

## RESEARCH SUMMARY

# Bringing Successful Challenges at the State Level

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Federal regulations have been challenged successfully in court on the basis of flawed economic analysis. A similar opportunity exists in the states, according to Reeve T. Bull in “Battling Overregulation in State Courts.”

While federal courts have struck down regulations because of deficiencies in the underlying economic analysis, similar invalidation of state regulations is rare. Bringing such challenges in state courts can spur state agencies to conduct better analysis and promote accountability.

### **ENSURING STATE REGULATIONS DO MORE GOOD THAN HARM**

Regulations promulgated by state agencies have widespread effect. They control whether businesses can get necessary permits, professionals can obtain occupational licenses, and even if and how teachers can instruct their students. Economic analysis can help make sure these regulations are not more burdensome than necessary, yet state agencies often do a poor job of conducting such analysis.

This is so despite the fact that:

- the vast majority of states require their agencies to consider the economic effects of regulations;
- most of those states allow courts to review agency regulations; and
- state-level economic analysis requirements are significantly more comprehensive than those prevailing at the federal level.

One would thus expect numerous challenges to agency action based on shoddy economic analysis at the state level and relatively few at the federal level. But state-level challenges are far less common. Other than a couple of unremarkable exceptions, no state litigant has ever successfully challenged a rule as a result of deficient economic analysis.

### **STATES FOLLOWING THE FEDERAL LEAD**

Challenges to federal regulations have become one of the more effective routes to overturning agency rules. Over the past four decades, litigants have brought dozens of such challenges. In many cases, this has led to an appreciable improvement in the quality of analysis conducted by federal agencies.

The lack of similar precedents at the state level will stand as a hurdle to the first wave of litigants. Pioneering litigants nonetheless can cite the relevant federal cases as persuasive precedent for supporting state-level suits. And once a challenge in a given state succeeds, it will encourage other litigants to follow.

## **KEY TAKEAWAY**

The prospects for successful challenges to state regulations based on inadequate economic analysis are far greater than the sparse record suggests. Indeed, these types of challenges should be even more successful in state courts than they have been in federal courts. To the extent that such lawsuits begin to emerge, state regulators will have a powerful incentive to ensure they are producing the best possible economic analysis.