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James Broughel

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The Mighty Waves of Regulatory Reform: Regulatory Budgets and the Future of Cost-Benefit Analysis

*James Broughel**

ABSTRACT

In the past 70 or 80 years, there have been three “waves” of reforms to the process of creating and managing U.S. federal and state regulations. The first wave began in 1946 with the passage of the federal Administrative Procedure Act, after which states went on to pass and formalize their own administrative procedures. The second wave began decades later in the mid-1970s, ushering in the era of cost-benefit analysis reforms for regulations. This article focuses on the third wave of regulatory reforms that appears to be sweeping the nation and includes a prediction that the next wave may include a return to some unsettled issues from the past.

The current wave consists of efforts to manage regulatory output under budget or inventory systems for regulations. States like Virginia and Idaho appear to be making the most significant headway as part of the current wave, although the federal government is engaged in a similar effort. The article next focuses on the future of regulatory reform, predicting that economists will revisit the theoretical foundations of cost-benefit analysis, the analytical tool used to evaluate regulations and their effects. Although academia will need to play a constructive role in this process, the states and federal independent agencies could also play a role by experimenting with regulatory institutions and, indeed, experimenting with different methods and modes of analysis.

* Senior Research Fellow at the Mercatus Center at George Mason University. Broughel received his PhD in economics from George Mason University in 2017. He is also an adjunct professor in the law school at George Mason University.

I. INTRODUCTION

The modern era of administratively-driven governance began during the Progressive Era but took its modern form during the New Deal period in the 1930s and early 1940s. In the 70 or 80 years that have elapsed since then, there have been three “waves” of reforms to the process of creating and managing U.S. federal and state regulations. The first wave began in 1946 with the passage of the federal Administrative Procedure Act (“APA”).¹ This law set up a formal process by which federal regulatory agencies promulgate rules, including requirements for public participation before rules are finalized and judicial oversight of regulatory actions.² After 1946, states went on to pass and formalize their own administrative procedures, usually in the form of an act that looked quite similar to the APA.³ Solidifying these formal administrative procedures constituted the first wave of U.S. regulatory reforms.

The second wave of reforms began decades later in the mid-1970s, continued on through the 1980s and, to some extent, continues today.⁴ This was, and is, the era of cost-benefit analysis (“CBA”) reforms for regulations.⁵ In 1981, President Ronald Reagan issued an executive order that formally required executive branch regulatory agencies to adopt CBA for so-called “major regulations.”⁶ However, this kind of analysis had already been used less formally in the federal government due to various executive orders and policies imposed by previous presidents.⁷ In the years since Reagan’s executive order, the vast majority of states have adopted similar requirements regarding CBA for regulations, at least nominally.⁸ However, this state-level CBA tends to be fairly incomplete and not particularly sophisticated.⁹

This article focuses on the third wave of regulatory reforms that is sweeping the nation and includes a prediction that the next wave may include a return to some unsettled issues from the past. The current wave consists of efforts to manage regulatory output under budget or inventory systems for regulations. These efforts often come under the heading of regulatory reduction or red tape reduction

1. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

2. *Id.*

3. A list of years when states passed APA laws can be found in Rui J. P. de Figueiredo Jr. & Richard G. Vanden Bergh, *Protecting the Weak: Why (and When) States Adopt an Administrative Procedure Act* (Oct. 2001) (unpublished manuscript) (on file with Haas School of Business, University of California at Berkeley).

4. For example, New Mexico did not require cost-benefit analysis until 2018. *See* Directing Boards, Commissions, and Agencies to Implement Rulemaking Reforms, N.M. Exec. Order No. 2018-055 (Dec. 18, 2018).

5. On the use of cost-benefit analysis in the federal government prior to 1981, *see* Jim Tozzi, *OIRA’s Formative Years: The Historical Record of Centralized Review Preceding OIRA’s Founding*, 63 Admin. L. Rev. 37, at 39 (2011).

6. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

7. *See, e.g.*, Exec. Order No. 11,821, 3 C.F.R. § 926 (1975); Exec. Order No. 11,949, 3 C.F.R. § 161 (1977); and Exec. Order No. 12,044, 3 C.F.R. § 152 (1978).

8. JASON A. SCHWARTZ, 52 EXPERIMENTS WITH REGULATORY REVIEW: THE POLITICAL AND ECONOMIC INPUTS INTO STATE RULEMAKING 126–40 (2010).

9. For example, a report by the Pew Foundation tracked cost-benefit analyses produced in the states, and none of the analyses deemed sophisticated enough to merit counting in the study were related to rulemaking, even though many states require regulatory CBA. *See* PEW CHARITABLE TRS., STATES’ USE OF COST-BENEFIT ANALYSIS: IMPROVING RESULTS FOR TAXPAYERS 16 (2013).

initiatives, but they also constitute efforts to measure, track, and control aggregate regulation levels.

It seems likely that these reforms have been set up, at least in part, to address the slow economic growth the United States has been experiencing in recent years, which may be a result of the near-relentless growth of regulation over the last half-century. Part II of this article will place the current wave of regulatory reforms in the context of a period of slow economic growth coinciding with an ever-expanding regulatory state.

Part III will focus on states like Virginia and Idaho that appear to be making the most significant headway as part of the current wave; however, the federal government is also engaged in a similar effort and other states, like Ohio, appear to be close behind. Because these efforts are ongoing, their permanence, durability, and ultimate success remain unclear. But the sheer momentum behind such efforts makes them notable. The current wave of reforms is also largely a partisan effort, advanced by Republicans, which raises additional questions about the durability of these reforms.¹⁰ It is worth noting, however, that the two previous waves of reforms also began as largely partisan efforts.¹¹ If history is any guide, once these regulatory budgets are adopted, they may come to enjoy support from all sides of the political spectrum.

Part IV of this article focuses on the future of regulatory reform. Although there are numerous ways in which regulatory policy could be improved, the focus here will be on revisiting the foundations of CBA, the analytical tool used to evaluate regulations and their impacts. While the implementation of this tool in regulatory policy constituted the second wave of regulatory reforms, as discussed above, critical methodological problems with CBA remain unresolved by economists and are likely to be revisited as part of the future push for reform.¹² Addressing these problems will become increasingly urgent if CBA is to maintain a prominent place in regulatory policy and maintain credibility among economists, policymakers, and, most importantly, the public.

Although academia will need to play a constructive role in this process, the states and federal independent agencies could also play a role by experimenting with regulatory institutions and different methods and modes of analysis. Part V of this article will review several interesting state regulatory analysis structures that differ significantly from the federal structure, which other jurisdictions may wish to emulate as they consider how to set up systems to analyze, review, and manage regulations. Part VI concludes.

10. This is especially true of executive-led efforts initiated by governors or the president, which could be reversed through simple executive action at a later time. By contrast, reforms initiated legislatively are likely to have more permanence as they are harder to unwind.

11. For a description of the political atmosphere that surrounded the creation of the Administrative Procedure Act, see McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 182 (1999).

