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# Deregulation Defanged: An Empirical Review of Federal Deregulatory Policy and its Legal Obstacles

*Jack Thorlin\**

## ABSTRACT

The federal government has embarked on a major deregulatory push since 2017, but summarizing its effects has proven difficult. Federal agencies issue cost-benefit analyses of specific deregulatory actions, but courts have struck down several of the proposed rule changes, and state governments have taken countervailing action against others. To obtain a clear understanding of the overall effectiveness of the Trump administration's deregulatory efforts, this article provides a rigorous, empirical review of deregulatory actions taken and the countervailing effect of judicial actions and state governments.

Methodological problems have plagued estimates of overall Trump administration regulatory savings, most of which have come from right-leaning sources in and out of government. The White House Office of Management and Budget (OMB), for example, releases the authoritative federal accounting of deregulatory savings. However, its approach is overly simplistic, includes rules that are deregulatory in only a technical sense, and examines only the present value of anticipated future savings. Examining only present value assumes that all future expected regulatory savings will materialize, an assumption that requires no intervention by the judiciary or state governments. As we will see, this assumption is unwarranted. Through this accounting approach, OMB has claimed \$23 billion in overall savings from deregulation over an indefinite time horizon, amounting to \$1.6 billion annually, but a closer review finds only around \$131 to \$261 million in actual annual savings through the end of fiscal year 2018. An empirical examination of less tangible "soft" benefits of deregulation—e.g., the decreased expectation of future

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regulation by businesses—yields no clear evidence of deregulatory effect beyond the savings identified in specific deregulatory actions.

Anticipated actions by courts and the governments of pro-regulation states against upcoming or ongoing major deregulatory actions suggest the bottom line of federal deregulatory savings estimates will not change dramatically in the near future. The totality of the evidence thus suggests the administration's deregulatory efforts have not and will not meaningfully alter the country's economic growth. To the contrary, the available evidence suggests that the Trump administration's deregulatory campaign has been ineffective and is unlikely to improve.

### INTRODUCTION

The Trump administration and Republican leaders in Congress frequently cite deregulation as a major cause of the current period of economic growth.<sup>1</sup> However, there has been almost no serious general accounting of deregulation under the Trump administration. That is largely due to regulatory cost being a complex and highly partisan issue. Right-leaning think tanks have put forward triumphalist estimates with little credibility, while academics have generally focused critiques more on specific deregulatory actions than on overall regulatory burden reduction.<sup>2</sup> Neither vague triumphalist estimates nor analyses of specific regulations truly address the salient question: is the deregulatory agenda significantly driving economic growth? This article contributes to answering that question with a rigorous empirical approach to assessing (a) projected savings from deregulatory actions and (b) the effect of judicial and state-level interventions that have weakened federal deregulatory action.

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1. See, e.g., Donald Trump (@realDonaldTrump), TWITTER (May 2, 2019, 9:29 AM), <https://twitter.com/realDonaldTrump/status/1123987855053873154> (“Tax Cuts [] and deregulation [] have produced non-inflationary prosperity for all Americans.”).

2. See, e.g., Elizabeth Harrington, *Report: Trump Rolls Back \$60 Billion More in Regulatory Savings*, WASH. FREE BEACON (April 20, 2017), <https://freebeacon.com/issues/report-trump-rolls-back-60-billion-regulatory-savings/> (citing the think tank American Action Forum for the proposition that the Trump administration has saved “an additional \$60 billion in regulatory costs” within the first three months of the administration despite OMB itself claiming \$23 billion by the end of fiscal year 2018 over an indefinite time horizon). For a general, qualitative assessment of Trump administration regulatory savings, see Joan MacLeod Heminway, *Mr. Toad's Wild Ride: Business Deregulation in the Trump Era*, 70 MERCER L. REV. 587 (2019) (describing the landscape of regulatory change under President Trump from a more qualitative and less empirical vantage).

