting, comprehensive benefit-cost analysis requirement.[8] It has tried on numerous occasions in the last several decades (see, *e.g.*, Regulatory Accountability Act of 2017),[9] but never with any success.

The situation in the states is fundamentally different. As will be explored in section II, 41 states have, in fact, enshrined some form of cross-cutting economic-analysis requirement in statutory law. In many cases, this requirement actually appears in the state APA.[10] The exact formulation differs from case to case, and certain states require far more economic analysis than others, but the fact remains that most states have enshrined economic-analysis requirements that are significantly more comprehensive than those prevailing at the federal level.

Given this dynamic, one would expect numerous challenges to agency action based on shoddy economic analysis at the state level and relatively few at the federal level, yet (as this paper will show) roughly the inverse is true. Though such challenges are not exactly common at the federal level, they have arisen

5. Jim Tozzi, "OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding," *Administrative Law Review* 63, no. 37 (2011).
6. Executive Order No. 12044, Improving Government Regulations, 43 Fed. Reg. 12661 (March 23, 1978).
7. Susan E. Dudley, "Milestones in the Evolution of the Administrative State," *Daedalus* 150, no. 3 (2021): 33–48.
8. Reeve T. Bull and Jerry Ellig, "Judicial Review of Regulatory Impact Analysis: Why Not the Best?," *Administrative Law Review* 69, no. 4 (Fall 2017): 725–840; and "Statutory Rulemaking Considerations and Judicial Review of Regulatory Impact Analysis," *Administrative Law Review* 70, no. 4 (2018): 873–959.
9. Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017); S. 951, 115th Cong. (2017).
10. Baugus, Bose, and Broughel, "A 50-State Review of Regulatory Procedures."

with some degree of frequency over the past few decades, and litigants often succeed in challenging federal agency action on those grounds.[11] At the state level, by contrast, virtually no such challenges have arisen.

This dynamic is partly a result of pervasive economic-analysis mandates in federal statutes other than the APA. Many statutes require specific agencies to undertake economic analysis when enacting certain types of rules.[12] When such a statute exists, a litigant can challenge the analysis an agency performs through a traditional APA challenge.[13]

The widespread existence of non-APA-based economic-analysis requirements helps explain why statutory challenges may be as pervasive at the federal level as at the state level, yet it fails to explain why state-level challenges are far less common. After all, the APA is widely considered a foundational statute and is sometimes described as the "constitution" of the regulatory state.[14] The fact that most states have seen fit to enshrine an economic-analysis requirement in the state APA is indicative of a strong commitment to economic analysis. The relative scarcity of challenges to state agency rules alleged to have shoddy economic analysis is therefore somewhat puzzling.

Ascertaining precisely why such challenges are far less common at the state level is beyond the scope of this paper. I, however, argue that the prospects for successful challenges to state regulations based on inadequate economic analysis are far greater than the sparse record might suggest. I consider challenges that have succeeded at the federal level and then provide a road map for raising similar challenges at the state level, showing how state APAs often contain the same requirements that have proven a fruitful source of litigation at the federal level.

Indeed, challenges to federal regulations based on shoddy economic analysis have become one of the more effective routes to overturning agency rules. Over the last 40 years or so, litigants have brought dozens of challenges to federal rules, alleging that the issuing agency failed to discharge a statutory economic-analysis requirement. In some of these cases, most notably two decisions known as *Corrosion Proof Fittings v. EPA*[15] and *Business Roundtable v. SEC*,[16] the court

11. Emily Bremer, "The Unwritten Administrative Constitution," *Florida Law Review* 66, no. 3 (2015): 1215–73.
12. Bull and Ellig, "Statutory Rulemaking Considerations"; and Cass R. Sunstein, "Cost-Benefit Default Principles," *Michigan Law Review* 99, no. 7 (2001): 1651.
13. Bull and Ellig, "Statutory Rulemaking Considerations"; and Caroline Cecot and W. Kip Viscusi, "Judicial Review of Agency Benefit-Cost Analysis," *George Mason Law Review* 22, no. 3 (2015): 575–617.
14. Emily Bremer, "The Unwritten Administrative Constitution."
15. Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991).
16. Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

very carefully parsed the agency's economic analysis and struck down the rule at issue because of inadequacies or flaws in the agency's reasoning. In *Corrosion Proof Fittings*, the court faulted the agency for considering only two regulatory alternatives rather than a larger array of possible options. In *Business Roundtable*, the court pointed to the agency's failure to establish a baseline against which to measure the proposed rule's effects, and its abortive efforts to either monetize the possible regulatory benefits or explain why doing so was impracticable. In both cases, the court carefully pored over the record and identified a handful of deficiencies in the analysis the agency had conducted.

As was true in both *Corrosion Proof Fittings* and *Business Roundtable*, state statutes often direct agencies to conduct economic analysis. And, like the federal APA, state APAs or other statutes usually include judicial-review provisions directing courts to review agencies' fact-finding and policy-making procedures to identify any flaws that might have caused the agency to reach an insufficiently supported result. There is therefore no reason why state courts could not undertake the same level of searching scrutiny seen in those two decisions.

The purpose of this paper is to provide a litigating strategy to hold state agencies accountable for achieving the mandates with which state legislatures have tasked them. Litigation is seldom perceived as a socially beneficial activity, but it can serve a valuable purpose: creating an incentive for constructive activities that parties may otherwise be reluctant to undertake. State governments, like their federal counterpart, are built upon the principle of separation of powers. When a state legislature directs a state agency to consider the economic effects of a rule, it is presumably doing more than asking the agency to check a box or justify a predetermined outcome by dressing it up in economic terms. And when a state legislature authorizes state courts to review the rules issued by state agencies, it is defending separation of powers by ensuring that the agencies are held accountable.

The increased prevalence of lawsuits challenging federal agency rules for inadequate economic analysis has, in many cases, led to an appreciable improvement in the quality of analysis conducted by federal agencies.[17] To the extent that such lawsuits begin to emerge at the state level, state regulators will increasingly have a powerful incentive to ensure that state agencies are producing the best possible economic analysis.

17. Jerry Ellig, "Improvements in SEC Economic Analysis after *Business Roundtable:* A Structured Assessment," *Florida State University Business Review* 19, no. 1 (2020): 51–94.

I. FEDERAL APA-BASED CHALLENGES TO AGENCY ECONOMIC ANALYSIS

This section explores how judicial review of agency economic analysis works in the federal system. I begin by setting forth the judicial-review provisions of the APA, which authorize courts to review essentially any final action undertaken by federal agencies. I then explore the various economic-analysis requirements that, though not housed in the APA, have sprung up across a wide array of federal statutes.

A. Judicial Review Under the APA

Administrative agencies derive all their powers from laws promulgated by Congress. When delegating power to agencies, Congress decides how much power the agency is to have and how the agency is to go about wielding it. Congress can also place constraints on agencies to ensure they use their delegated powers effectively.

One of the most effective means of constraining agency power is to authorize federal courts to review agency actions. Congress did precisely that through the APA, providing that federal courts can review essentially any final action of a federal agency. Specifically, 5 U.S.C. § 704 states that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." Section 706 of Title 5 provides the substantive standard by which a court will review a final agency action, stating in relevant part that a court can overturn any agency action that fits any of the following descriptions:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[18] The type

18. Administrative Procedure Act, 5 U.S.C. § 706(2).

> of challenge a party may bring against an agency's action depends both on the alleged defect in the agency's conduct and on the general approach taken by the agency in adopting the rule. If a party is challenging an agency's rule because there was some flaw in the agency's reasoning, it will typically bring its challenge under either the "arbitrary, capricious" or "substantial evidence" standard.[19]

Which of those two challenges a party brings depends on how the agency adopted the rule. If the agency went through a process known as *formal rulemaking*, which is similar to an adjudication and involves a formal evidentiary hearing, then the rule is reviewed under the substantial-evidence standard. If the agency went through a process known as *informal rulemaking*, which is similar to Congress passing a statute and requires the solicitation and consideration of public comments, then the rule is reviewed under the arbitrary or capricious standard.[20] Because Congress almost never requires agencies to use formal rulemaking proceedings (and agencies do not utilize those procedures of their own volition), the vast majority of agency rules are reviewed under the arbitrary or capricious standard. And though Congress occasionally mandates review under the substantial-evidence standard even for rules adopted via informal rulemaking,[21] most commentators have concluded that the two tests are essentially identical.[22]

What it means for a rule to be struck down as arbitrary or capricious has been fleshed out in the case law over the years. The best-known case applying the standard is *Motor Vehicle Manufacturers Association v. State Farm*, a 1983 Supreme Court decision. Under the *State Farm* test, an agency action is arbitrary or capricious if a reviewing court finds the agency's decision to be fundamentally irrational in light of the evidence before it and the statutory standard the agency was applying. Among other things, an agency might run afoul of the standard by ignoring an important aspect of the problem the agency was confronting or reaching a conclusion that does not follow logically from the information the agency considered. A reviewing court should defer to the agency and not substitute its judgment for that of the agency officials if a rational decision maker

19. Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 5th ed. (Chicago, IL: American Bar Association, 2012).
20. Lubbers, *A Guide to Federal Agency Rulemaking*.
21. Bull and Ellig, "Judicial Review of Regulatory Impact Analysis."
22. Antonin Scalia and Frank Goodman, "Procedural Aspects of the Consumer Product Safety Act," *UCLA Law Review* 20 (1973): 899–982.

could reach a variety of different conclusions, but it need not uphold an agency's decision that is fundamentally illogical or poorly reasoned.[23]

The Supreme Court decision in *Abbott Laboratories v. Gardner* held that a party that believes an agency rule is unlawful in some respect need not wait until the agency attempts to enforce the rule against the party. As long as the party can establish standing to sue by showing that the rule would affect it in some way, it can challenge the rule in court immediately after it becomes final.[24] In that sense, if a party believes that an agency ignored important evidence, misapplied a statutory standard, or otherwise behaved irrationally when formulating a rule, it can challenge the rule under the arbitrary or capricious standard in court even before the rule is ever applied to it. If the court concludes that the rule is indeed invalid, it will set the rule aside, which typically requires the agency to begin again and adopt another rule (or just abandon the rulemaking completely).

B. Challenging Federal Agency Rules on the Basis of Economic Analysis

Under the arbitrary or capricious standard, a party with standing can challenge any rule that it believes reflects erroneous reasoning by the issuing agency. In determining whether the agency's conduct was indeed irrational, the reviewing court will look to the statute that authorized the agency to act.

Of the various ways in which statutes dictate how agencies should proceed when adopting new rules, one of the more common approaches is to require agencies to conduct economic analysis before regulating. The reason for requiring such analysis is obvious: regulation can help improve certain aspects of our society and make people's lives better, but in a world of scarcity these sorts of interventions always carry associated costs. Agencies should act only if the benefits justify the associated costs.