For discussion of how CBA—a tool initially viewed as deregulatory in nature—came to be accepted by many progressives, see RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008).

12. The most obvious of which is that it is unclear what cost-benefit is measuring.

II. REGULATING IN AN ERA OF SLOW ECONOMIC GROWTH

Before delving into the nitty-gritty of regulatory reform, it is worth highlighting the importance of regulation and why excessive regulation in particular can be problematic. We live in an era of slow economic growth,¹³ at least relative to the 20th century. The following table presents compound annual growth rates of real gross domestic product (“GDP”) and real GDP per capita in the United States for every decade since 1950.¹⁴ A decline is evident—the United States has experienced slower growth in the two most recent decades relative to the second half of the 20th century in terms of both GDP and GDP per capita growth.

Compound Annual Growth Rates, by Decade

	1950s	1960s	1970s	1980s	1990s	2000s	2010s
Real GDP (%)	3.60	4.27	3.16	3.32	3.44	1.74	2.20
Real GDP per Capita (%)	1.80	2.96	2.09	2.35	2.19	0.80	1.50

Note: Data in the “2010s” column are for the 2010–2018 period. Author’s calculations are based on data from the US Bureau of Economic Analysis, “Real Gross Domestic Product [GDPC1]” and “Real Gross Domestic Product Per Capita [A939RX0Q048SBEA],” retrieved from FRED, Federal Reserve Bank of St. Louis.

Of course, GDP is not the same as human fulfillment.¹⁵ Some benefits of regulation do not show up in GDP. Nonetheless, a rising GDP is a reflection of a nation’s wealth increasing—more income is generated each year as national wealth increases—and more wealth is consistent with more opportunity, more jobs, and a better-educated and often healthier and safer workforce.¹⁶ Increased income may even be consistent with more happiness.¹⁷ GDP may not be a perfect measure of a nation’s prosperity, but it may very well be one of the best ones we currently have.

Consider, for example, that if per capita income this century had continued to grow at the historical rate from the second half of the 20th century (2.28%), rather than at the rate at which it did grow (1.11%), GDP per capita would have been

13. See ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR 2* (2016); see also TYLER COWEN, *THE GREAT STAGNATION: HOW AMERICA ATE ALL THE LOW-HANGING FRUIT OF MODERN HISTORY, GOT SICK, AND WILL (EVENTUALLY) FEEL BETTER* (2011).

14. Gross domestic product is the dollar value of all final goods and services produced within a country’s borders in a single year. Per capita GDP, meanwhile, is simply GDP divided by the number of people in the population, which corresponds with a measure of the average income in a country during a particular year. “Real” GDP or GDP per capita simply refers to the fact that values have been adjusted for inflation to account for a changing price level across time.

15. JOSEPH E. STIGLITZ ET AL., *MISMEASURING OUR LIVES: WHY GDP DOESN’T ADD UP 4* (2010).

16. Aaron Wildavsky, *Richer Is Safer*, 37 *FIN. ANALYSTS J.* 19, 27 (1981).

17. Betsey Stevenson & Justin Wolfers, *Subjective Well-Being and Income: Is There Any Evidence of Satiation?* 103 *AM. ECON. REV.: PAPERS & PROCEEDINGS* 598, 598 (2013).

\$69,769 in 2018 instead of \$56,717 (in 2012 dollars).¹⁸ This represents a difference of more than \$13,000 for every individual in the United States. At some point, an economy that grows more quickly than another economy is so much richer in terms of wealth, technology, and opportunity that one can reasonably say that it is objectively better off in terms of human well-being.¹⁹

A decline in economic growth is also evident at the state level during the first two decades of this century. For example, according to the U.S. Bureau of Economic Analysis (“BEA”), Missouri real GDP grew at a compound annual rate of 0.9% from 2000 to 2010.²⁰ From 2010 to 2017, the corresponding rate was just 0.3% annually.²¹

The noticeable slowdown in economic growth, at both the national level and the state level, is a major problem that should be a top concern for policymakers. Even seemingly small differences in growth rates—such as tenths of a percentage point—can add up to billions or even trillions of dollars over time because of the compounding nature of economic growth. A state growing by 1% per year (roughly Missouri’s growth rate in 2017) will take about 70 years to double the size of its economy.²² If this rate can be increased to 2% annual growth (roughly the national rate in recent years), the doubling time falls to 35 years, which is half as long. In other words, by the end of a typical American life span, the economy would be double the size under the 2% growth scenario versus the 1% scenario. At 3% annual growth, the doubling time falls to 24 years. At this rate, the economy could double three times in an ordinary American’s life span. The end result would be an economy that is four times larger at the end of an average American’s life than it would be under the 1% scenario.²³

It is difficult to conceive of what the U.S. economy would look like if it were two to four times as large as it is today; the benefits in terms of technology, wealth, and opportunity are likely to stretch the bounds of the imagination. Furthermore, growth in the range of 3-4%, although ambitious, is not out of reach. Tennessee’s economy grew 2.8% in 2017, a rate nearly two percentage points higher than Missouri’s; Oregon’s economy grew 3.6% in 2017.²⁴

18. Author’s calculation based on U.S. Bureau Econ. Analysis, *Real Gross Domestic Product Per Capita*, FRED, FED. RES. BANK ST. LOUIS (Sept. 26, 2019), <https://fred.stlouisfed.org/series/A939RX0Q048SBEA>.

19. This is an important point because economists have long struggled with how to connect measurable variables like economic growth to human well-being. See, e.g., TYLER COWEN, *STUBBORN ATTACHMENTS: A VISION FOR A SOCIETY OF FREE, PROSPEROUS, AND RESPONSIBLE INDIVIDUALS* (2018).

20. *Missouri BEARFACTS*, U.S. BEA (Sep. 2018), <https://apps.bea.gov/regional/bearfacts/statebf.cfm>.

21. U.S. Bureau Econ. Analysis, *Real Gross Domestic Product for Missouri*, FRED, FED. RES. BANK ST. LOUIS (May 14, 2019), <https://fred.stlouisfed.org/series/MORGSP>.

22. See *Missouri BEARFACTS*, *supra* note 20; James Broughel, *Small Differences in Growth Rates Matter for Illinois’s Future*, MERCATUS CTR. GEORGE MASON UNIV. (July 27, 2017), <https://www.mercatus.org/publications/illinois-economic-growth>.

23. According to the Centers for Disease Control and Prevention, life expectancy at birth was 78.6 years in 2016. See NAT’L CTR. FOR HEALTH STATS., CTR. FOR DISEASE CONTROL & PREVENTION, *Health, United States, 2017*, tbl.15 (2017), <https://www.cdc.gov/nchs/data/abus/2017/015.pdf>.

24. U.S. DEP’T OF COM., U.S. BUREAU ECON. ANALYSIS, *PER CAPITA PERSONAL INCOME: TENNESSEE* (Sept. 25, 2018); U.S. DEP’T OF COM., U.S. BUREAU ECON. ANALYSIS, *PER CAPITA PERSONAL INCOME: OREGON* (Sept. 25, 2018).