Understanding the change in overall regulatory costs first requires an examination of where overall regulatory costs were at the beginning of the Trump administration. Both the administration and the Trump campaign cited studies placing the annual federal regulatory burden—the total economic cost of complying with federal regulations—at about \$2 trillion.<sup>3</sup> The campaign claimed it would reduce the regulatory burden by \$200 billion annually.<sup>4</sup> The administration has publicly announced \$23 billion in total future savings from the deregulatory actions taken to date, which translates to about \$1.6 billion in annual savings.<sup>5</sup> Needless to say, \$1.6 billion is a negligible dent in \$2 trillion, a reduction slightly less than a tenth of one percent. However, on March 19, 2019, the White House announced: “The Trump administration has rolled back business killing regulations to unleash an economic boom across all sectors of the economy.”<sup>6</sup> Either something more must be at work than the specific savings cited, or the administration is dramatically overstating the effect of deregulation.

There are several potential explanations for the administration’s apparently misplaced enthusiasm. The regulatory burden might not actually be as high as \$2 trillion, so even if the Trump administration is cutting a significant portion of the burden, it does not amount to large savings. Alternatively, the Trump administration might be undercounting deregulatory savings. After all, its estimates include only the specific federal estimates for savings from the repeal of particular rules. It is entirely possible that the decreased expectation of future regulation among the business community accounts for much higher savings than the repeal of a few specific rules.

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3. Peter Navarro, *Scoring the Trump Economic Plan: Trade, Regulatory & Energy Policy Impacts*, at 6 (Sept. 29, 2016), [https://assets.donaldjtrump.com/Trump\\_Economic\\_Plan.pdf](https://assets.donaldjtrump.com/Trump_Economic_Plan.pdf).

4. *Id.*

5. Alan Levin and Alyza Sebenius, *Trump Claims \$1.6 Billion a Year Saved from Cutting Red Tape*, BLOOMBERG (Oct. 16, 2018), <https://www.bloomberg.com/news/articles/2018-10-17/trump-administration-claims-23-billion-in-regulation-savings>.

6. Press Release, White House, “President Donald J. Trump’s Economic Agenda is Working for All Americans,” (Mar. 19, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-economic-agenda-working-americans/>. Adding to the confusion, the White House stated, “The Trump Administration’s regulatory reform efforts have saved American families and businesses \$23 billion in Fiscal Year 2018.” Levin & Sebenius, *supra* note 5.

To resolve the apparent paradox, we must take a closer look at various estimates for overall regulatory burden and Trump administration deregulatory actions. At the level of overall regulatory burden, two general methods for calculating regulatory costs produce wildly varying estimates: (1) tallying the specific costs of individual rules, and (2) using survey or econometric tools to produce an estimate of the overall regulatory burden. The first approach is more grounded in specific measurable economic facts, but omits entirely the more difficult-to-quantify benefits of deregulation, notably the reduced expectation of future regulation and the avoided costs of discontinued regulatory efforts that did not culminate in actual rule-makings. The second approach can capture those harder-to-quantify benefits. However, the difficulty of isolating deregulatory effects necessitates using statistical methods that are prone to misuse or abuse by partisan entities. Bluntly, the organizations that have used the second approach often appear to have done so in order to reach their own preferred conclusion on regulatory costs.<sup>7</sup>

Similar methodological problems have plagued estimates of the Trump administration's regulatory savings. Partisan entities have used inconsistent or nonsensical methods to come up with extreme estimates that are then passed on by friendly media outlets without necessary caveats.<sup>8</sup> The federal government itself issues tallies of the economic impact of individual new regulations that are more reliable than broad estimates, yet the federal tallies can be simultaneously over- and underinclusive. They do not include savings from decreased expectations of regulation, and are thus underinclusive. However, because of imprecise definitions of "deregulation," the formal tallies can also count actions that do not fit a classical understanding of the term. Some ostensibly "deregulatory" actions taken by the administration were either initiated by the Obama administration or are deregulatory only in a technical sense, such as rules relaxing eligibility for special Medicare reimbursement rates.<sup>9</sup>

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7. See, e.g., Clyde Wayne Crews Jr., *Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway* (Jan. 8, 2017) (Competitive Enterprise Inst., Working Paper, 2017) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2502883](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2502883) (exhibiting a clear anti-regulation bias while using dubious statistical methods to reach an outlier conclusion regarding the total cost of federal regulations).