Though this basic concept seems fundamental, it was only recently introduced into the realm of regulatory policy making, and even now it is not uniformly required by statute. Instead, economic-analysis requirements arise from a patchwork of statutory directives and executive-branch directives.

Though regulators have probably always conducted some form of intuitive benefit-cost analysis when regulating—trying to get a rough sense of whether any given intervention would do more harm than good—it was not until the Johnson

23. Motor Vehicle Manufacturers Association v. State Farm, 463 U.S. 29 (1983).
24. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

and Nixon administrations that the concept of economic analysis was formally introduced into the regulatory calculus. Under the Nixon Quality of Life Review program, the Office of Management and Budget (OMB), a centralized body within the White House, was given authority to assess regulations using the tools of economics and to require agencies to modify rules that failed a benefit-cost analysis.[25]

The Carter administration formalized this program by issuing Executive Order 12044, and the Reagan administration tasked the newly created Office of Information and Regulatory Affairs (OIRA) within OMB to serve as the centralized review body (Executive Order 12291).[26] President Clinton reaffirmed this basic structure in Executive Order 12866,[27] and every subsequent administration has embraced the basic framework (see, *e.g.*, Obama's Exec. Order 13563; Trump's Exec. Order 13771; and Biden's memorandum on "Modernizing Regulatory Review").[28]

Under Executive Order 12866, any rule that has an annual economic impact exceeding $100 million must undergo a formal regulatory impact analysis. Agency economists weigh the benefits and the costs, assigning hard numbers whenever possible, and then OIRA reviews the agency's work and collaborates with agency officials to modify the rule in order to maximize benefits and minimize costs.

Though the Executive Order 12866 regime has led to a far more rational regulatory system and undoubtedly saved billions (if not trillions) of dollars in unnecessary regulatory costs, it has certain gaping holes. First, rules below $100 million need not undergo a formal regulatory impact analysis. Second, agencies often fail to quantify the benefits and costs even for rules that exceed $100 million in economic impact.[29] OIRA can require more rigorous analysis, but it is a tiny office with roughly 50 employees. It therefore stands at a distinct disadvantage when working with far larger regulatory agencies. Third, independent regulatory agencies (e.g., Securities and Exchange Commission, Commodity

25. Tozzi, "OIRA's Formative Years."
26. Executive Order No. 12291, Federal Regulation, 46 Fed. Reg. 13193 (February 17, 1981).
27. Executive Order No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (October 4, 1993).
28. Executive Order No. 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (January 21, 2011); Executive Order No. 13771, Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9339 (February 3, 2017); and "Modernizing Regulatory Review" memorandum (January 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/.
29. Jerry Ellig, "Evaluating the Quality and Use of Regulatory Impact Analysis: The Mercatus Center's Regulatory Report Card, 2008–2013" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, July 2016), https://www.mercatus.org/system/files/Ellig-Reg-Report-Card-Eval-v1.pdf/.

Futures Trading Commission) are not subject to the OIRA review component of the Executive Order 12866 regime. Finally, and most important for purposes of this paper, Executive Order 12866 explicitly states that the analysis it requires is not subject to judicial review. An agency might make its analysis fair game for judicial review by explicitly relying on it when explaining why it is adopting a rule, but nothing requires an agency to do so.

Given these gaps, Congress has occasionally stepped in to require more by way of economic analysis. It has sometimes imposed agency- or program-specific economic-analysis requirements (this will be explored in more detail in the sections that follow) or cross-cutting requirements to analyze specific aspects of a rule's economic effects. These requirements include those imposed by the Regulatory Flexibility Act, which requires agencies to consider the economic effects of proposed rules on small businesses,[30] and by the Unfunded Mandates Reform Act, which requires agencies to conduct a special analysis if a rule compels state, local, or tribal governments or private-sector entities to incur expenses in an amount exceeding $100 million per year.[31]

Congress has not, however, required that agencies consider the economic effects of any rules they adopt with respect to all parties that may be affected by their rules. It has attempted to do so numerous times in the past, debating bills such as the Regulatory Accountability Act[32] that would apply an economic-analysis standard to all regulations, but it has never passed such legislation.

Some commentators have also argued that the arbitrary or capricious standard of the APA itself requires some form of benefit-cost analysis, because adopting a rule in which the costs substantially outstrip the benefits seems inherently irrational and therefore arbitrary or capricious.[33] In *Michigan v. EPA*,[34] both the majority opinion and Justice Elena Kagan's dissent came close to embracing such a standard, but the Supreme Court has never explicitly held that the APA requires any form of economic analysis.

Congress has frequently imposed an economic-analysis requirement on individual agencies or regulatory programs. The late Dr. Jerry Ellig[35] and I explored a variety of statutory benefit-cost standards in a paper titled "Statutory Rulemaking

30. Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1980).
31. Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501-1571 (2012).
32. Regulatory Accountability Act of 2017, H.R. 5, 115th Cong.
33. Cass R. Sunstein, "Cost-Benefit Analysis and Arbitrariness Review," *Harvard Environmental Law Review* 41 (2017): 1–41.
34. Michigan v. EPA, 576 U.S. 743 (2015).
35. Dr. Jerry Ellig served as the chief economist for the Federal Communications Commission after an illustrious career in academia and at various think tanks.

Considerations and Judicial Review of Regulatory Impact Analysis." We classified these benefit-cost standards into five broad categories, with the standards closer to the top of the list representing the more rigorous benefit-cost requirements:

1. A requirement that the agency select the regulatory alternative that meets a specific standard—for example, a since-repealed provision of the Toxic Substances Control Act (TSCA) that required the Environmental Protection Agency to adopt the "least burdensome requirement";
2. A requirement that the agency consider specific benefits or costs—for example, a provision requiring the Securities and Exchange Commission to consider "efficiency," "competition," and "capital formation" when adopting a rule;
3. A requirement that the agency "consider" economic benefits and costs, or that it adopt a "reasonable" or "practicable" standard, without any further elaboration on what the associated benefits and costs are;
4. A requirement that the agency adopt a rule that is economically "feasible"; and
5. A prohibition on considering regulatory benefits and costs.[36]

There is, of course, a sixth option: the statute can say nothing regarding benefits or costs, in which case the agency presumably enjoys the discretion to either consider or ignore them. If Congress imposes one of the five standards enumerated above, however, any analysis the agency conducts under that standard could be a subject for consideration upon judicial review. If, for instance, Congress requires an agency to consider the economic costs, and the record contains no evidence whatsoever that the agency actually did that, then the rule is subject to being overturned under the arbitrary or capricious standard. Alternatively, if a statute prohibits consideration of economic costs, and the record suggests that the agency both considered the costs and factored them into its final decision, the agency's action is also arbitrary or capricious insofar as it relies upon a consideration that Congress took off the table.

As Dr. Ellig and I found, the more rigorous benefit-cost analysis requirements (i.e., those appearing at the top of the list) tend to lead to more searching judicial review by the courts. And, as a matter of logic, that outcome is precisely what one would expect. For instance, if a statute requires that the agency adopt the "least burdensome requirement," as the TSCA once did, the court's job is

36. Bull and Ellig, "Statutory Rulemaking Considerations."

very straightforward. Either the agency correctly selected the least burdensome option (presumably the one with the smallest economic costs) or it did not. If it is the former, the rule survives; if it is the latter, the rule fails.

If, on the other hand, Congress merely requires the agency to consider economic costs, then it is not entirely clear what level of sloppiness in the agency's analysis will justify striking down the rule under the arbitrary or capricious standard. An easy example would involve the agency's complete failure to cite any evidence regarding costs, in which case such a decision is clearly arbitrary or capricious. If, on the other hand, the agency dedicated some minimal attention to costs but summarily concluded that the benefits of acting outweigh the associated costs, the court might or might not find the agency's analysis sufficient. As Dr. Ellig and I found, courts do not interpret these cases uniformly. Some judges consider the mere mention of costs sufficient, while others go beyond the literal text of the statute and require not only some evidence that the agency considered costs but also proof that the agency actually selected an alternative that maximizes benefits and minimizes costs. Still, other judges fall somewhere between these two extremes.[37]

Given this framework, litigants who wish to challenge a federal agency rule that they believe suffers from faulty economic analysis must conduct the following calculus when determining if they have a viable suit:

- Does an agency- or program-specific statute impose some form of economic-analysis requirement? If not, the challenge is very unlikely to succeed, unless the litigants can show that the agency conducted some form of economic analysis (either voluntarily or as required by Executive Order 12866) and explicitly relied on it in the adopted rule.
- How rigorous is the economic-analysis requirement? The challenge is more likely to succeed if the requirement is very specific, such as selection of a particular regulatory alternative or at least the consideration of enumerated factors.[38]
- Does the agency's conduct under the economic-analysis requirement rise to the arbitrary or capricious level? This is a highly fact-specific inquiry by the courts. Judges will consider the statutory standard in light of the evidence before them, including the evidence the agency produced as well as any externally furnished evidence provided during the notice-and-comment process. They will then decide if the agency's conduct was so irrational as to merit setting aside the rule.

37. Bull and Ellig, "Statutory Rulemaking Considerations."
38. Bull and Ellig, "Statutory Rulemaking Considerations."

Although this is a difficult burden to shoulder, given the fact that most statutory economic-analysis requirements are fairly lax (e.g., cost-consideration requirements are far more pervasive than requirements to analyze specific benefits or costs or to select a particular alternative), many litigants have succeeded in challenging agency rules on this basis over the years. In our two papers, the previously mentioned paper and another titled "Judicial Review of Regulatory Impact Analysis: Why Not the Best?," Dr. Ellig and I cataloged dozens of successful agency-rule challenges that relied on statutory economic-analysis requirements.

Drawing on this research, in section IV, I set forth a variety of different approaches to challenging agencies' economic analyses—strategies that have succeeded in the federal courts. I also consider the likelihood that similar challenges at the state level would succeed. Before conducting that analysis, however, I first explore whether state statutes offer similar bases for challenging state rules, which is the subject of the next section.

II. STATE JUDICIAL-REVIEW REQUIREMENTS AND AGENCY ECONOMIC-ANALYSIS REQUIREMENTS

As discussed earlier, all state governments, like the federal government, have enacted an APA (sometimes styled slightly differently, for example, "Administrative Procedures Act" or "Administrative Process Act"). And, like the federal APA, state APAs almost always provide for some form of judicial review of state agency action. Many parrot the federal APA standard exactly, providing that all final agency action is subject to judicial review and that any action that is arbitrary or capricious or that is not supported by substantial evidence can be set aside by a reviewing court.