At the same time that growth has been slowing, regulation has been increasing. Over the last 70 years, federal regulation in the United States has increased dramatically by virtually every measure. According to the Office of the Federal Register, there were fewer than 10,000 pages in the U.S. *Code of Federal Regulations* in 1950, compared with more than 185,000 in 2018.²⁵ Regulatory agencies had 57,109 employees in 1960, compared with 277,163 in 2017.²⁶ Regulator budgets have increased in real terms from \$3 billion in 1960 to \$58 billion in 2017 (in 2009 dollars).²⁷ In 1970, there were roughly 406,000 regulatory restrictions in the U.S. *Code of Federal Regulations*;²⁸ by 2017 that number had risen to nearly 1.09 million.²⁹

The states also have sizable regulatory codes. As of 2017, Missouri had 113,000 regulatory restrictions on the books.³⁰ Much of that regulation comes from just a handful of regulatory agencies, such as the state Department of Natural Resources; the Department of Insurance, Financial Institutions and Professional Registration; and the Department of Health and Senior Services.³¹

These two trends—rising regulation and a slowdown in growth—are important because there is strong evidence that slower growth and higher levels of regulation are connected. Empirical academic research suggests that regulation slows economic growth³² and negatively affects the factors that contribute to growth, such as investment, productivity, and innovation.³³ Some progress has been made to reduce the buildup of unnecessary regulations at the state level in recent years (including in Missouri),³⁴ and reforms at the federal level are also occurring.³⁵ But these ef-

25. OFFICE OF THE FED. REGISTER, FEDERAL REGISTER STATISTICS: CODE OF FEDERAL REGULATIONS TOTAL PAGES AND VOLUMES 1938-2018, <https://www.federalregister.gov/uploads/2019/07/pagesPublished2018-1.pdf> (last visited May 3, 2019).

26. Susan Dudley & Melinda Warren, Regulators' Budget: More for Homeland Security, Less for Environmental Regulation: An Analysis of the U.S. Budget for Fiscal Years 1960 through 2018 (2017), regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/2018_Regulators_Budget-2017-07-18.pdf.

27. *Id.*

28. Regulatory restrictions are instances of the terms “shall,” “must,” “may not,” “prohibited,” and “required.”

29. James Broughel & Jonathan Nelson, *A Snapshot of California Regulation in 2019*, MERCATUS CTR. AT GEORGE MASON UNIV. (July 3, 2019), <https://www.mercatus.org/publications/regulation/snapshot-california-regulation-2019>.

30. James Broughel et al., MERCATUS CTR. AT GEORGE MASON UNIV., *A Snapshot of Missouri Regulation in 2017*, (July 12, 2017), <https://www.mercatus.org/publications/snapshot-missouri-regulation>.

31. *Id.*

32. See, e.g., John W. Dawson & John J. Seater, *Federal Regulation and Aggregate Economic Growth*, 18 J. ECON. GROWTH 137, 137 (2013); Bentley Coffey et al., *The Cumulative Cost of Regulations* 4 (Apr. 2016) (working paper) (on file with Mercatus Center at George Mason University); and Simeon Djankov et al., *Regulation and Growth*, 92 ECON. LETTERS 395, 395 (2006).

33. See Alberto Alesina et al., *Regulation and Investment*, 3 J. EUR. ECON. ASS'N 791, 791 (2005); Renaud Bourles et al., *Do Product Market Regulations in Upstream Sectors Curb Productivity Growth? Panel Data Evidence for OECD Countries*, 95 REV. ECON. & STATS. 1750, 1750 (2013); Chiara Franco et al., *Product Market Regulation and Innovation Efficiency*, 45 J. PRODUCTIVITY ANALYSIS 299, 299 (2016).

34. For example, the No Mo Red Tape initiative was a priority of the administration of Missouri Governor Eric Greitens. See Hailey Hofner, *Greitens Program to 'Cut Red Tape' Produces Reviews of State Regulations*, MO. BUS. ALERT (Jan. 15, 2019), <http://www.missouribusinessalert.com/government/102084/2019/01/15/greitens-program-to-cut-red-tape-produces-reviews-of-state-regulations/>.

forts may not be enough to return growth rates to historical levels. This is especially important with respect to federal regulations because the number of federal requirements far exceeds state regulations.³⁶ In some cases, a single federal agency targets tens of thousands of restrictions at state businesses all by itself, which can be more than all the restrictions found in an entire state's regulatory code.³⁷ As just one example, the Environmental Protection Agency is estimated to impose more than 80,000 restrictions on the chemical manufacturing industry alone,³⁸ whereas some states, such as Montana, have as few as 60,000 restrictions in their rulebooks.³⁹

III. THE CURRENT WAVE OF REGULATORY REFORM: CUTTING RED TAPE WITH REGULATORY BUDGETS

Given disappointing economic growth in recent years, combined with the empirical observation that regulation has been increasing for decades (both of which were described in Part II), it is not surprising that governments are looking to regulatory reform to boost growth. Researchers at the Mercatus Center at George Mason University have estimated that federal regulation is slowing national economic growth by about 0.8 percentage points a year.⁴⁰ Lowering growth by a little under one percentage point may not sound significant. However, it means that, had regulation levels been capped in the United States in 1980,⁴¹ 2012 GDP would have been *\$4 trillion larger*, amounting to \$13,000 in extra income for each American.

Other studies estimate even larger effects than this,⁴² and state regulations are an added burden layered on top of the one imposed by the federal regulatory scheme. State and federal governments continue to struggle to rein in the explosive growth of the administrative state over the last 70-plus years, but two states' efforts in particular are worth highlighting for their innovative attempts to curb regulatory growth: Virginia and Idaho.

35. See Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

36. See *State RegData*, QUANTGOV, <http://www.quantgov.org/state-regdata> (last visited Oct. 14, 2019); see also Broughel and Nelson, *supra* note 29.

37. See *State RegData*, QUANTGOV, <http://www.quantgov.org/state-regdata> (last visited Oct. 14, 2019); see also *RegData U.S.*, QUANTGOV, <https://quantgov.org/regdata-us/> (last visited Nov. 2, 2019).

38. See *Federal Regulation and State Enterprise Index: Missouri*, QUANTGOV 2–3, <https://quantgov.org/50states/missouri/> (last visited Feb. 25, 2019).

39. James Broughel, *A Snapshot of Montana Regulation in 2019*, MERCATUS CTR. AT GEORGE MASON UNIV. (May 2, 2019), <https://www.mercatus.org/publications/regulation/snapshot-montana-regulation-2019>.

40. Coffey et al., *The Cumulative Cost of Regulations*, *supra* note 32.

41. Note that capping regulation at a particular year's level is not the same as no new regulation after that year. New regulation would be allowed, but old regulations would have to be removed to allow for new regulations.