8. See *infra*, Section I(C)(ii).

9. See, e.g., 42 C.F.R. 414 (Nov. 2017), <https://www.govinfo.gov/app/details/FR-2017-11-16/2017-24067>.

To obtain a neutral, non-partisan estimate for overall savings, in this article I examine “hard” deregulatory benefits—the federal agencies’ savings estimates for specific deregulatory actions—and “soft” benefits that accrue from decreased private sector expectation of regulation. Establishing “hard” benefits simply requires a review of OMB’s estimate, screening out rules that do not reasonably fit the definition of “deregulation” because they control access to federal subsidies rather than govern the behavior of private sector entities. This analysis suggests \$131 to \$261 million in annual savings as of the end of fiscal year 2018, with highly uncertain future additions possible as additional major deregulatory acts are finalized and make their way through legal challenges. While establishing a precise estimate for “soft” benefits is essentially impossible, I review the available evidence for soft benefits and the factors that are likely weakening these types of benefits. I conclude that there is no evidence for significant “soft” benefits.

This suggests that the Trump administration’s deregulatory agenda is not having a significant effect on the economy as a whole. Even taking the maximum “hard” deregulatory savings estimate, \$261 million annually is roughly one-thousandth of one percent of current U.S. GDP.<sup>10</sup> It is about one-tenth of the unrecoverable cost of the partial government shutdown of December 2018 – January 2019.<sup>11</sup> However, the ubiquity of the deregulatory talking point among right-wing politicians and commentators suggests the deregulatory agenda serves important non-economic ends. Among the explanations I explore are the unification of the Republican Party and gratifying politically important constituencies.

In Part I, I describe and evaluate various existing empirical measures for the overall regulatory burden and deregulatory actions taken to date under President Trump. Using insight gained from the review of existing literature, in Part II, I present my neutral estimates for “hard” and “soft” deregulatory benefits, factoring in empirical data on judicial review of agency actions and state government inter-

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10. *Interactive Access to Industry Economic Accounts Data: GDP by Industry*, U.S. BUREAU OF ECON. ANALYSIS (Jan. 9, 2020), <https://apps.bea.gov/iTable/iTable.cfm?ReqID=51&step=1>.

11. Caitlin Emma & Jennifer Scholtes, *Shutdown Costs the U.S. 3 Billion That Won't Be Recovered*, *CBO says*, POLITICO (Jan. 28, 2019), <https://www.politico.com/story/2019/01/28/government-shutdown-cost-1123735>.

ventions. In Part III, I discuss possible non-economic motives for the deregulatory agenda which may explain the contradiction between the amount of discussion of deregulation and its apparently small economic effect.

## I. EXISTING EMPIRICAL ESTIMATES OF THE REGULATORY BURDEN AND PRESIDENT TRUMP'S DEREGULATORY AGENDA

The first step of the investigation into the economic effect of President Trump's deregulatory agenda is reviewing existing studies of the overall regulatory burden and the economic effect of recent deregulatory actions. Recent studies place the overall federal regulatory burden—the cost of complying with federal regulations—within a range of \$78 billion to \$2.028 trillion annually.<sup>12</sup> Estimates for Trump administration regulatory savings range from \$1.6 billion annually (the administration's estimate) to perhaps as much as \$86 billion in the administration's first year (the estimate of one right-leaning think tank, as relayed by conservative media sources).<sup>13</sup> The absurdly broad sweep of these ranges strongly suggests the need for a new approach. Examining the apparent flaws in the studies produced to date should help us craft a better methodology.

### A. *Why are Regulatory Costs So Hard to Pin Down?*

Empirical measurement of regulatory costs is inherently subjective and difficult to specify in a neutral fashion. Even coming up with a definition for regulatory cost can be surprisingly challenging. It is simple to say that “regulatory costs” are the total cost to the government of enforcing a rule and to private entities of following it, but the lines get blurry at the level of federal regulations. Should we count

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12. See U.S. OFFICE OF MGMT. & BUDGET, 2017 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT, at 2 (Dec. 2017), [https://www.whitehouse.gov/wp-content/uploads/2017/12/draft\\_2017\\_cost\\_benefit\\_report.pdf](https://www.whitehouse.gov/wp-content/uploads/2017/12/draft_2017_cost_benefit_report.pdf) [hereinafter 2017 DRAFT REPORT] (estimating \$78 billion annually as the low end of the regulatory burden range); see also Mark Crain & Nicole Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, NATIONAL ASSOCIATION OF MANUFACTURERS (Sept. 10, 2014), available at <https://web.archive.org/web/20150323014159/https://www.nam.org/data-and-reports/cost-of-federal-regulations/federal-regulation-full-study.pdf> (estimating \$2.028 trillion as the annual regulatory burden).