Unlike the federal APA, however, many state APAs actually integrate some form of cross-cutting economic-analysis requirement. As explored above, the federal APA is entirely silent on the question of economic analysis, unless one interprets the arbitrary or capricious standard to impose some form of implicit benefit-cost balancing requirement. State APAs, by contrast, often require the same types of analysis that various federal laws apply to specific agencies on an across-the-board basis. Still, some states impose cross-cutting economic-analysis requirements in a statute other than the APA.

In this section, I analyze both the judicial-review and economic-analysis requirements of state APAs as well as similar requirements that appear in statutes other than the APA. I explore, in the first subsection, the 32 state APAs that set forth an arbitrary or capricious standard of review that is essentially identical to that prevailing in the federal APA (and similar judicial-review provisions housed in statutes other than the APA in five states). I also identify four state APAs that set a substantial-evidence standard that is likely identical to the federal standard in practice. And I briefly look at the approaches taken in the state APAs that do not match the federal APA standard.

In the second subsection, I explore the 41 states that impose some form of economic-analysis requirement by statute, usually in the state APA. I summarize preexisting work by Brian Baugus, Feler Bose, and James Broughel, who classified state impact-analysis requirements into three broad categories: economic analysis, small-business analysis, and fiscal analysis. I take the first category—economic analysis—and look at some of the specific requirements imposed, drawing from and summarizing the existing work of Baugus et al.

In theory, for those state agency actions that are subject to both a judicial review and an economic-analysis requirement, a state litigant should be able to bring a claim against a state agency that substantially parallels such a claim at the federal level. Indeed, most states have demonstrated an even stronger commitment to economic analysis than the federal government by actually baking such a requirement into the APA rather than relying on agency- or program-specific statutory requirements (or an executive-branch-based economic-analysis regime, such as that created by Executive Order 12866).

In subsequent sections, I explore whether such challenges have succeeded and, to the extent they have not, how state litigants might mount challenges similar to those that have become prevalent at the federal level.

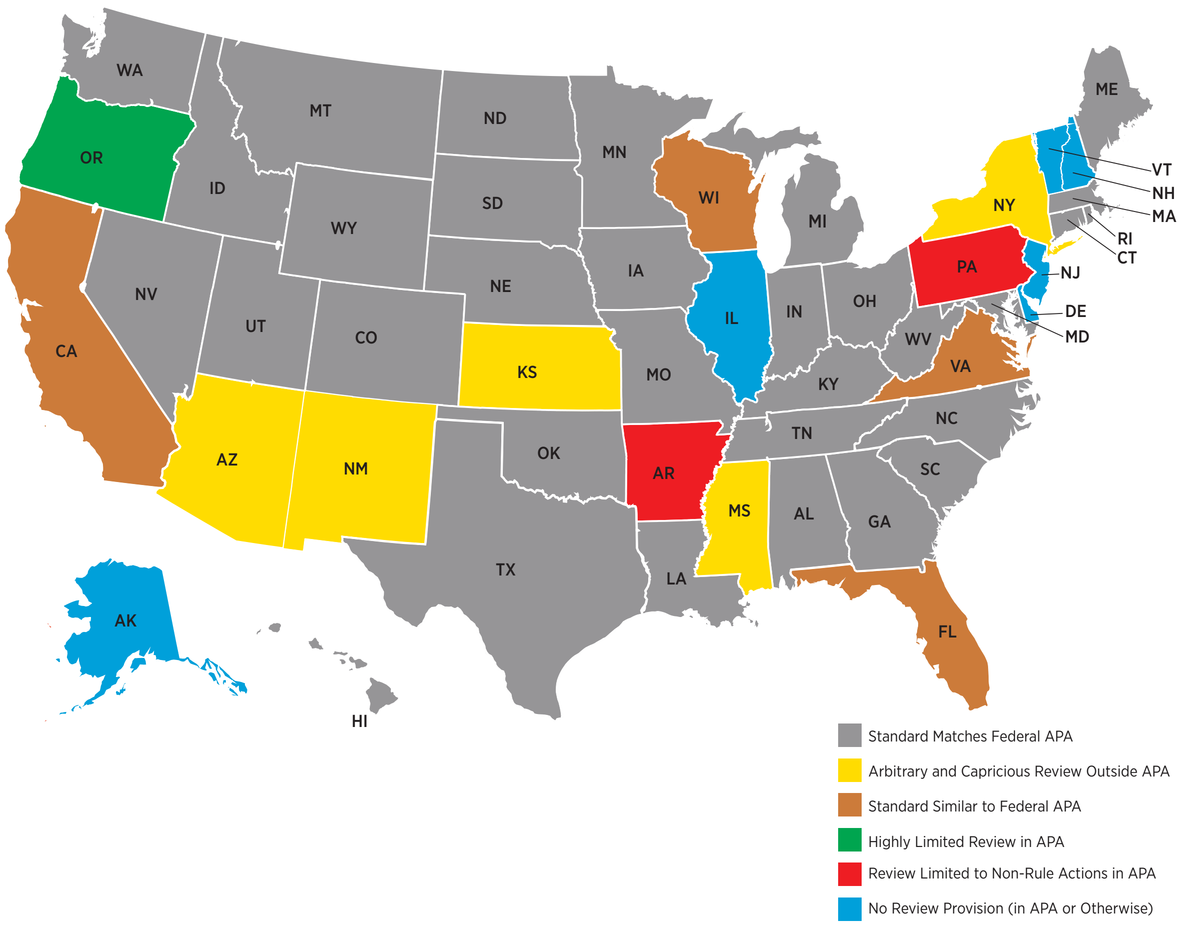
A. State APA Judicial-Review Provisions

Every state has enacted an APA. Though these laws vary significantly, their basic function is the same as that of the federal APA: they provide the basic structure of the state regulatory regime.

The majority of these state APAs also include some provision related to judicial review. As is true of federal agencies, litigants can typically sue state agencies for failure to observe various legal requirements when acting. In many states, this includes the ability to sue an agency if it issues a rule that is deficient in some respect.

Map 1 categorizes the various state APA judicial-review provisions. In the remainder of this section, I elaborate on each type.

MAP 1. VARIOUS STATE JUDICIAL-REVIEW PROVISIONS



Standard matches federal APA. Thirty-two state APAs have judicial-review provisions that are, in relevant part, effectively identical to the judicial-review provision of the federal APA. Each of these provisions provides for the judicial review of rules issued by agencies. Though none uses language identical to that of the relevant federal APA judicial-review provision, all provide that a rule can be set aside if it is found to be arbitrary or capricious.

The arbitrary or capricious standard applies to the vast majority of federal agency rules that are reviewed by courts (i.e., all rules other than those issued via formal rulemaking or for which another statute provides a differing standard of review).[39] The use of identical language in state APAs suggests that state legis-

39. Lubbers, *A Guide to Federal Agency Rulemaking*.

latures wish state courts to apply a similar standard of review to that applied to federal rules.

Though less relevant than the arbitrary or capricious standard, the other components of state APA judicial-review provisions often establish standards similar to that in the other components of the federal APA. For instance, like the federal APA equivalent, state APA judicial-review provisions often refer to a court's ability to strike down a rule if it is found to be beyond the agency's statutory authority. Some such provisions also announce a substantial-evidence standard as an alternative to the arbitrary or capricious standard.

Arbitrary and capricious review outside APA. Five states have judicial-review provisions that include an arbitrary or capricious standard, but that standard is not housed in the state APA. Instead, it appears in another component of the state statutory code.

Though analyzing how these non-APA judicial-review provisions function is beyond the scope of this paper, there is no a priori reason to believe that they function any differently from the corresponding state APA provisions. State courts would presumably apply the standard in the same way regardless of the section of the statutory code in which it appears. I therefore treat the review standard in these five states as identical to that seen in the 32 states with APA-based arbitrary or capricious standards.

Standard similar to federal APA. Four state APA judicial-review provisions contain language that, though not identical, is sufficiently similar to that used in the federal APA to suggest that a reviewing court would undertake an analysis much like that applied by federal courts under the arbitrary or capricious standard.

The relevant provisions in the California, Florida, and Wisconsin APAs announce a substantial-evidence standard of review. Most federal courts that have compared the arbitrary or capricious standard and the substantial-evidence standard under the federal APA have concluded that they are essentially identical and that the reviewing court should scrutinize the record with the same level of stringency under either test.[40]

In Virginia, the relevant state APA provision refers to the "substantiality of the evidence" supporting the agency's factual findings. This verbal formulation is sufficiently similar to substantial evidence that it is reasonable to assume that a similar standard is intended.

40. Scalia and Goodman, "Procedural Aspects."

Highly limited review in APA. The judicial-review provision of the Oregon APA parallels that of the federal APA in part, providing that a rule can be set aside if it is found to be unconstitutional, exceeds the agency's statutory authority, or was issued without observing the necessary procedural requirements. It does not contain language referring to setting aside a rule that is arbitrary or capricious or that is not backed by substantial evidence. This circumscribed standard of review suggests that the Oregon courts are not to assess the rationality of the agency's decision. If the agency complied with all statutory and constitutional requirements, then the rule should stand on judicial review.

Review limited to non-rule actions in APA. In two states, the APA announces a standard of review for certain types of agency actions that do not include rulemaking. The relevant review provision applies only to *agency adjudications*, in which an agency official is acting like a judge by deciding an individual case rather than acting like a legislature by announcing a cross-cutting rule.

In these states, it is unclear whether a party can challenge a rule that an agency issues. The research underlying this paper involved (1) scanning the state APA for any judicial-review provision and (2) running a Westlaw search in state statutes other than the APA for language such as "arbitrary," "capricious," "substantial evidence," or similar formulations. It is possible (indeed probable) that a non-APA statute provides for judicial review of rules under some standard that does not closely match that of the federal APA. As this paper focuses on state-level challenges that resemble those lodged at the federal level, such provisions are not especially relevant to the analysis offered here. Another study focusing on how judicial review of rules works in these states may yield additional useful insights.

No review provision (in APA or otherwise). Six states' statutory codes feature neither an APA provision referring to judicial review of agency action nor a non-APA statutory provision announcing a review standard similar to that seen at the federal level. These states do not necessarily foreclose the possibility of a litigant challenging an agency rule in court. As was true of the states that seemingly limit judicial review to adjudicative decisions, these states may well provide for judicial review of rules in some statutory provision other than the APA, using a standard that is dissimilar to that seen at the federal level. This paper, however, will not analyze those provisions.