42. For example, Dawson and Seater estimate that GDP in 2011 would have been \$39 trillion larger had regulation been capped at 1949 levels. See Dawson & Seater, *supra* note 32, at 160.

A. Virginia

In 2018, Virginia passed the Regulatory Reduction Pilot Program (“RRPP”).⁴³ This legislation was quite remarkable for two reasons. First, in an era generally known for political polarization, it passed with overwhelming bipartisan support.⁴⁴ The final bill sailed nearly unanimously through a legislature narrowly controlled by Republicans and was signed into law by Governor Ralph Northam, a Democrat.⁴⁵ Second, the RRPP created one of the first state regulatory budgets in the United States.⁴⁶

Virginia’s new law likely achieved such consensus because its initial focus is on cutting occupational licensing requirements, a form of regulation that both liberals and conservatives tend to disfavor.⁴⁷ There is widespread agreement among economists in particular that licensing regulations often limit upward mobility, harm traditionally disadvantaged groups, and stifle competition.⁴⁸ Furthermore, by focusing reform on occupational licensing in general, rather than on specific professions’ licenses, the effort may face less concentrated opposition from regulated professionals, who often hinder such reforms.⁴⁹

The Virginia law includes several key elements. First, it tasks two state agencies—the Department of Criminal Justice Services and the Department of Professional and Occupational Regulation—with producing a baseline count of their regulations and regulatory requirements.⁵⁰ This process establishes an inventory of the agencies’ requirements. As of late 2018, the agencies began reporting their counts, finding 6,226 requirements between them.⁵¹ Roughly 80% of these are discretionary, meaning the requirements are not required by law, so the relevant

43. H.B. 883, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

44. James Broughel, *A Reform That Offers Hope for Centrists*, WASH. POST (Mar. 14, 2018), <https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2018/03/14/a-reform-that-offers-hope-for-centrists/>.

45. The bill passed 40 Yea votes to 0 Nays in the Senate and 96 to 3 in the House. *Votes: VA HB883*, LEGISCAN, <https://legiscan.com/VA/votes/HB883/2018> (last visited May 14, 2019).

46. The federal government has also been experimenting with regulatory budgeting. See Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

47. James Broughel, *Licensing, Justice Reform Will Aid Virginia’s Poorest*, CHARLOTTESVILLE DAILY PROGRESS (Mar. 25, 2018), https://www.dailyprogress.com/opinion/opinion-commentary-licensing-justice-reform-will-aid-virginia-s-poorest/article_50fb837e-2ed5-11e8-98b9-b32062f3608d.html.

48. See WILLIAM MELLOR & DICK M. CARPENTER II, *BOTTLENECKERS: GAMING THE GOVERNMENT FOR POWER AND PRIVATE PROFIT* xi (2016); U.S. COUNCIL OF ECONOMIC ADVISERS, DEPTS. OF TREASURY & LABOR, *OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS* 4 (July 2015); Matthew D. Mitchell, MERCATUS CTR. AT GEORGE MASON UNIV., *Occupational Licensing and the Poor and Disadvantaged* (Sept. 2017), <https://www.mercatus.org/publications/study-american-capitalism/occupational-licensing-and-poor-and-disadvantaged>; Patrick A. McLaughlin et al., MERCATUS CTR. AT GEORGE MASON UNIV., *The Effects of Occupational Licensure on Competition, Consumers, and the Workforce* (Nov. 2017), <https://www.mercatus.org/publications/study-american-capitalism/effects-occupational-licensure-competition-consumers-and>.

49. For example, many occupational licensing requirements exist to protect established interests rather than to serve the public interest. See MELLOR & CARPENTER, *supra* note 48.

50. H.B. 883, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

51. See Letter from Aubrey L. Layne Jr., Va. Sec’y of Fin., to Members of the Va. House of Delegates & Senate 2 (Oct. 22, 2018), available at <https://gallery.mailchimp.com/e8c66a6ccb254adb5e21e438b/files/7ba34af5-8103-436d-b2a8-19e7aedbf20d/20181025105757192.pdf>.

agency has the ability to remove them.⁵² Of the 4,947 discretionary requirements, the agencies are required to cut 25% of them.⁵³ This amounts to roughly 1,200 requirements that the agencies must eliminate by the end of 2021. If they fail to achieve the reduction, alternative measures will be considered; for example, the implementation of a policy that mandates the repeal, replace, or streamlining of two requirements for every one requirement added.⁵⁴

Perhaps more importantly, by July 1, 2020, all executive branch agencies subject to the state Administrative Process Act will have to produce a baseline regulatory catalog and report their catalog data.⁵⁵ At that point, it is quite possible that the pilot program will be expanded to other, and perhaps even all, state regulatory agencies. It remains unclear whether reporting will continue beyond the pilot phase or whether additional reductions will be required beyond the two initial pilot agencies. However, if the Virginia reform is successful at meeting the reduction targets—and it seems to be on track so far—while also maintaining high levels of public health and safety, it seems likely the new regulatory budget could become a permanent feature of Virginia’s regulatory process.

Notably, in 2018, CNBC named Virginia one of America’s best states for business, citing the new regulatory reduction law as a major reason for Virginia’s strong improvement in the rankings from the previous year.⁵⁶ Given this positive response from the media, it is not surprising that other states are considering emulating Virginia’s reforms.⁵⁷ For example, Ohio passed legislation in 2019 that, like Virginia, would create an inventory of regulatory restrictions across state departments, and added an additional mandate that two or more restrictions be removed for each new one added until mid-2023.⁵⁸

B. Idaho

Idaho is also in the early stages of enacting a regulatory budget. Shortly after taking office in January of 2019, Governor Brad Little made regulatory reform one of his top priorities by signing two executive orders targeting regulatory burdens.⁵⁹ Little’s Executive Order 2019-02 established a policy whereby for each new regulation added, two have to be identified for elimination or significant sim-

52. *Id.* at 1.

53. Technically, the law requires agencies to identify discretionary and nondiscretionary requirements, and the reduction target of 25 percent is set based on the overall count. In practice, the two agencies have set the reduction goal based on discretionary requirements only. H.B. 883, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

54. *Id.*

55. *See id.*

56. Jeff Clabaugh, *Virginia Ranks 4th Among CNBC’s Best States for Business*, WTOP (Jul. 10, 2018), <https://wtop.com/business-finance/2018/07/virginia-ranks-no-4-on-cnbc-best-states-for-business/>.

57. *See* H.B. 995, 2019 Leg., Reg. Sess. (Pa. 2019). The Pennsylvania bill, known as the *Fighting Chance Act*, is modeled after Virginia’s regulatory reforms.

58. *See* H.B. 166, 2019 Leg., Reg. Sess. § 121.95(F) (Ohio 2019).