13. Tim Devaney, *Study: Trump Has Eliminated \$86B in Regs*, THE HILL (Apr. 20, 2017), <https://thehill.com/regulation/329720-study-trump-has-eliminated-86b-in-regs>.

the costs of “self-regulation,” where expensive measures might be adopted by businesses to forestall regulation by a government entity? How do we count the decreased expectation of future costs due to a general presumption against new regulation in a particular administration?

*1. Deepwater Horizon: a window into empirical problems with regulatory costs*

One recent example helps illustrate the definitional problems. In the aftermath of the 2010 Deepwater Horizon oil spill, BP, the oil conglomerate that operated the compromised oil rig, spent \$17.7 billion on response activities, and invested more in its internal independent safety and operational risk management group.<sup>14</sup> BP presented those actions as voluntary, just part of being a good corporate citizen. However, the Obama administration also put in place regulations such as the Well Control Rule, finalized in April 2016.<sup>15</sup> It placed specific requirements on the operation of blowout preventers, the safety valve that failed on the Deepwater Horizon rig.<sup>16</sup> The Trump administration quickly proposed a partial repeal of that rule, claiming that the change would save the offshore oil industry \$946 million over ten years.<sup>17</sup>

If one were keeping a table comparing regulatory costs between the two administrations, how would one apportion costs? Though neither administration included the cost of BP’s voluntary measures in its regulatory cost estimates, the \$17.7 billion BP spent on remedial activities is, in some sense, a regulatory cost. Had BP not made those efforts, a federal regulator or a court would likely have forced them to do something. If the expenditures were made pursuant to a court order, it would seem strange to put those costs on the Obama

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14. *Sustainability Review*, BP, at 7, 16 (2010), [https://www.bp.com/content/dam/bp-country/en\\_ru/documents/publications\\_PDF\\_eng/bp\\_sustainability\\_review\\_2010\\_eng.pdf](https://www.bp.com/content/dam/bp-country/en_ru/documents/publications_PDF_eng/bp_sustainability_review_2010_eng.pdf). [<https://web.archive.org/web/20160420152154/>].

15. Wendy Becktold, *Proposed Changes to Safety Rule Suggest Influence of Offshore Drilling Industry*, SIERRA CLUB (May 14, 2018), <https://www.sierraclub.org/sierra/proposed-changes-key-safety-rule-Well-Control-Rule-suggest-influence-offshore-drilling-industry>.

16. *Id.*

17. U.S. BUREAU OF SAFETY AND ENVTL. ENFORCEMENT, INTERIOR, OIL AND GAS AND SULFUR OPERATIONS IN THE OUTER CONTINENTAL SHELF—BLOWOUT PREVENTER SYSTEMS AND WELL CONTROL REVISIONS, 92 Fed. Reg. 22128 (May 2018), <https://www.govinfo.gov/content/pkg/FR-2018-05-11/pdf/2018-09305.pdf>.

administration, which had no oversight over the courts. However, it is probably true on some level that the Obama administration was more likely to strictly regulate BP, which likely spurred BP to make additional expenditures. The tallying of those costs within the Obama administration would then require a number of complicated allowances.

The simplest way to tally the costs is the way the administrations actually did estimate the costs, counting only the estimated cost of compliance with new federal regulations at the time those rules were adopted. When the Obama administration finalized the rule, it estimated the cost would be \$858 million to \$1 billion over ten years.<sup>18</sup> Through deregulation of part of the Well Control rule, the Trump administration projects a decrease in costs of \$946 million over ten years.<sup>19</sup>

That methodology is clean but does not at all describe the actual economic effect of the regulation. The Obama administration clearly did not impose \$946 million in actual costs, especially since the rule was only in place starting in April 2016 with seven months to go in the Obama presidency. It certainly *intended* to impose those costs, but the actual economic effect was far less. President Trump also did not repeal the entire rule, so some portion of the regulatory costs will continue with his administration's implicit blessing. Should his administration then be on the hook for those costs? For how long? The duration of a presidency? If we use that measure, then the Trump administration's imposed costs could easily exceed the Obama administration's even for a rule imposed by the Obama administration that the Trump administration successfully repealed. But if duration of a presidency is not appropriate, what is? Ten years? Forever?