B. State Economic-Analysis Requirements

This section draws from preexisting work by Baugus et al., who surveyed all 50 states to identify those that imposed some form of economic-analysis requirement. Baugus et al. also identified state laws that required an analysis of the fiscal impacts of proposed regulations or of the effects of proposed regulations on small businesses. This paper is limited to economic-analysis requirements imposed under state law. Future research might consider the extent to which courts review an agency's fiscal or small-business analysis.

In relevant part, Baugus et al. found that 41 state statutes impose some requirement that agencies perform at least certain elements of a complete regulatory impact analysis.[41] In most cases, this requirement is included in the state APA. Only nine states do not impose any form of economic-analysis requirement by statute: Alaska, Connecticut, Georgia, Hawaii, Massachusetts, New Mexico, Pennsylvania, Utah, and Wyoming.

Of the 41 states imposing a statutory economic-analysis requirement, roughly half (19) require an analysis of the three key elements of a complete regulatory impact analysis: identification of the underlying problem the regulation is attempting to solve, analysis of the regulatory alternatives, and assessment of regulatory benefits and costs. Table 1 summarizes the research from Baugus et al. as it relates to the required elements of the analysis.

In sum, 19 state statutes require that agencies perform each of the elements of a complete regulatory impact analysis, and 41 state statutes require that agencies perform at least one of those elements.

TABLE 1. KEY ELEMENTS OF A COMPLETE REGULATORY IMPACT ANALYSIS BY STATE

Element of Analysis	States
Problem Identification	AL, AZ, AR, CO, DE, IA, KY, LA, ME, MD, MI, MN, MS, NE, NV, NJ, NY, NC, OH, OK, RI, SC, SD, VT, WA, WV, WI
Analysis of Alternatives	AL, AZ, AR, CA, CO, DE, FL, ID, IL, IN, IA, LA, ME, MD, MI, MN, MS, MO, MT, NV, NJ, NY, NC, ND, OK, OR, RI, SC, SD, TN, TX, VT, VA, WA, WI
Assessment of Benefits and Costs	AL, AZ, AR, CA, CO, FL, ID, IL, IN, IA, KS, KY, LA, ME, MD, MI, MS, MO, MT, NV, NH, NY, NC, OK, RI, SC, TX, VT, WA, WI
All Three Elements Required	AL, AZ, AR, CO, IA, LA, ME, MD, MI, MS, NV, NY, NC, OK, RI, SC, VT, WA, WI

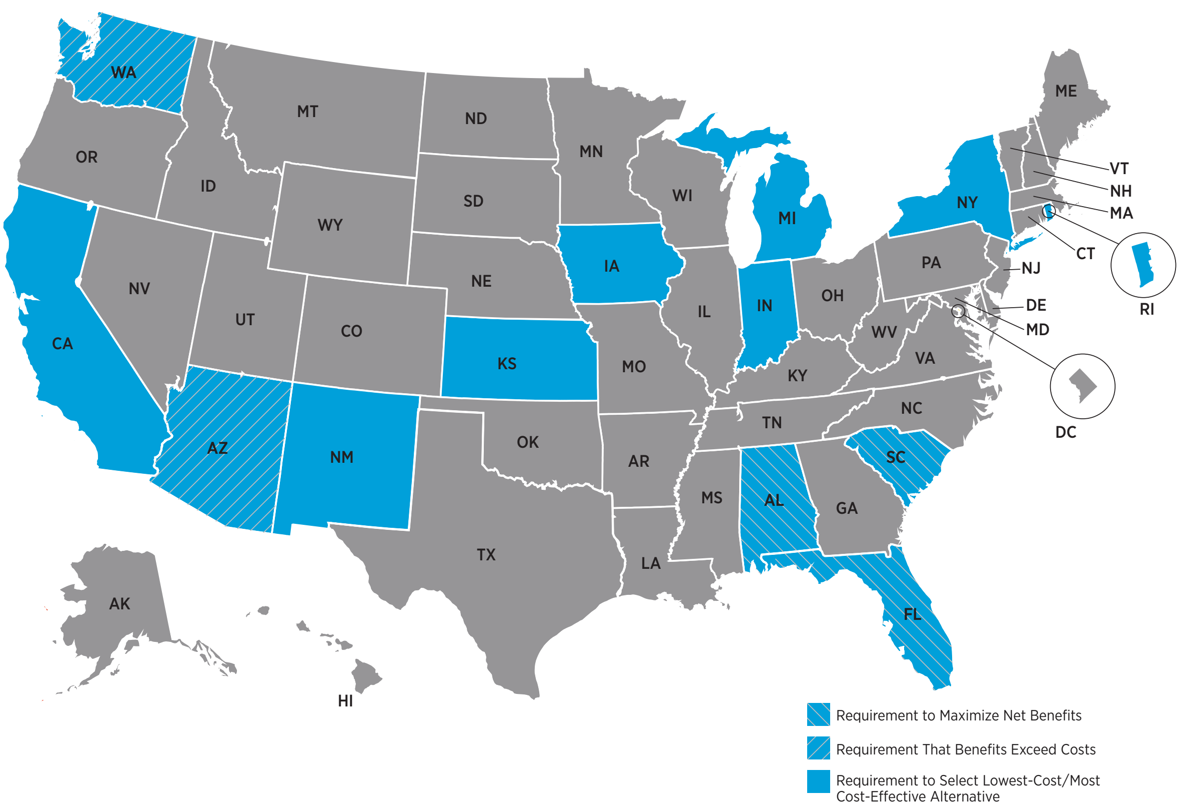
41. Baugus, Bose, and Broughel, "A 50-State Review of Regulatory Procedures."

In addition to requiring state agencies to perform this analysis, state statutes sometimes mandate that the agencies decide on a particular alternative that is favored by the economic analysis they perform. In our previous research, Dr. Ellig and I found that this sort of requirement almost never exists at the federal level. Federal statutes may direct agencies to consider certain regulatory benefits and costs, but they very rarely require agencies to select a particular alternative based on that analysis.[42]

Map 2 summarizes the state statutory standards that require the selection of a particular regulatory alternative.

As reflected above, the most popular requirement is a mandate that the agency select the lowest-cost option or the most cost-effective alternative. In

MAP 2. STATE STATUTORY STANDARDS THAT REQUIRE THE SELECTION OF A PARTICULAR REGULATORY ALTERNATIVE



42. Bull and Ellig, "Statutory Rulemaking Considerations."

several instances, state statutes impose more than one requirement relating to the selection of a particular alternative.

In some cases, a double requirement makes logical sense. For instance, Arizona requires that the alternative selected have benefits exceeding costs and also be the least costly or most cost-effective choice. Applying this standard, an agency still cannot select the alternative—even if a particular approach is the most cost-effective or least costly—if it involves costs that exceed benefits. In other cases, the two separate standards are somewhat difficult to reconcile. For instance, Alabama requires that state agencies select the alternative that is most cost-effective or least costly and that maximizes net benefits. Although both tests will often point to the same alternative, that need not be the case. For example, one alternative may be the least expensive, but a more costly alternative may produce benefits so great that its greater cost can be justified.

I also built upon the work of Baugus et al. by reviewing the statutory language that imposes the economic-analysis requirement in each state and comparing it to the type of language used at the federal level. In doing so, one overarching theme stood out: though state statutory economic-analysis requirements are generally far more extensive than those seen in federal statutes, as noted above, they seldom contain any explicit directives telling the agency what to do with the analysis produced. As noted in section I, federal statutes usually at least direct agencies to "consider" the costs or benefits underlying a particular regulatory action. State statutes usually do not contain even that level of direction. Rather, they typically tell state agencies to produce a report analyzing the economic implications of a rule and contain no further direction as to what to do with the report.

It can be argued that state economic-analysis requirements are actually *less* strict than their federal counterparts, since any economic-analysis requirement at the federal level at least tells the agency to consider the analysis produced. Nevertheless, it seems that a requirement to consider the economic analysis produced is implicit in the state statutory requirements. If state agencies were not at least required to consider the results of their analysis, then the statutory provisions imposing the analytical mandates would be reduced to nothing more than make-work requirements. As is true of federal consideration requirements, state economic-analysis requirements usually do not mandate that agencies select any particular alternative on the basis of the results of the analysis. But a better reading of the statutes is that they require at least a consideration of the results, lest the legislature be accused of creating a superfluous and meaningless exercise.

At the same time, state legislatures could be clearer about what they intend the agency to do with the analysis it creates. Section IV will offer some drafting suggestions for state legislatures looking to adopt or amend statutory economic-analysis requirements.

III. EXISTING STATE CHALLENGES TO AGENCY ECONOMIC ANALYSIS

As outlined above, there is in theory ample opportunity for state litigants to challenge rules issued by state agencies for failure to conduct adequate economic analysis. A solid majority of state statutory codes include provisions allowing a litigant to challenge a rule, and most of these provisions are housed in the state APA. The vast majority of these statutory provisions authorize courts to strike down agency rules if they are deemed arbitrary or capricious, and a handful of other provisions authorize courts to strike down rules that are not backed by substantial evidence.

Further, the majority of state statutory codes include some form of economic-analysis requirement that applies to rules issued by state agencies, and many require that agencies conduct all or nearly all the elements of a complete regulatory impact analysis. Thus, the two critical components for a viable judicial challenge exist: state agencies usually must conduct some form of economic analysis when issuing rules, and state statutes usually authorize courts to strike down rules for faulty analysis.

Notwithstanding the existence of these critical ingredients, it appears that, with two exceptions, a litigant has never successfully challenged a rule for an agency's failure to conduct the economic analysis required by the cross-cutting statutory provisions outlined in section II. Indeed, it appears that, with only six exceptions (the two cases noted above and four others involving unsuccessful challenges), no litigant has ever even raised such a challenge, successfully or otherwise, in a case that ultimately produced a written decision. A handful of litigants have challenged rules over an agency's failure to conduct the economic analysis required under a program-specific statutory mandate, rather than under a cross-cutting mandate as described in section II. Even then, the number of challenges is very few.

To reach this conclusion, I performed the following search on the Westlaw database that includes all decisions from state courts: (economic! or benefit or cost) /10 (arbitrary /2 capricious). Translating the Boolean expression into plain language, this search identifies any case in which any verbal formulation including "economic" (e.g., "economics," "economically," etc.) or the word "benefit" or "cost" appears within 10 words of a verbal formulation in which the words "arbitrary" or "capricious" appear within two words of each other. The basic idea is to identify any decision in which a court struck down a rule under the arbitrary or capricious standard because of some flaw in economic analysis, including analysis of the rule's benefits and costs.

This search produced several thousand cases. A research assistant sorted through each of these cases, identifying those that appeared to involve judicial review of agency rules for failure to conduct any form of economic analysis. I then reviewed the cases identified by the research assistant and narrowed them down to the dozen or so that involved this type of review.