59. *See Governor Little Signs Two New Executive Orders Reducing Regulatory Burdens on Idahoans*, IDAHO OFFICE OF THE GOVERNOR (Jan. 31, 2019), <https://gov.idaho.gov/pressrelease/governor-little-signs-two-new-executive-orders-reducing-regulatory-burdens-on-idahoans/>.

plification.⁶⁰ As in Virginia, policymakers in Idaho are also estimating a baseline count of regulations. The order identifies a total of 8,200 pages and 72,000 restrictions in the Idaho Administrative Code.⁶¹ These estimates provide a benchmark against which future cuts in regulation can be measured. The order also establishes clear lines of responsibility, designating rules-review officers within state agencies and tasking the state Division of Financial Management (“DFM”) with regular reporting on the effort.⁶² Presumably, the DFM will also review agency rules and repeal activity before rules are formally proposed, thereby ensuring that the one-in, two-out policy is followed.

Signed on the same day as Executive Order 2019-02, Executive Order 2019-01 implemented occupational licensing reforms by establishing sunrise and sunset reviews for Idaho state licenses.⁶³ The actions of both Virginia and Idaho highlight how states sometimes pair specific targeted regulatory reforms, like occupational licensing or criminal justice reform, with broader regulatory process reforms like regulatory budgets. Such piggybacking of broad-based regulatory reforms with consensus reforms may be a wise strategy. It suggests that relatively uncontroversial reforms may be a useful launching pad for more general reforms that may be perceived as somewhat controversial on their own. Kicking off broader reforms with pilot programs may also help produce new knowledge by allowing experimentation to occur before reforms are implemented more broadly.

Several elements of Idaho’s reform effort are notable, as they have been identified as critical to the success of regulatory reduction efforts in other jurisdictions—most notably in Canada.⁶⁴ These elements include a baseline count of the total amount of regulations in place, a process by which to achieve a meaningful reduction (one in, two out), oversight mechanisms, and regular reporting.⁶⁵

Interestingly, due to the somewhat unusual regulatory process in Idaho, Governor Little was also given a unique opportunity to replace the entire Idaho Administrative Code with a new version more to his administration’s liking. The Idaho legislature is required to pass a rule reauthorization bill each year, or else all regulations in its code expire.⁶⁶ The legislature failed to pass the bill when it ended its session in April of 2019.⁶⁷ Therefore, all regulations on the books were set to expire on July 1, 2019 unless passed as emergency regulations. This opportunity

60. Alternatively, the agency will have to explain why this is impossible. See Idaho, Exec. Order No. 2019-02 (Jan. 21, 2019), <https://gov.idaho.gov/wp-content/uploads/sites/74/2019/01/eo-2019-02.pdf>.

61. *Id.*

62. *Id.*

63. Idaho, Exec. Order No. 2019-01 (Jan. 31, 2019), <https://gov.idaho.gov/wp-content/uploads/sites/74/2019/01/eo-2019-01.pdf>.

64. Laura Jones, *Cutting Red Tape in Canada: A Regulatory Reform Model for the United States?*, MERCATUS CTR. AT GEORGE MASON UNIV. (Nov. 11, 2015), <https://www.mercatus.org/publications/regulation/cutting-red-tape-canada-regulatory-reform-model-united-states>.

65. See James Broughel, *A Step-by-Step Guide to Using Mercatus Tools to Reduce State Regulation Levels*, MERCATUS CTR. AT GEORGE MASON UNIV. (Apr. 11, 2017), <https://www.mercatus.org/publications/reduce-state-regulations-with-mercatus-tools>; James Broughel & Laura Jones, *Effective Regulatory Reform: What the United States Can Learn from British Columbia*, MERCATUS CTR. AT GEORGE MASON UNIV. (Sept. 17, 2018), <https://www.mercatus.org/publications/regulation/effective-regulatory-reform>.

66. Idaho Code § 67-5292 (2019).

67. Keith Ridler, *Idaho Governor has Unfettered Chance to Cut State Rules*, ASSOCIATED PRESS (April 17, 2019), <https://www.apnews.com/3c58858586d9454bbe53a575f2bb82c0>.

allowed the administration to effectively repeal and replace the entire Idaho Administrative Code.

Before the Idaho legislature opted to let the state code expire, the Little administration had to justify any deregulatory action by issuing a new regulatory action.⁶⁸ But with the entire code set to sunset, the administration had to justify any regulations that it wanted to *keep* by formally issuing a new rule, which reversed the burden of proof.⁶⁹ The results are striking. At the end of June 2019, the Little administration announced it would allow 20% of all rule chapters and 900 pages (out of 8,200) to expire on the July 1 deadline.⁷⁰ As of July 2019, the administration expected to eliminate or significantly simplify 55% to 60% of all state regulations by the end of the year.⁷¹

This situation highlights the potential power of sunset provisions built into regulatory codes. Sunsets can not only return some accountability to the legislature by forcing lawmakers to vote on rules; sunsets can also be used to trigger retrospective review and evaluation of existing rules by forcing them back through the rulemaking process, to be justified anew. Another notable example comes from Rhode Island, a state that forced a regulatory reset by setting a one-time expiration date for its entire code, in this case for the purpose of moving rules to an online system and also as part of a streamlining effort.⁷² In the process, it eliminated 31% of the state's rule volume.⁷³

The Idaho reform is truly innovative and should be watched closely going forward. While there is the danger that Idaho's regulatory reset could unleash uncertainty in the marketplace, so far this does not appear to have happened. Meanwhile, the reform also has the potential to spur reductions in regulatory burdens that would simply be unachievable in more conventional settings.

C. Other Promising Efforts

President Donald Trump's administration has also been experimenting with a regulatory budget in recent years.⁷⁴ The federal regulatory budget is more traditional than those the states are establishing because it relies on cost estimates.⁷⁵ In other words, the administration allocates a limited amount of cost burden to agencies each year, and they are not allowed to impose more than this amount on the public with their regulations. By contrast, the states mentioned above are limiting

68. James Broughel, *Idaho Repeals Its Regulatory Code*, MERCATUS CTR. AT GEORGE MASON UNIV.: THE BRIDGE (May 9, 2019), <https://www.mercatus.org/bridge/commentary/idaho-repeals-its-regulatory-code>.

69. *Id.*

70. Press Release, Governor Brad Little, How Idaho Ushered In the Largest Regulatory Cuts in State History (Jun. 19, 2019), <https://gov.idaho.gov/pressrelease/opinion-how-idaho-ushered-in-the-largest-regulatory-cuts-in-state-history/>.

71. Press Release, Governor Brad Little, Idaho Pursues Further Cuts to State Regulations (July 19, 2019), <https://gov.idaho.gov/pressrelease/idaho-pursues-further-cuts-to-state-regulations/>.

72. See Press Release, Governor Marie Raimondo, Governor Signs Bill to Improve Rhode Island's Regulatory Climate for Businesses (July 1, 2016), <https://www.ri.gov/press/view/34428>; S. 3015, 2016 Leg., Reg. Sess. (R.I. 2016).

73. Press Release, Governor Marie Raimondo, Governor Raimondo Announces Largest Successful Regulatory Reform Effort in State History (Oct. 15, 2018), <https://www.ri.gov/press/view/34428>.