## 2. *Requirements for useful methodology*

We are left with an unpalatable reality: assigning cost responsibility for regulations is fundamentally an exercise in arbitrariness. But that does not mean that all assessments are created equal. Rather, an assessment of regulatory cost is only worthwhile if it is (a) uniform in methodology between administrations, (b) presented and discussed

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18. *Id.*

19. *Id.* at 22145.

consistent with the methodology, and (c) not deliberately chosen to reach a desired conclusion.

Consistent methodology is easy to explain, yet surprisingly rare in practice. Comparing finalized actions for the Obama administration and proposed actions for Trump would be misleading.<sup>20</sup> Similarly, relying on survey data from small businesses to estimate Obama-era regulatory costs is not comparable to using agency-estimated regulatory costs for the Trump administration.

When one examines general regulatory cost studies, the presentation and discussion of regulatory cost estimates almost never corresponds to the study's methodology. Imagine, for example, that a regulation proposed in 2016 is expected to cost \$10 billion over ten years. A think tank issues a report at the end of 2016 claiming that the administration has imposed \$10 billion in new regulatory costs in 2016. A new administration comes into office in 2017 and rescinds the regulation. The same think tank says that the new administration saved \$10 billion. The actual truth of the underlying matter is that no new costs were imposed by the previous administration and no costs were avoided—the rule never went into effect. The presentation conflated *actual* costs with *projected* costs.

Self-serving methodologies pervade the arena of regulatory estimates. The most obvious example of this is comparing the final year of an administration with the first year of a new administration.<sup>21</sup> A new administration will not have time to finalize any major regulatory or deregulatory actions within one year. An outgoing administration will have had eight years to propose regulations and ordinarily will not propose a major new regulation in its final year. Thus, in its final year, it will be mostly finalizing regulations, precisely what a

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20. See, e.g., Diane Katz, *Here's How Much Red Tape Trump Has Cut*, HERITAGE FOUNDATION (Oct. 17, 2018), <https://www.heritage.org/government-regulation/commentary/heres-how-much-red-tape-trump-has-cut>. The study claims President Obama put rules in place costing \$122 billion annually, while President Trump saved \$23 billion in 2018 alone. The citation for the Trump numbers leads to an OIRA publication, which does not explain where the overall numbers come from other than to cite to a list of deregulatory actions. Many of those actions are proposed rulemakings, not finalized rules. OFFICE OF INFO. AND REGULATORY AFFAIRS, REGULATORY REFORM REPORT: COMPLETED ACTIONS FOR FISCAL YEAR 2018 (2018), [https://www.reginfo.gov/public/pdf/eo13771/EO\\_13771\\_Completed\\_Actions\\_for\\_Fiscal\\_Year\\_2018.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Completed_Actions_for_Fiscal_Year_2018.pdf).

21. See, e.g., Clyde Wayne Crews, *So, What Regulations Did Trump Eliminate?*, COMPETITIVE ENTERPRISE INST. (Dec. 27, 2017), <https://cei.org/blog/so-what-regulations-did-trump-eliminate>.

new administration will not be doing. If one wanted to maximize costs of the previous administration and minimize costs of the new, all it would take would be to put on methodological blinders and look at finalized regulations.

### *B. Overall Regulatory Burden*

To produce an estimate of Trump-specific regulatory cost reductions, it is helpful to first understand the overall regulatory burden. Conceptually, this is the cost to the country as a whole of complying with every rule established or policed by a federal agency—the combined costs to the federal government of implementing the rule and to the private sector of complying with the rule. The overall burden produces a logical cap on the amount of savings we could reasonably attribute to President Trump. If the overall burden is \$78 billion annually—a low-end estimate endorsed by the federal government—it is logically impossible that President Trump cut the burden by \$86 billion during his first year in office.