Before parsing the results, a few disclaimers are in order regarding the comprehensiveness of the research:

- The Westlaw database excludes any cases that may have been filed but did not result in the issuance of a judicial opinion.
- Any Westlaw search is necessarily imperfect and balances the competing risks of identifying too many cases and overlooking relevant cases. By searching for the terms "economic," "benefit," or "cost" within 10 words of the arbitrary or capricious formulation, the research excluded cases in which those terms appear more than 10 words apart. I imposed this cutoff to ensure that the search did not produce an unmanageable number of cases to review, assuming that any relevant case in which the key search terms appeared more than 10 words apart was likely to be rare.
- The search includes only the arbitrary or capricious formulation and excludes the substantial-evidence formulation. This was done merely to control the volume of cases, because including the latter formulation introduced many thousands of additional cases. The majority of states use some version of the arbitrary or capricious formulation and virtually all relevant federal cases use that standard when reviewing agency rules, so this cutoff should not exclude many (or perhaps any) relevant cases.

Given these caveats, it is possible that, for instance, a litigant brought a challenge to a rule for an agency's failure to conduct some form of economic analysis described in section II but the case did not produce a written opinion. It is also possible that such a challenge arose but resulted in an opinion that did not use the key terms captured in the Westlaw search. It is likely safe to assume that such cases are rare, given the breadth of the search used and the fact that it turned up only a handful of decisions involving a challenge to a rule based on inadequate economic analysis under a cross-cutting analytical requirement. (However, the search appears to have missed at least one relevant case, as described below.)

Of the 3,551 cases reviewed, only around a dozen included an opinion in which a judge reviewed any sort of statutorily mandated economic analysis. And, among these cases, only four from Florida and one from California involved analysis mandated under one of the cross-cutting provisions described in section II. In reviewing the Florida cases, one decision cited another case that also involved judicial review of a cross-cutting economic-analysis requirement. But this case did not show up in the original search, because the arbitrary or capricious formulation was removed from "economic," "benefit," or "cost" by more than 10 words.

In four of the six cases involving judicial review of a cross-cutting economic-analysis requirement, the litigant challenging the rule lost. And of the remaining two cases in which the litigant prevailed, the court conducted an extremely cursory analysis, suggesting that the agency rule will only be struck down if the agency has failed to conduct any sort of analysis whatsoever.

In the first Florida case, *Lost Tree Village Corp. v. Board of Trustees of the Internal Improvement Trust Fund*,[43] a litigant challenged a handful of regulatory amendments that would have prevented the construction of bridges and utility lines over submerged land on which it wished to build a residential development and golf course. The litigant asserted, among other things, that the economic-impact statement required under the Florida APA was inadequate. The court rejected this challenge with very little analysis, concluding that any estimate of costs would have been speculative and therefore unnecessary.

The second Florida case, *Department of Natural Resources v. Sailfish Club of Florida, Inc.*,[44] also involved a challenge to an agency's economic-impact statement. The litigant alleged that the agency did not sufficiently assess the economic impact on individual lessees when converting a licensing scheme into a leasing scheme. The court rejected this claim with virtually no analysis, simply concluding that the economic-impact analysis was intended to be "informal" and that a litigant therefore cannot prevail merely by pointing to theoretical flaws in the agency's analysis.

43. Lost Tree Village Corp. v. Board of Trustees of the Internal Improvement Trust Fund, 698 So. 2d 634 (Fla. Ct. App., 4th Dist. 1997).
44. Department of Natural Resources v. Sailfish Club of Florida, Inc., 473 So. 2d 261 (Fla. Ct. App., 1st Dist. 1985).

The third Florida case, *Florida Waterworks Association v. Florida Public Service Commission*,[45] involved yet another challenge to an agency's economic-impact statement. A utility firm challenged a rule used to determine contributions in aid of construction, alleging, among other things, that the associated economic-impact statement was deficient in various respects. In a very cursory analysis, the court actually agreed with the utility firm in finding that some of the conclusions in the statement were "subject to debate," but it found that the defendant, public service commission, checked all the required boxes for its analysis and therefore rejected the challenge.

The fourth Florida case, *Department of Health and Rehabilitative Services v. Wright*,[46] concerned a rule that prohibited certain types of restraints by medical facilities. The parties challenging the rule asserted that it was invalid, relying in part on the agency's alleged failure to prepare an adequate economic-impact statement. In analyzing this claim, the court emphasized that the statutory burden associated with the economic-impact statement requirement was very light: the analysis need not be perfect (substantial compliance is sufficient), and the court will remand the rule only if there is a material error in the analysis. Thus, if the agency can show that it fully considered the economic factors or that its failure to do so was harmless, the rule will be upheld. Notwithstanding this exceedingly generous standard of review, however, the court found that the agency failed to realistically consider the economic effects of the proposed regulatory change and concluded that it had no alternative but to strike down the rule.

The fifth Florida case, *Cataract Surgery Center v. Health Care Cost Containment Board*,[47] was not identified in the original search but was cited in other Florida cases addressing judicial review of economic-impact statements; it also involved striking down a rule on the basis of an inadequate economic-impact statement. The case involved a challenge to a rule that required the collection of data from freestanding ambulatory surgery centers. After reciting the same generous standard of review used in the *Wright* case, the court concluded that the agency failed to consider the ongoing costs of the data-collection requirements. Had the agency conducted any analysis of this factor, the result might have been

45. Florida Waterworks Association v. Florida Public Service Commission, 473 So. 2d 237 (Fla. Ct. App., 1st Dist. 1985).
46. Department of Health and Rehabilitative Services v. Wright, 439 So. 2d 937 (Fla. Ct. App., 1st Dist. 1983).
47. Cataract Surgery Center v. Health Care Cost Containment Board, 581 So. 2d 1359 (Fla. Ct. App., 1st Dist. 1997).

different. But the agency's complete failure to perform this analysis was fatal to the rule.

In short, all the Florida cases suggest that the Florida courts tend to assess economic analyses with a very high degree of deference. Indeed, the cases seem to suggest that as long as the agency fulfills its statutory mandate to perform some form of analysis, the court will not parse its findings at any level of detail.

The only relevant California case, *California Manufacturers & Technology Association v. State Water Resources Control Board*,[48] involved a highly cursory analysis of the alleged violation of a cross-cutting economic-analysis requirement. The state APA required the agency to consider the adverse impact of its proposed action on California business enterprises and individuals and to describe reasonable alternatives that would mitigate that impact. The challenger alleged that the California agency relied on incomplete data and had an obligation to seek out additional information concerning other businesses that might have been affected by the proposed rule. The court decided that the agency was under no such obligation. The agency satisfied the relevant statutory standard as long as it reached a reasonable conclusion based on the data before it.

Among this handful of cases, several referred to a standard similar to that articulated in the *State Farm* decision discussed above: the court should defer to any reasonable agency fact-finding and should not substitute its judgment for that of the agency decision maker. Since the states are applying a standard that is strikingly similar to that prevailing at the federal level, a similar result is expected: courts would defer in a close case as long as the agency's conclusion is not irrational, but they would police for any obvious errors in the agency's reasoning. In contrast to the federal cases (and in sharp contrast to decisions like *Corrosion Proof Fittings* or *Business Roundtable*), however, state courts generally did not parse the agencies' findings in any detail. It appears that state courts are exhibiting far greater deference to the agencies whose work they review than do their federal counterparts, suggesting that state courts could move toward a far more rigorous level of scrutiny if they were to follow the lead of the federal courts.

Outside the states of Florida and California, the research did not identify any other cases that involved judicial review of an agency's economic analysis conducted under a cross-cutting statutory requirement. A handful of cases involved judicial review of a rule promulgated under a statute that itself required

48. California Manufacturers & Technology Association v. State Water Resources Control Board, 64 Cal. App. 5th 266, 278 Cal. Rptr. 3d 668 (Cal. Ct. App. 2021).

some form of economic analysis (i.e., the analytical requirement was program-specific rather than cross-cutting). For example, in *American Lung Association of Idaho/Nevada v. Department of Agriculture*,[49] an NGO challenged an Idaho agency's determination that there were no economically viable alternatives to field burning to remove straw and stubble. The court analyzed the underlying evidence in some detail, acknowledging that the challenger had shown that another state had prohibited field burning without a major disruption to the industry, but concluded that the challenger had failed to provide actual evidence that an alternative to field burning could produce a comparable economic result. Given these deficiencies, the court upheld the agency's rule.

In *Association of Irritated Residents v. State Air Resources Board*,[50] the court rolled up its sleeves and analyzed a wide array of objections to the economic analysis undergirding a rule setting greenhouse-gas reduction targets. The relevant statute required the agency to consider the cost-effectiveness of its proposed course of action and to assess economic and noneconomic benefits and costs in reaching its conclusion. The challenger alleged that the approach that the agency adopted was inadequate in various respects, including the agency's failure to pursue the most aggressive reduction target that was technologically and economically feasible. The court pored over the evidence and concluded that, contrary to the challenger's assertion, the agency considered a wide array of evidence in concluding that the approach it took was optimal from both an economic and technological perspective. The court also rejected the challenger's assertion that the agency failed to consider alternatives to the cap-and-trade program upon which it ultimately settled, citing multiple alternative approaches that the agency considered and ultimately deemed suboptimal. The court then proceeded to reject a variety of additional challenges to the rule.

Neither case is directly relevant to the topic addressed in this paper because neither concerns economic analysis required under a cross-cutting statute. Yet both cases show that a court can, if it chooses, engage with agencies' economic findings and determine whether the conclusion an agency reached is arbitrary or capricious.

The same is true of a larger number of cases that concern so-called rate-making. State utility commissions are often required to consider a variety of economic factors when deciding what rate to set, and disgruntled customers often

49. American Lung Association of Idaho/Nevada v. Department of Agriculture, 130 P.3d 1082 (Idaho 2006).
50. Association of Irritated Residents v. State Air Resources Board, 143 Cal. Rptr. 3d 65, 206 Cal. App. 4th 1487 (Cal. Ct. App., 1st Dist. 2012).

challenge the rate as inappropriate. The research turned up a handful of such cases, and each involved some level of analysis of the agency's economic rationale for settling on the rate it did.

In short, state courts are perfectly capable of analyzing complex economic arguments. It is therefore somewhat surprising that almost no cases challenge agency rules under one of the cross-cutting economic-analysis requirements and that the small handful of cases that do make the challenge contain fairly abortive analysis. As noted above, it is beyond the scope of this paper to analyze why this may be the case. But the next and final section will explore how such challenges might succeed in the future, drawing on precedent from the federal level.