74. See Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

75. Historically, placing limits on regulatory cost has been the traditional way regulatory budgets have been framed. See, e.g., S. 51, 96th Cong. (1979).

the number of regulatory requirements or restrictions agencies can impose. The federal regulatory budget is also an incremental budget, setting annual allowances for new regulations only,⁷⁶ whereas the Virginia budget is based on regulatory totals, which is more comprehensive.

In theory, basing agency allocations on regulatory cost makes sense because different individual restrictions or requirements could have vastly different economic impacts. However, there are also limitations to relying on cost estimates, most notably the fact that so few regulations even have credible cost estimates.⁷⁷ Even when federal agencies attempt to estimate the costs of their regulations, their estimates can be compromised by political factors,⁷⁸ or estimates may be inaccurate, due to uncertainty or to the fact that certain costs, like opportunity costs, tend to be overlooked by agencies.⁷⁹ Thus, the simpler regulatory budgets being implemented in the states (some of which take a pay-as-you-go approach by requiring that new regulations be offset by eliminating old ones) may be more practical, and even more efficient, than cost-based budgets. Despite any shortcomings with its approach, the Trump administration deserves credit for helping to usher in the current wave of regulatory budgets. It seems likely that, by making regulatory reform an early priority of his administration, President Trump has inspired and built momentum for similar state efforts.

At least 20 states have initiated red tape reduction efforts since 2010.⁸⁰ Some of them include elements of a regulatory budget by placing caps or limits on regulatory restrictions, requiring regulatory offsets, or setting reduction targets.⁸¹ These have mostly been governor-led efforts, often initiated via an executive order.⁸² Though none of these efforts to date have implemented a permanent, comprehensive state budgeting system for regulations, such a system may indeed be coming. Furthermore, the emphasis that governors are placing on measuring regulations and on reducing regulatory burdens is notable, suggesting a pervasive sense that the United States is overregulated. The momentum behind the current wave of reforms may just be getting started.

76. See, e.g., OFFICE OF MGMT. & BUDGET, REGULATORY REFORM: REGULATORY BUDGET FOR FISCAL YEAR 2019 (2018) (setting incremental annual cost allowances by federal department for fiscal year 2019).

77. Broughel & Jones, *supra* note 65.

78. *Id.* at 17.

79. James Broughel, *OIRA Should Stop Calling a Tail a Leg*, MERCATUS CTR. AT GEORGE MASON UNIV.: THE BRIDGE (Aug. 26, 2019), <https://www.mercatus.org/bridge/commentary/oira-should-stop-calling-tail-leg>.

80. Justin D. Smith, *Regulatory Reform at the State Level: A Guide for Cutting Red Tape in the Executive Branch*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 270, 281-283 (2019).

81. For example, Idaho has imposed a one-in, two-out policy. See Idaho, Exec. Order No. 2019-02 (Jan. 21, 2019), <https://gov.idaho.gov/wp-content/uploads/sites/74/2019/01/eo-2019-02.pdf>. Governors in Missouri and Kentucky have set reduction targets in the range of 30 to 33 percent. See *State Agencies Still Considering Rules Cutbacks*, JEFFERSON CITY NEWS TRIB. (Jan. 14, 2019, 12:05 AM), <http://www.newstribune.com/news/local/story/2019/jan/14/state-agencies-still-considering-rules-cutbacks/760979/>; James Broughel, *Tracking the Progress of Kentucky's Red Tape Reduction Initiative*, MERCATUS CTR. AT GEORGE MASON UNIV. (June 26, 2019), <https://www.mercatus.org/publications/regulation/tracking-progress-kentucky%E2%80%99s-red-tape-reduction-initiative>.

82. But not all. For example, Texas passed a one-in, one-out law in 2017. See H.B. 1290, 85th Gen. Assemb., Reg. Sess. (Tx. 2017).

IV. THE NEXT WAVE OF REGULATORY REFORM: REVISITING THE FOUNDATIONS OF COST-BENEFIT ANALYSIS

Although CBA is the dominant analytical framework for evaluating the potential effects of regulations, the outputs of CBA are neither objective nor particularly meaningful, as this section will explain. Considering that CBA has been applied to regulations for roughly 40 years, many may be surprised to learn that there is no consensus among economists as to what it actually measures.⁸³ Some economists see the welfare measure underlying CBA as a form of economic efficiency,⁸⁴ formally known as Kaldor–Hicks efficiency.⁸⁵ Other economists are not interested in this approach, largely because efficiency partially depends on the initial distribution of wealth in society.⁸⁶ Critics of efficiency, who seem more concerned with the distribution of wealth than with the overall amount, base CBA on a mathematical function representing social welfare.⁸⁷

Strangely, neither the economic efficiency approach nor the social welfare approach actually measure what their proponents claim to measure. The problem with the social welfare approach, as demonstrated by Kenneth Arrow's pathbreaking impossibility theorem,⁸⁸ is that under certain reasonable restrictions,⁸⁹ it is mathematically impossible to aggregate individual preferences into a cumulative social welfare function.⁹⁰ There are ways around Arrow's impossibility theorem by relaxing the restrictive assumptions.⁹¹ For instance, if economists could map individual levels of consumption into units of cardinal utility,⁹² then a social wel-

83. The two dominant approaches to discounting in CBA are focused on different measures of welfare. See James Broughel, *Three Approaches to the Social Discount Rate*, MERCATUS CTR. AT GEORGE MASON UNIV. (Dec. 6, 2018), <https://www.mercatus.org/publications/regulation/social-discount-rate>.

84. For an example of an economist who prefers that CBA measure efficiency, see David Burgess, *The Appropriate Measure of the Social Discount Rate and Its Role in the Analysis of Policies with Long-Run Consequences*, MERCATUS CTR. AT GEORGE MASON UNIV. (Dec. 6, 2018), https://www.mercatus.org/system/files/burgess_-_mercatus_research_-_the_appropriate_measure_of_the_social_discount_rate_and_its_role_in_the_analysis_of_policies_with_long-run_consequences_-_v1.pdf.

85. See Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939); see also J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939).

86. James Broughel, *Equity or Efficiency? The Battle for the Soul of Benefit-Cost Analysis*, MERCATUS CTR. AT GEORGE MASON UNIV. (Mar. 14, 2019), <https://www.mercatus.org/publications/regulatory-analysis/equity-or-efficiency-battle-soul-benefit-cost-analysis>.

87. Sometimes this welfare function is interpreted as describing a social planner's welfare. For an example of economists who prefer that CBA measure social welfare, and who criticize efficiency for distributional reasons, see Mark Moore & Aidan Vining, *The Social Rate of Time Preference and the Social Discount Rate*, MERCATUS CTR. AT GEORGE MASON UNIV. (Dec. 6, 2018), https://www.mercatus.org/system/files/moore_and_vining_-_mercatus_research_-_a_social_rate_of_time_preference_approach_to_social_discount_rate_-_v1.pdf.

88. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 60 (3rd ed. 2012).

89. Such as the assumption that no single individual is allowed to be a dictator whose preferences are always satisfied. See Amartya Sen, *The Possibility of Social Choice*, 89 AM. ECON. REV. 349, 351 (1999).

90. See Allan M. Feldman, *A Very Unsubtle Version of Arrow's Impossibility Theorem*, 12 J. W. ECON. ASS'N 534, 546 (1974) (providing an intuitive explanation of Arrow's impossibility theorem).

91. See Sen, *supra* note 89, at 354. (addressing this topic).

92. Indeed, some researchers try to do just this. See MATTHEW ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS (2012).

fare function might be obtainable. But no credible, agreed-upon method of mapping in this way exists,⁹³ which is one reason why Kaldor–Hicks efficiency has enjoyed longstanding support among economists.⁹⁴

Kaldor’s and Hicks’s approach emerged in response to a particular problem: how should economists deal with interpersonal comparisons of utility?⁹⁵ If two people each receive one dollar’s worth of goods, but one is rich and one is poor, who is made better off in terms of utility? The answer that Kaldor, Hicks, and other economists such as Lionel Robbins settled upon was that economists should avoid getting entangled in debates about the desirability of particular distributions of wealth.⁹⁶ Economists are well-positioned to make assessments as to whether the overall economic pie has increased or decreased. Their expertise can also provide insights into whether a particular policy is likely to lead to a specified end result. These assessments involve positive analysis. However, Kaldor, Hicks, Robbins, and others believed economists should avoid making interpersonal comparisons of utility that involve normative judgments about how the economic pie *should* be distributed.⁹⁷ These are matters on which economists have no particular expertise.

Kaldor–Hicks efficiency, therefore, is indifferent to the distributional outcomes of policy. In efficiency analysis, the net benefits calculation identifies whether total wealth increases from a policy change, irrespective of its distribution, and the analyst need not make any particular claims as to whether overall social welfare has increased.⁹⁸ It should therefore be obvious that treating a unit of consumption as if it provides differing amounts of utility, depending on who receives it, is inconsistent with efficiency.⁹⁹ But this is precisely what economists do when they engage in the practice of discounting. A social discount rate places unequal weights on consumption based on the assumption that a unit of consumption will provide differing amounts of utility depending on when it is delivered in time.¹⁰⁰ Discounting in this manner makes interpersonal comparisons of utility and

93. See Cass Sunstein, *Cost-Benefit Analysis: Who’s Your Daddy?* 7 J. OF COST-BENEFIT-ANALYSIS 107, 114 (2016) (discussing the current inability to map consumption to utilities in a satisfactory manner).

94. See John Graham, *Saving Lives through Administrative Law and Economics*, 157 U. Pa. L. Rev. 395, 411 (2008) (giving a history of how Kaldor-Hicks reasoning came to be so accepted by economists).

95. See Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, ECON. J. 635, 635 (1938); Kaldor, *supra* note 85; Hicks, *supra* note 85.

96. Hicks, *supra* note 85, at 711.

97. *Id.* at 711–12.

98. See David Weisbach, *Distributionally Weighted Cost-Benefit Analysis: Welfare Economics Meets Organizational Design*, 7 J. OF LEGAL ANALYSIS 151, 154 (2015) (pointing out that “Maximizing efficiency is not the same as maximizing welfare,” and stating that efficiency is based on distributionally unweighted benefits and costs).

99. Note that efficiency in the Kaldor–Hicks sense, which is how the term is used here, is different from efficiency in the Pareto sense, which is a situation in which no one can be made better off without making at least one other person worse off. Kaldor–Hicks improvements are sometimes referred to as “potential Pareto improvements” because if compensation from winners to losers took place, efficient projects would result in at least one person being made better off without making anyone else worse off, i.e., a Pareto improvement. While Pareto improvements are generally more desirable, virtually all policies create some losers, so judging policies on the basis of whether they are Kaldor–Hicks improvements has proved more practical, as compensation is usually unrealistic. See D. Bruce Johnsen, *A Coasian Approach to Cost-Benefit Analysis*, 42 HARV. J.L. & PUB. POL’Y 490, 512 (2018).

100. The standard rationales put forth by economists for weighting consumption in this way are that society values future utility less than present utility owing to impatience, i.e., “pure time preference,” and that future consumption provides less utility than present consumption because society is

violates the assumption that analysis is indifferent with respect to the distribution of wealth, and is therefore inconsistent with efficiency in the Kaldor–Hicks sense. Curiously, those economists who say they want CBA to measure efficiency do not seem to mean it, because they insist on the practice of discounting consumption in CBA.¹⁰¹ Their stated and revealed preferences diverge.¹⁰²

Some might argue that these problems involving welfare measures are not so important. For example, despite economists not agreeing on what CBA measures, perhaps the different approaches are not so different from one another in their recommendations. This view is mistaken for two reasons. First, *it is not clear what CBA measures*. Even if standard approaches produce similar recommendations, they may not measure anything meaningful,¹⁰³ in which case an entirely different approach is needed. Second, since standard methods do not actually measure Kaldor–Hicks efficiency, the most obvious alternative to present practices is to measure efficiency, which many economists already support. Unfortunately, such an approach is likely to lead to dramatically *different* policy recommendations compared with present approaches, because a steadfast commitment to wealth maximization, combined with distributional indifference, would mean a commitment to pursuing capital accumulation and economic growth above all other considerations.¹⁰⁴

Whether or not economists are willing to tackle these challenges is unclear. On the one hand, revisiting the foundations of CBA might mean admitting that decades of academic research have led economists down a dead-end street. On the other hand, if economists do not revisit these issues, the prospects for CBA look dim because the credibility of CBA, as well as any policies based on it, is in doubt. This article is a call for such reconsideration by economists.

V. PROCEDURAL REFORMS MIGHT RESULT IN HIGHER-QUALITY COST-BENEFIT ANALYSIS

Given the problems with CBA outlined above, one might wonder whether there is any value in producing CBA at all. However, there are several reasons to believe CBA is not worth abandoning just yet. First, CBA's foundations could be firmed up relatively easily by simply measuring efficiency rather than some vague undefined notion of social welfare or distributive justice. Second, it is unclear what an alternative to CBA would be.

expected to be wealthier in the future. These are rationales for discounting under the conventional Ramsey approach to discounting. See NAT'L ACAD. OF SCIENCES, ENG'G AND MED., VALUING CLIMATE DAMAGES: UPDATING ESTIMATION OF THE SOCIAL COST OF CARBON DIOXIDE 162–163 (2017).

101. See James Broughel, *Three Approaches to the Social Discount Rate: The Unsettled Matter of Discounting the Future*, MERCATUS CTR. AT GEORGE MASON UNIV. (Dec. 6, 2018), <https://www.mercatus.org/publications/regulation/unsettled-matter-discounting-future>.