While I endeavor to address each estimate from behind a veil of ignorance as to the political ends of its affiliated organization, I suspect most of the estimates ultimately fail because their authors are not attempting to dispassionately analyze regulatory costs. Their ideologies assume regulatory costs are highly burdensome, so the researchers select a methodology that allows them to reach that conclusion. The contortions become more strained when the authors want to prove that the costs of regulations put into place by one administration are far greater than the costs of another.

One would expect that both sides of the political spectrum would be interested in overall regulatory costs, but that does not turn out to be the case. I was unable to find any serious modern left-leaning estimates of total regulatory burdens.<sup>22</sup> This has largely ceded the field to conservative organizations, which bring far more passion to the

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22. I suspect this may be due to certain subjects being of greater ideological interest to those institutions. One can find examples of minimizing the cost of specific government programs, however. *See, e.g.*, the Political Economy Research Institute, “Economic Analysis of Medicare for All” (Nov. 30, 2018) <https://www.peri.umass.edu/publication/item/1127-economic-analysis-of-medicare-for-all> (assessing the cost of Sen. Bernie Sanders’s Medicare For All plan as \$13.5 trillion over ten years, roughly \$20 trillion less than estimates by relatively neutral entities like Rand).

enterprise. This one-sided energy in the field has produced a host of inaccurate estimates with questionable methodologies.

*1. \$2 Trillion in annual regulatory costs—only through bad modeling*

During the 2016 presidential campaign, Peter Navarro and Wilbur Ross—now a White House advisor on trade and secretary of commerce, respectively—authored a justification of then-candidate Trump’s economic plans.<sup>23</sup> The report claimed Trump would “reduce the current regulatory burden by a minimum of 10% or \$200 billion annually.”<sup>24</sup> The authors were working off the assumption that the annual regulatory burden is about \$2 trillion, a figure for which they cited an influential study by the National Association of Manufacturers (NAM) from 2014.<sup>25</sup> What, in turn, was NAM’s methodology?

To understand the methodology, one must break down specific contributors to the overall burden. The NAM study’s conclusions, if true, paint a dire picture of federal regulation. The NAM study posits an annual regulatory burden of \$2.028 trillion, or roughly 11% of U.S. GDP.<sup>26</sup> That staggering share of the economy roughly corresponds to the annual contribution of the entire U.S. manufacturing sector.<sup>27</sup> Of that \$2.028 trillion, the NAM study found that “economic” regulations—those that “govern decision-making in market transactions” according to the authors<sup>28</sup>—imposed by far the highest cost, \$1.448 trillion. Environmental regulation imposed \$330 billion, tax compliance \$159 billion, and occupational safety, health, and homeland security regulations \$92 billion.<sup>29</sup>

The short version of NAM’s methodology for calculating the impact of economic regulations which make up 71% of the alleged regulatory burden, is this: (1) use a survey of business leaders to establish

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23. Navarro, *supra* note 3.

24. *Id.* at 6.

25. *Id.*

26. Crain & Crain, *supra* note 12; Interactive Access, *supra* note 10.

27. U.S. BUREAU OF ECON. ANALYSIS, GROSS DOMESTIC PRODUCT BY INDUSTRY: THIRD QUARTER 2018, at 9 (Feb. 21, 2019), <https://www.bea.gov/system/files/2019-02/gdpind318.pdf>.

28. Crain & Crain, *supra* note 12 at 28.

29. *Id.* at 50.

the quality of U.S. regulation relative to other nations' regulations; (2) compare the regulatory score to the GDP of each country to get a numerical estimate of how much regulation quality determines GDP;<sup>30</sup> (3) calculate how much larger or smaller the United States GDP would have been had it received the same score as the top performing countries on regulation quality; and (4) subtract actual U.S. GDP from U.S. GDP under an optimal regulatory scenario and the result is the regulatory burden (i.e., the difference between how the U.S. economy would perform if U.S. regulation matched in quality the regulation of the highest-ranked countries).<sup>31</sup>

There are three independently crippling problems with the study's implementation of this approach, which I will detail further below.<sup>32</sup>

- Conflation of regulatory efficiency and regulatory burden: The authors measured regulatory performance of the United States *relative* to other countries and used it to extract an *absolute* figure for U.S. regulatory burden;
- Use of evidence not focused on regulatory burden: The authors used survey data of non-experts to estimate a nuanced and complicated phenomenon; and
- Calculation of the effect on absolute GDP: The authors used absolute GDP instead of GDP growth, which yields an over-sensitive model where many minor phenomena appear far more important than they plausibly could be.