IV. ROAD MAP FOR FUTURE STATE APA CHALLENGES TO AGENCY ECONOMIC ANALYSIS

The analysis in the preceding three sections yields a somewhat surprising result: economic-analysis requirements contained in state APAs and other statutes are generally far more detailed and sophisticated than those contained in federal statutes. Federal statutes that require economic analysis almost always provide a fairly vague directive to agencies, usually urging them to "consider" economic costs (and occasionally benefits) or to adopt a "feasible" approach, and they almost never require agencies to select a particular alternative.[51] State APAs, by contrast, often direct agencies to conduct each of the elements of a complete regulatory impact analysis and sometimes even mandate that agencies select a particular regulatory alternative. Yet challenges to agencies' economic analysis are far more unlikely at the state level, notwithstanding the fact that well over half of the state APAs include judicial-review requirements that are highly similar to those seen in the federal APA.

Determining why this is the case is beyond the scope of this paper. It is possible that state judges interpret the lack of any clear directive to select a particular regulatory alternative or even to consider economic benefits and costs as foreclosing judicial challenge. This is unlikely, however, for the reasons explored in section II: state legislatures presumably adopted economic-analysis requirements for reasons other than a desire to make state agencies jump through an additional hoop, and they presumably intended agencies at least to consider the analysis they perform. Alternatively, litigants in the various states may not see such suits as being worth their time, either because they judge the probability of

51. Bull and Ellig, "Statutory Rulemaking Considerations."

success to be quite low or because they anticipate a modest remedy that may not justify the expense of litigation.

It is also possible that the lack of such challenges is merely a result of litigants' not having thought to bring them. A successful lawsuit often produces follow-on challenges of a similar type, and the fact that few litigants have brought such suits to date may explain their scarcity. Once a pioneering litigant brings a successful challenge in a given state, other litigants are likely to follow.

The remainder of this section therefore attempts to sketch out how such lawsuits might look, drawing on federal precedent. Because state economic-analysis requirements are typically more explicit than those contained in federal statutes, these lawsuits should presumably be even easier to mount at the state level than they are at the federal level. Of course, the lack of state-based precedent will stand as a hurdle to the first wave of litigants, but state-based litigants can cite the relevant federal cases as persuasive precedent for supporting a similar suit under state law.

A. State Analogues to Federal Challenges

As noted in section I, federal statutes that impose economic-analysis requirements are almost never as explicit as the corresponding state statutes. As Dr. Ellig and I found, very few federal statutes actually direct agencies to conduct the required elements of a regulatory impact analysis or mandate that an agency select a particular regulatory alternative. Rather, most such statutes impose an exceedingly vague economic-analysis requirement, such as requiring agencies to "consider" regulatory costs or to adopt an approach that is economically feasible.[52]

Notwithstanding these vague statutory formulations, federal courts sometimes assess agency rules under each of the key elements of a regulatory impact-analysis requirement: identifying the underlying problem, considering the alternatives, assessing the benefits and costs, and selecting a cost-justified alternative.[53] In this subsection, I address each of these requirements, looking at how federal courts have analyzed federal agency actions under the relevant statutory standard. I also look at how state litigants might raise a similar challenge, drawing on the far more explicit language contained in state APAs and other statutes.

52. Bull and Ellig, "Statutory Rulemaking Considerations."
53. Bull and Ellig, "Judicial Review of Regulatory Impact Analysis."

Identifying the underlying problem. Federal statutes almost never explicitly direct agencies to undertake the first step in conducting a regulatory impact analysis, which is used to identify the underlying problem. Yet that step is arguably implied by the mere directive to undertake some form of economic analysis: regulators cannot assess the benefits and costs of a proposed regulation and the possible alternatives without first identifying the regulatory problem they are attempting to solve. As a result, federal courts occasionally assess the extent to which agencies have identified the underlying problem, even in the absence of an explicit statutory requirement to do so.

One aspect of identifying the regulatory problem is to establish a baseline against which to measure the regulation's effects. For instance, if a statute tasks an agency with reducing greenhouse gas emissions, it must first define current greenhouse gas levels so that it can determine what a reduction entails. Federal courts have, on occasion, struck down agency rules for failing to establish a baseline.

For instance, in *Business Roundtable v. SEC*, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) faulted the SEC for failing to establish a baseline for existing levels of proxy challenges against which to measure any increase in challenges brought about by the proposed rule.[54] Similarly, in *American Equity Investment Life Insurance Co. v. SEC*,[55] the DC Circuit faulted the SEC for failing to establish a baseline level of competition and efficiency against which to assess the effects of the proposed rule.

In neither case did the applicable statute direct the SEC to define the underlying problem and establish the need for regulatory intervention. Rather, the court saw such a requirement as implicit within a general requirement that the agency conduct economic analysis.

Litigants challenging a regulation issued by a state agency under a state statute that mandates such analysis are better positioned than the litigants in the federal cases mentioned above, because they can explicitly point to a statutory requirement to identify the underlying problem and argue that establishing a baseline standard is a key component of determining whether a problem requiring regulatory intervention exists, rather than trying to conjure such a requirement from vague statutory language that requires an agency to "consider" economic costs or assess the economic feasibility of a proposed rule.

54. *Business Roundtable*, 647 F.3d 1144.
55. American Equity Investment Life Insurance Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010).

Another aspect of identifying the regulatory problem is determining whether the problem is sufficiently important to meet the threshold required for regulatory intervention. In *National Resources Defense Council v. Herrington*,[56] for example, the DC Circuit faulted the Department of Energy's determination that imposing energy efficiency standards for certain appliances would not produce energy savings of sufficient magnitude to justify regulation. In these types of cases, the key question is determining what the legislature intended with respect to a required showing of the severity of the underlying problem. In *Herrington*, the analysis turned on how significant the energy savings needed to be to justify regulatory intervention.

In mounting similar challenges to state agency regulations in states that require a demonstration of an underlying problem, litigants must carefully parse the relevant statutory language to determine what the state legislature required to justify intervention. But again, state litigants are generally better positioned than federal litigants, because most states statutorily require their agencies to identify a regulatory problem prior to intervening. A state litigant can therefore point to explicit statutory language and argue that the threshold for intervention has not been met, rather than arguing that such a requirement is implied by a general statutory requirement to conduct some form of economic analysis.

Considering the alternatives. As with the requirement that an agency define the underlying problem before intervening, the requirement that an agency assess the possible alternatives to any contemplated regulatory intervention is seldom articulated explicitly in federal statutory law (with a handful of notable exceptions, such as the National Environmental Policy Act). Here, too, courts often read this requirement into vague statutory language requiring consideration of benefits or costs or assessment of regulatory feasibility, because it is so fundamental to sound economic analysis: whether a particular action is economically justified cannot be meaningfully determined without knowing what the alternatives to the contemplated action involve.

A variety of federal cases have struck down agency actions for failing to consider a reasonable range of alternatives. In *Corrosion Proof Fittings v. EPA*, the court faulted the EPA for considering only two extreme alternatives: an outright ban on the substance at issue (asbestos) or the absence of any regulatory intervention. Though the underlying statute (the Toxic Substances Control Act) did not specify that the agency must consider a reasonable range of alterna-

56. National Resources Defense Council v. Herrington, 768 F.2d 1355 (D.C. Cir. 1985).

tives, doing so was implicit within its requirement that the agency adopt the least restrictive option. By failing to assess less burdensome approaches (e.g., requiring that workers exposed to asbestos wear protective gear), the agency failed to discharge its duty to identify and adopt the least restrictive regulatory approach.[57] Another case from the DC Circuit, *New York v. Reilly*,[58] did precisely the same thing, and the court found the agency's decision to impose an outright ban to be arbitrary or capricious because it failed to consider less burdensome options.

Though *Corrosion Proof Fittings* and *Reilly* involved agencies that considered merely the two most extreme alternatives, an agency's rule still might be vulnerable even if it considers a somewhat larger range of options. In *Center for Biological Diversity v. NHTSA*,[59] the agency considered five different alternatives, but the court found its analysis inadequate in the face of evidence that there were at least 28 different options that could have been considered.

In other cases, courts fault agencies for failing to pay adequate heed to specific alternatives that they had in front of them. Often, this is a result of an agency's failure to consider an alternative that a private party had brought to their attention. Federal agencies are required to undertake a notice-and-comment process prior to adopting rules, in which businesses, trade groups, and other entities file comments that encourage agencies to take a less costly or more beneficial approach. If an agency simply ignores a relevant comment or fails to give it sufficient attention, the court can strike down the rule. This was precisely what occurred in a DC Circuit case *Chamber of Commerce v. SEC:* the SEC failed to analyze a less burdensome disclosure directive that several commenters (as well as two SEC commissioners) had raised.[60]

In still other cases, courts fault agencies for failing to consider obvious alternatives, regardless of whether any party raised them. The most obvious alternative of all, of course, is simply doing nothing. In *American Equity Investment Life Insurance Co.*, the DC Circuit faulted the SEC for failing to assess whether existing state regulations were insufficient before it decided to intervene.[61]

In almost all of these cases, the court saw a requirement to consider regulatory alternatives to be implied by a general economic-analysis requirement. State litigants will generally be in a better position because they can point to a specific

57. *Corrosion Proof Fittings*, 947 F.2d 1201.
58. New York v. Reilly, 969 F.2d 1147 (D.C. Cir. 1992).
59. Center for Biological Diversity v. NHTSA, 538 F.3d 1172 (9th Cir. 2008).
60. Chamber of Commerce v. SEC, 443 F.3d 890 (D.C. Cir. 2006).
61. *American Equity Investment Life Insurance Co.*, 613 F.3d 166.

provision of the state APA that contains this requirement. As noted above, 35 states impose some statutory requirement to consider regulatory alternatives. Litigants in these states can cite the relevant statutory requirement and then draw on the federal precedent that fleshes out the specifics of what agencies must do when considering regulatory alternatives.

Assessing the benefits and costs. The ideal economic analysis would first identify all significant benefits and costs associated with a proposed course of action and then identify all the important alternatives. It would then calculate the monetary value of those benefits and costs and select the alternative that performs most favorably on the basis of that analysis (usually the alternative that either imposes the lowest costs or has the largest positive difference between benefits and costs). Unfortunately, agencies almost never produce analyses with that level of sophistication.

At the federal level, this lack of thoroughness has a simple explanation: agencies are almost never required to do a detailed analysis (as will be explained more fully below). But it is also partly a function of the difficulty of producing such an analysis. The benefits and costs can be difficult to quantify and attempting to perform such a calculation—both for the alternative selected and for the other viable alternatives—can be very time and resource intensive.[62]

As a result, federal courts are usually quite forgiving in reviewing agencies' analyses of benefits and costs. Among the federal cases Dr. Ellig and I analyzed, courts almost never faulted an agency for failing to monetize or quantify benefits or costs. Only the *Business Roundtable* decision ever came close, and even in that case the court suggested that the agency could discharge its burden by explaining why monetization was not possible.[63] Most cases have instead focused on obvious logical errors that agencies committed when performing their economic analyses.