102. On the mental disconnect between what economists say and what they do, see James Broughel, *Even Economists Lie to Themselves*, FOUND. FOR ECON. EDUC. (July 11, 2019), <https://fee.org/articles/even-economists-lie-to-themselves/>.

103. James Broughel, *Make Benefit-Cost Analysis Meaningful*, REG. REV. (Jan. 7, 2019), <https://www.theregreview.org/2019/01/07/broughel-make-benefit-cost-analysis-meaningful/>.

104. See Tyler Cowen, *Policy Implications of Zero Discounting: An Exploration in Politics & Morality*, 21 SOC. PHIL. & POL'Y 121, 127–30 (2004).

The problems with CBA identified in Part IV are damning in one way: they give reason to believe that the institutions that govern the federal regulatory process do not work well and that the academic process has problems as well. Otherwise, how could these issues have been allowed to persist unresolved for so long? This suggests that perhaps the states and territories should experiment with different regulatory regimes than those that currently exist at the federal level.

CBA is still relatively rare in the states, so questionable CBA practices may not yet be entrenched in state governments the way they are in Washington, D.C. or in academia. Obviously, academic economists must play an important role in reshaping the CBA of the future. But perhaps institutional experimentation, including experimentation with welfare measures, could help improve the quality of regulatory analysis and, more importantly, make CBA useful for practical policy decisions. In addition to states, so-called independent agencies in Washington, D.C., which have traditionally been exempt from many CBA requirements, could be well-positioned to experiment along similar lines.

Several examples in the states offer a glimpse of what improvements in the regulatory analysis and review process might look like. One example comes from New Hampshire, which requires a “fiscal impact statement” for proposed regulations.¹⁰⁵ Notably, this analysis is supposed to capture more than just the budgetary impacts of rules to the state government. It must also include “a narrative stating the costs and benefits to the citizens of the state and to the political subdivisions of the intended action.”¹⁰⁶ This model is noteworthy in that the analysis is produced by the legislative budget assistant in the legislature,¹⁰⁷ not by the agencies that regulate (although the two often work together to construct the final analysis). This process helps address the issue—commonly found in federal regulatory analyses—that analysis is produced to reach a predetermined conclusion or to defend a regulation, as opposed to honestly assess the outcomes of the regulation.¹⁰⁸ Regulatory agencies are run by political personnel who come into office with agendas and may pressure analysts to bend analysis to support policy objectives.¹⁰⁹ Thus, analytical independence from these political forces is important.

The New Hampshire process requires review by the Joint Legislative Committee on Administrative Rules (“JLCAR”), including a review of analysis.¹¹⁰ Thus, both the production of analysis and its review take place in the legislative branch, away from the political influence of the governor and his administration. By contrast, at the federal level, both production and review of analysis take place

105. N.H. REV. STAT. ANN. § 541-A:5.

106. *Id.* at § 541-A:5(IV)(a).

107. *Id.* at § 541-A:5(I).

108. This is why regulatory analyses are commonly referred to as “advocacy documents.” See E. Donald Elliott, *Rationing Analysis of Job Losses and Gains: An Exercise in Domestic Comparative Law*, in DOES REGULATION KILL JOBS? 256, 265 (Cary Coglianese et al. ed., 2014); Christopher Carrigan & Stuart Shapiro, *What’s Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit–Cost Analysis*, 11 REG. & GOVERNANCE 203, 203 (2017).

109. See Carol Davenport & Eric Lipton, *Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, N.Y. TIMES (Aug. 11, 2017); STUART SHAPIRO, ANALYSIS AND PUBLIC POLICY: SUCCESSES, FAILURES, AND DIRECTIONS FOR REFORM 44 (2016); Richard Williams, *The Influence of Regulatory Economists in Federal Health and Safety Agencies* (Working Paper, MERCATUS CTR. AT GEORGE MASON UNIV., Jul. 2008), <https://www.mercatus.org/publications/regulation/influence-regulatory-economists-federal-health-and-safety-agencies>.

110. N.H. REV. STAT. ANN. §541-A:2; see also N.H. REV. STAT. ANN. §541-A:13(IV)(d).

in the executive branch.¹¹¹ This is not to say New Hampshire's process works perfectly. The reviews by the JLCAR seem to focus mostly on legal criteria rather than on economic impacts, and legislatures are also political, of course. Nonetheless, the New Hampshire model is one that is well worth considering.

Another possible best practice comes from Wisconsin, where legislators can request an alternative CBA, distinct from one produced by the regulatory agency, to be commissioned (from an outside consulting firm, for example).¹¹² This raises the possibility of competing analyses. Notably, if the total implementation and compliance costs estimated in a second analysis vary from the agency's original estimate by 15% or more, the cost of the CBA is then charged to the agency's budget.¹¹³ This provides a financial incentive for agencies to be accurate and honest up front. Having legislators request the CBA also changes incentives from what they might be if firms were contracted by a regulatory agency directly.¹¹⁴

Taken together, New Hampshire and Wisconsin raise interesting questions about whether independent production of analysis and third-party review of analysis from outside the executive branch are potential improvements to administrative procedures that would result in higher-quality, more credible, and more useful analysis. There is no guarantee such reforms would bring about better CBA, especially without shoring up CBA's theoretical foundations. Nonetheless, these experiments are notable and worth thinking about carefully.

VI. CONCLUSION

Although the federal government has been experimenting with innovative reforms in recent years (including a regulatory budget), the states have been more aggressive regarding setting up procedures for reviewing old regulations, establishing budget infrastructure for regulations, and setting benchmarks for reducing red tape. Virginia and Idaho in particular appear to be models that other states should look to for inspiration, and other states may be close behind. Given years of slow growth in the United States, coinciding with steady regulatory accumulation, these efforts are a welcome development.

Going forward, CBA should be the next top priority for reformers. The lack of a coherent welfare measure underlying CBA in particular is the most troubling aspect of modern CBA. This is not to say that CBA should be abandoned—far from it. In fact, committing CBA to the measurement of allocative efficiency is a practical way forward that would almost certainly pave the way for vast improvements in evidence-based policy.

The states are far behind the federal government when it comes to adopting CBA for regulations, but this may well prove to be a feature rather than a bug. The states can learn from the many missed opportunities at the federal level, perhaps by establishing independent production and review of analysis outside the executive branch, as well as setting clearer standards for what CBA should look like and what it should measure. Such experimentation in the laboratories of democracy

111. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

112. WIS. STAT. § 227.137(4m).

113. *Id.* at § 227.137(4m)(b)(2)(a).

114. For example, if an agency wants its actions portrayed in the best light possible, and contractors know this, those contractors who want recurring work from an agency can be expected to give agencies the answers they want.

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may prove to be the best hope for ushering in the next critical wave of U.S. regulatory reform. Although the challenges associated with regulatory reform are great, they are not insurmountable. The lessons learned from the previous waves of reform are many, and if those lessons are heeded, the next wave may prove to be the most successful of all.