For example, in *Center for Biological Diversity*, the United States Court of Appeals for the Ninth Circuit faulted the National Highway Traffic Safety Administration (NHTSA) for assuming that the value of reduced carbon emissions was zero in the analysis it performed. The precise value of carbon reduction can be reasonably disputed, but it is safe to assume that it is greater than zero. By committing such an obvious error, the agency opened itself up to challenge on judicial review.[64]

62. Office of Management and Budget, *Circular A-4* (September 17, 2003).
63. *Business Roundtable*, 647 F.3d 1144.
64. *Center for Biological Diversity*, 538 F.3d 1172.

Similarly, in *Chamber of Commerce*, the DC Circuit criticized the SEC for simply ignoring certain costs that mutual funds would incur in order to comply with the regulation adopted.[65] Agencies need not engage in a highly detailed assessment of the underlying benefits or costs, but they must at least acknowledge that obvious benefits and costs exist.

In other cases, the courts occasionally engaged in a more extensive review of the agency's fact-finding, though they again limit themselves to policing for clear errors rather than attempting to re-create the agency's analysis. For example, in *American Equity Investment Life Insurance Co.*, the DC Circuit pushed back on the SEC's claim that adopting a particular rule would reduce market uncertainty. Though adopting a rule would indeed reduce uncertainty, that would be true of any approach the agency might adopt, so the court concluded that the agency could not claim that the diminished uncertainty was somehow a benefit associated with the particular approach selected.[66]

Several cases also have involved the courts' scrutinizing the record to assess the strength of the evidence behind the agencies' claims. When the court finds the evidence cited to be insufficient, it strikes down the rule. For instance, in *Gas Appliance Manufacturers Ass'n v. Department of Energy*,[67] the DC Circuit determined that the agency had not provided adequate evidence for its claim that a proposed rule would reduce energy loss by 40 percent from fittings. In *Competitive Enterprise Institute v. NHTSA*,[68] the DC Circuit concluded that NHTSA improperly dismissed evidence that higher fuel-efficiency standards cause manufacturers to produce smaller, less safe cars without producing any contrary evidence.

With respect to challenges to rules based on shoddy analysis of benefits or costs, litigants challenging state rules are not necessarily better positioned than their counterparts challenging federal rules. Economic-analysis requirements contained in state APAs resemble those contained in federal statutes in that they do not generally mandate the monetization or even quantification of benefits or costs. State courts are therefore no more likely than their federal counterparts to parse an agency's economic analysis and find that it is insufficiently rigorous.

State courts, however, may be equally willing as federal courts to police the record for obvious errors in the agency's analysis, including citing absurd values for benefits or costs, ignoring clear benefits or costs, or botching the assessment of benefits or costs to such a degree that even a nonexpert judge can clearly dis-

65. *Chamber of Commerce*, 443 F.3d 890.
66. *American Equity Investment Life Insurance Co.*, 613 F.3d 166.
67. Gas Appliance Manufacturers Ass'n v. Department of Energy, 998 F.2d 1041 (D.C. Cir. 1993).
68. Competitive Enterprise Institute v. NHTSA, 956 F.2d 321 (D.C. Cir. 1992).

cern the underlying errors. In this respect, litigants may be missing an opportunity to challenge state agency rules insofar as they do not appear to be bringing these sorts of challenges that have become somewhat routine at the federal level.

Selecting a cost-justified alternative. As noted above, federal law almost never mandates that agencies select a particular regulatory alternative. Of the dozens of statutory provisions that Dr. Ellig and I analyzed in our earlier papers, only two required the selection of a particular alternative: the Toxic Substances Control Act ("least burdensome requirement") and the Cost Savings Act ("maximum feasible reduction of costs to the public and to the consumer"). Both provisions have since been repealed.[69] Though additional research would likely turn up other statutes, the paucity of examples in our sample suggests that such a requirement is exceedingly rare.

State statutes, by contrast, often mandate the selection of a specific regulatory alternative. As noted above, 13 states impose such a requirement, and all require that the agency select the lowest cost or most cost-effective alternative, a standard quite similar to the least-burdensome standard at issue in the *Corrosion Proof Fittings* decision.

If the approach taken by the United States Court of Appeals for the Fifth Circuit in *Corrosion Proof Fittings* is any indication of how a state court might apply a similar standard, then challengers to state rules have every reason to be optimistic. The *Corrosion Proof Fittings* decision (along with the *Business Roundtable* decision discussed above) is almost uniformly reviled by regulatory scholars as an example of judicial review gone too far.[70] Though a reviewing court is generally expected to defer to an agency's fact-finding unless it is clearly erroneous, the Fifth Circuit in this case carefully parsed the agency's findings and identified numerous errors in its analysis (e.g., inflating the benefits, applying discount rates asymmetrically, ignoring the downstream risks of substitution by regulated entities, tolerating unusually high costs).

Dr. Ellig and I defended the *Corrosion Proof Fittings* decision in part by arguing that the unusually strict statutory standard merited an unusually careful review by the courts.[71] Were an agency merely tasked with considering costs, it would indeed be inappropriate for the court to suggest that the agency erred by selecting a costly alternative, as long as it provided some rationale for doing so.

69. Bull and Ellig, "Statutory Rulemaking Considerations."
70. Jonathan S. Masur and Eric A. Posner, "Cost-Benefit Analysis and the Judicial Role," *University of Chicago Law Review* 85, no. 4 (2018): 935–87.
71. Bull and Ellig, "Statutory Rulemaking Considerations."

But the underlying statute required selection of the least-burdensome alternative, so the court was justified in poring over the record to ensure that the agency had actually done so.

State courts, too, should apply this level of scrutiny to agencies' analyses in those states in which the APA or another statute mandates the selection of the least costly or most cost-effective alternative. An agency cannot discharge its mandate merely by showing that it was aware of the underlying costs and decided that the benefits were more important. It must show that it actually studied the costs of both the option selected and a fair range of alternatives and reasonably concluded that the alternative it chose was the least costly or most cost-effective.

For states requiring maximization of net benefits, state courts should theoretically undertake an equally searching inquiry. The agency presumably should have monetized both the benefits and costs of each of the viable alternatives and then selected the alternative for which the difference between the benefits and costs is the largest number. Unfortunately, though, the analysis is likely muddled by the fact that the three states that impose a net-benefit-maximization standard—Alabama, Florida, and South Carolina—also require the agency to select the least costly or most cost-effective alternative. As table 2 shows, these two standards will sometimes favor different alternatives, unless the term "effective" in "cost-effective" is interpreted to require the agency to adopt the regulation with the best balance between benefits and costs. At that point, the standard likely becomes duplicative of the net-benefit-maximization requirement.

The net-benefit-maximization standard favors alternative A; the lowest-cost standard favors alternative B. It is therefore unclear whether an agency in Alabama, Florida, or South Carolina should choose A or B, because one provision of the law requires it to select one and another provision requires it to select another.

The third selection standard, a requirement that the benefits exceed the costs, is more forgiving because it does not mandate that the agency select only one option. For instance, using the examples in table 2, the agency could choose

TABLE 2. ANALYSIS OF ALTERNATIVES

Alternative	Benefit ($)	Cost ($)	Net Benefit ($)
A	100M	10M	90M
B	900K	1M	–100K
C	50M	25M	25M

alternative A or C, as both feature benefits that exceed costs. It could not, however, choose alternative B, as the costs exceed the benefits.

Arizona and Washington require both that the benefits exceed the costs and that the agency select the least costly or most cost-effective alternative. Generally, these two requirements will harmonize with one another: the agency must ensure not only that it is selecting the alternative with the lowest costs, but also that the alternative it selects creates benefits that exceed the costs. Occasionally, however, the two tests may be in some tension. For instance, using the examples in table 2, Arizona and Washington could arguably require that state agencies select alternative B because it features the lowest costs. Yet it also involves costs that exceed benefits, thereby violating the second relevant mandate. In this case, it is unclear whether they would require the state agencies to select alternative A, which is the second least costly option and features benefits that exceed costs, or require that the state agencies simply could not regulate because the least costly alternative does not produce positive net benefits.

To answer these questions, litigants in the 13 states that mandate the selection of one or more specific alternatives will need to begin bringing challenges to agency rules. Given the extremely aggressive review involved in federal cases, such as *Corrosion Proof Fittings*, there is every reason to believe that state courts will carefully scrutinize agency rulemakings in these states. Once these cases start to emerge, state courts will hopefully work out some of the seeming contradictions in the statutes. They could do this by reconciling the statutory mandates or by urging the state legislature to amend the statutes and provide greater clarity to state agencies and regulated parties.

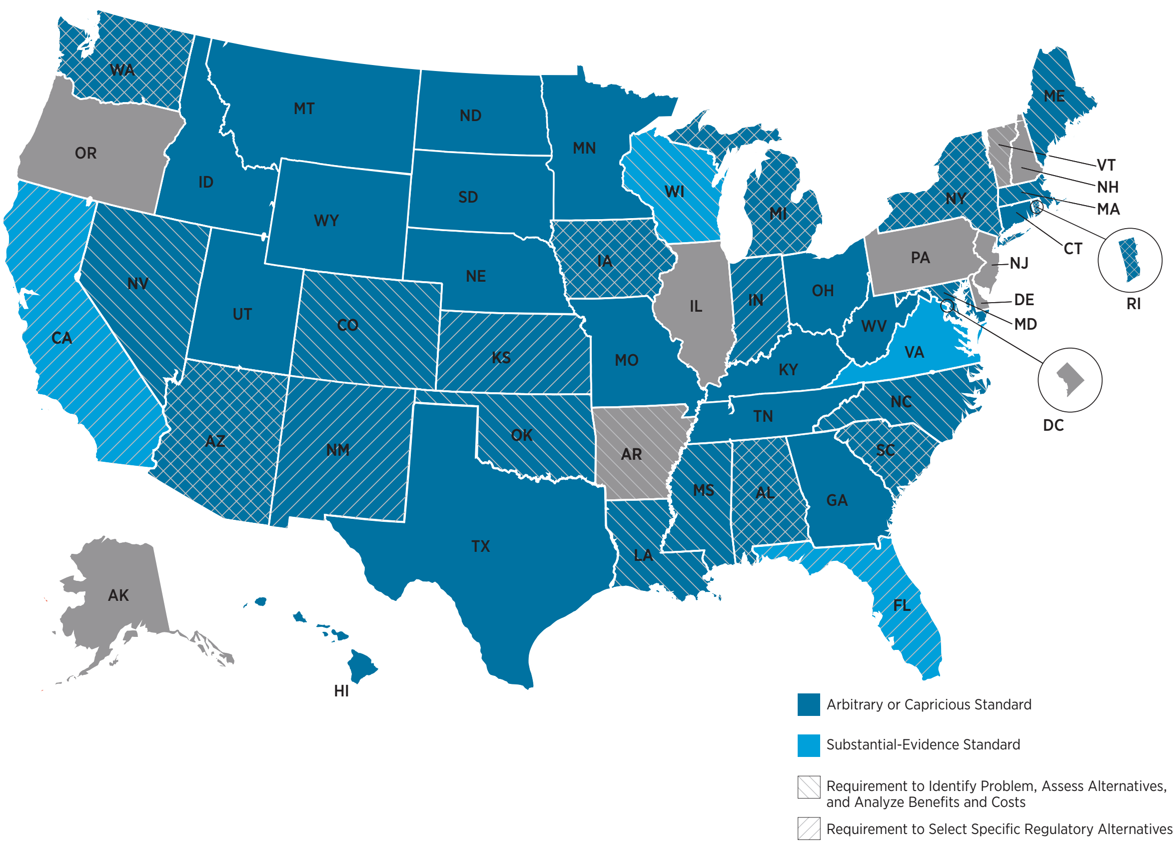
B. A Road Map to State APA Challenges to Economic-Analysis Requirements

In a majority of states, litigants wishing to challenge a rule issued by a state agency on the basis of shoddy economic analysis are at least as well positioned as litigants wishing to do the same at the federal level. Thirty-seven states have implemented the arbitrary or capricious standard for review of agency rules, and 32 of those states have adopted that standard in their state APAs. Another four states include a substantial-evidence standard in their state APAs, which federal courts have traditionally construed as being equivalent to the arbitrary or capricious standard.

Of these 41 states, the vast majority have adopted some form of statutory economic-analysis requirement, often in their state APA. In most cases, the economic-analysis standard is far more specific than that prevailing at the federal level. Unlike federal statutes that require economic analysis, many of which refer only to consideration of economic costs or the adoption of an economically feasible approach, state economic-analysis requirements tend to set forth the requirements of a complete regulatory impact analysis in explicit terms (e.g., identification of the problem, consideration of alternatives, analysis of benefits and costs, and selection of a particular alternative). Unfortunately, the state statutes are usually very vague as to what state agencies are expected to do with the analysis they produce. But, for the reasons explored in section II, the mere existence of an economic-analysis requirement should be viewed as tantamount to a requirement to at least consider a rule's economic effects.

Map 3 offers a summary of the judicial review and economic-analysis requirements of the 50 states, providing an overview of the states in which a judicial challenge to agency rules based on poor economic analysis might be especially attractive.

MAP 3. JUDICIAL REVIEW AND ECONOMIC-ANALYSIS REQUIREMENTS IN 50 STATES



As map 3 shows, a decent number of states (17) provide both for judicial review of agency rules and for all three elements of a complete regulatory impact analysis. Eight states provide for judicial review under the arbitrary or capricious standard, mandate all three elements of a complete regulatory impact analysis, and require agencies to select a particular regulatory alternative. Both types of states theoretically offer far more attractive opportunities for challenging agency rules for failure to conduct adequate economic analysis than does the federal government, which only occasionally provides for certain elements of a regulatory impact analysis via statute and almost never mandates the selection of a particular alternative.

Moreover, even in states that do not check all or most of the relevant boxes, litigants may still be able to mount challenges to rules based on poor economic analysis. For example, in states such as Delaware or Illinois, in which a statute mandates some form of economic analysis but neither the state APA nor another statute explicitly provides for review of agency rules, it seems improbable that a litigant simply cannot challenge rules issued by state agencies. It is more likely that some state statute other than the APA provides for review of rules, and it was not identified in the search conducted for this paper because the state uses a review standard other than arbitrary or capricious or substantial evidence.

In this light, litigants have a strong incentive to consider challenges to agency rules on the basis of inadequate economic analysis, except in those nine states that do not impose any form of economic-analysis requirement via statute (provided in section II). If and when litigants do so, the increased rate of challenges will necessarily impose certain costs. In addition to the direct costs of litigation, such challenges can distract agencies from other priorities. Moreover, as agency officials become fearful of losing in court, they may take an overly cautious approach when undertaking rulemaking. Many scholars have argued that the prevalence of aggressive judicial review at the federal level has resulted in a phenomenon known as *ossification*, causing a substantial slowdown in agencies' regulatory efforts as they attempt to insulate themselves from successful challenges in the future.[72]

The increased litigation costs, however, are outweighed by the substantial benefits of increased agency accountability. As Dr. Ellig showed, the large number of challenges to SEC rulemakings over the course of the 2010s led to a marked improvement in the quality of economic analysis that the agency under-

72. Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," *Duke Law Journal* 41, no. 6 (1992): 1385–462; and Paul R. Verkuil, "Rulemaking Ossification—A Modest Proposal," *Administrative Law Review* 47, no. 3 (1995): 453–59.

took.[73] Though both federal and state judges are generalists and lack the economic training that many rulemaking officials at federal agencies possess, they are capable of identifying obvious errors in agencies' economic analyses and holding agencies to account.[74] The mere threat of a court carefully parsing the record and sending a rule back to an agency, sometimes forcing it to redo months' or even years' worth of work, is often a sufficient incentive for agency officials to enhance the quality of their analyses and ensure that they are reaching well-informed and defensible conclusions.

Moreover, because rules often last for decades, the up-front costs associated with conducting a high-quality economic analysis, though not insubstantial, are worth it in the long term. Even assuming a rule produces large economic benefits on net (which most rules do not), the cost of delaying a rule by a few months is relatively small compared to the potentially enormous payoff associated with significantly reducing costs or further increasing benefits over the life of the regulation. And as agencies become better at conducting economic analysis, which is likely to be the case as they improve their skills in the face of potential litigation, the amount of time required to produce an analysis that passes muster will almost certainly decrease.

In addition to the practical benefits of improved agency economic analysis, more active judicial review enhances the accountability of the regulatory state. As the foregoing analysis has shown, 41 states have seen fit to enshrine some form of economic-analysis requirement in statutory law, often placing it in the state APA. The state legislatures that passed these laws presumably intended to do more than merely signal a commitment to cost-effective regulation. They intended agency officials to undertake rigorous economic analysis in order to ensure that the benefits of the rules they adopted justified the costs. When agency officials fail to conduct economic analysis or undertake low-quality analysis, they flout this legislative mandate.

States that have provided for judicial review of agency rules have signaled that they expect the courts to police agencies' work and ensure fidelity to the statutory requirements. In this sense, litigants who bring challenges to rules are engaged in a public service, calling upon the courts to hold agencies accountable to the legislative will.

Finally, though this paper has focused exclusively on judicial challenges to state agency rules based on existing statutory economic-analysis requirements, it

73. Ellig, "Improvements in SEC Economic Analysis."
74. Bull and Ellig, "Judicial Review of Regulatory Impact Analysis."

holds at least one lesson for state legislatures: if the intent is for agencies to perform high-quality economic analysis, then state legislatures should offer much clearer standards as to how these agencies should use the analyses they produce. Ideally, the statute would consist of a clear directive to select a particular option (and would not include two different, potentially contradictory standards, as is true in a handful of states).

But if a state legislature does not wish to direct an agency to select a particular alternative, it should at least explicitly state that it wishes the agency to consider the economic analysis it conducts. As explained in section II, a consideration requirement is probably implicit in the directive to conduct the analysis in the first place. Yet it is entirely possible that a state judge would interpret an economic-analysis requirement as a mere compliance exercise that an agency can discharge by doing a cursory analysis and then promptly ignoring it. In an even more likely scenario, a potential litigant might interpret the vague statutory language as foreclosing any sort of judicial challenge and decide against filing a lawsuit.

Consequently, the 41 state legislatures that have imposed economic-analysis requirements have every reason to amend their laws to state explicitly that the agencies must consider their analyses or, better still, must select a particular alternative. And on the off chance that a state legislature actually intends to create a mere compliance exercise, it too should amend its statutory economic-analysis requirement for clarity by explicitly stating that the analysis the agency conducts is *not* subject to judicial review. Though that approach would be very undesirable for all the reasons discussed above, it would at least have the virtue of clarity and avoid the possibility of courts and litigants wasting time on challenges the legislature did not intend to arise.

V. CONCLUSION

In Shakespeare's *Henry VI*, the character Dick the Butcher uttered the immortal lines, "the first thing we do, let's kill all the lawyers."[75] Dick's sentiment was not unique to Shakespeare's time; many individuals frustrated by the maddening process of litigation have felt a similar compulsion over the ensuing centuries.

Yet litigation, and the oft-maligned lawyers who bring it, can serve an invaluable purpose. In the case of judicial review of regulatory economic-analysis requirements, this purpose is especially significant. By policing agen-

75. William Shakespeare, *Henry VI*, Part II, 4.2.

cies' economic analysis, courts are ensuring that the agencies are putting their limited regulatory resources to the best possible use and not imposing unnecessary burdens on the economy. Courts are also defending the role of the legislature (setting the law) by ensuring that agency officials are actually observing the requirements imposed by statute.

At the federal level, the rise in number of such lawsuits has already had a positive effect: agencies are doing better economic analysis and thereby honoring the will of Congress, which imposed the analysis requirements in the first place. It has also, however, likely slowed down the rulemaking process. But, to use the language of economics, the benefits outweigh the costs: ensuring that rules are well-reasoned and cost-justified is worth the extra time it takes to get the analysis right. As noted above, requiring rigorous economic analysis may add months to the process of crafting a rule, but the rule will often stay in place for decades. Even if it is assumed that regulations always yield net social benefits (a highly questionable assumption), the costs of forestalling those benefits by a few months pale in comparison to the savings associated with minimizing regulatory costs over the course of the ensuing decades.

In this paper, I have sought to provide a road map for lawyers at the state level who might be considering bringing such challenges. Though they will largely be acting as pioneers, given the paucity of such litigation at the state level, they have every reason to be optimistic, because such suits have been very effective at the federal level and state statutes are usually far more amenable to such challenges.

Dick the Butcher's famous line has elicited both laughs and cheers across the ages. But some literary critics have interpreted it as implicit praise of the lawyer's role in society: would-be tyrants are always eager to overthrow the rule of law and the class of professionals tasked with defending it. In this sense, I hope that this paper has offered a valuable outline to those intrepid litigators who may choose to start bringing state-level challenges to agencies' economic analyses.

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