*a. Conflating regulatory efficiency and regulatory burden.* To explain the flaws in the methodology used by NAM and relied upon by the Trump administration, I will start at the broadest conceptual level before descending into the more technical. At the highest level, this study is not measuring regulatory burden. It is attempting to measure how much wealthier the United States would be if its regulatory structure was similar to that of the "best" regulatory countries in the world. That is, inherently, a question of relative cost, not absolute cost

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30. Statistically savvy readers will recognize this as a regression analysis. I am trying to keep the terminology simple for lay readers.

31. See Richard W. Parker, *The Faux Scholarship Foundation of the Regulatory Roll-back Movement*, 45 *ECOLOGY L. QUARTERLY* 845 (2018) (an article-length and extremely thorough accounting of the NAM study, which helped this author much better understand NAM's methodology).

32. For a more detailed technical discussion, see *id.* at 862-75.

of regulation. The regulatory quality score that NAM relies upon is measuring businesses perception of how efficient a country seems at regulation, not how much it regulates.

Perhaps the easiest way to see this flaw is to note the countries that scored highest in one of the three categories NAM used to calculate regulation quality: Singapore, Qatar, Rwanda, Finland, and Hong Kong.<sup>33</sup> The NAM methodology contends that the United States economic regulatory burden would be zero if only it regulated like Finland, a country that regulates far more than the United States. And, lest we think Finland actually has a regulatory burden of zero, the International Monetary Fund (IMF) indicated that relatively inefficient product market regulation imposes a 10% drag on Finnish productivity.<sup>34</sup> Singapore and Qatar are also known for regulatory *efficiency*, not necessarily *light* regulation of their economies. It is simply nonsensical to assume the United States could entirely wipe out its regulatory burden by successfully matching those countries in regulatory quality.

On first examination, it is surprising that a business-friendly organization like the National Association of Manufacturers would make this error because this methodology superficially seems like it could underestimate the regulatory burden. One can imagine the regulatory burden as a combination of the cost of the substance of regulations (e.g., a business must cut emissions of regulated pollutants) and the cost of inefficient regulatory process (e.g., multiple agencies administer a particular rule, so businesses have to fill out more paperwork). The NAM methodology examines only the latter category of costs, so it seems to be *ceteris paribus* underestimating the overall burden.

It turns out that *ceteris* is not *paribus* in this case. NAM's methodology does not count substantive burden, but it dramatically overestimates the process burden, allowing the authors to draw the conclusion that the overall burden is vastly larger than it actually is. From a political perspective, costs due to substance garner far more

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33. The survey question was "In your country, how burdensome is it for businesses to comply with governmental administrative requirements (e.g., permits, regulations, reporting)?" Klaus Schwab, *The Global Competitiveness Report 2013-2014: Full Data Edition*, WORLD ECONOMIC FORUM, at 418 (2013), [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2013-14.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf).

34. INT'L MONETARY FUND, FINLAND, IMF COUNTRY REPORT NO. 16/369, at 28 (NOVEMBER 2016), <https://www.imf.org/external/pubs/ft/scr/2016/cr16369.pdf>.

attention than costs due to process. Indeed, to speak of “deregulation” as process improvements that do not allow any greater freedom to businesses or individuals sounds strange, if not outright erroneous. If process improvements can spur bigger gains than substantive deregulation, political opponents of regulation have every incentive to conflate process improvements with the overall regulatory burden. In that way, substantive regulatory changes can be presented as the logical solution to the regulatory burden. The NAM study’s methodological emphasis on process improvements rather than substantive changes in regulation benefits opponents of regulation as long as the problem is ultimately described as “regulatory burden” instead of “process deficiencies.”

*b. Using evidence not focused on regulatory burden.* In the NAM study, the relative regulatory burden of various countries is based on a survey given to business executives in 148 countries.<sup>35</sup> The NAM report uses three different survey questions to create a unified measure of relative regulatory burden. The questions were:

- In your country, how burdensome is it for businesses to comply with governmental administrative requirements (e.g., permits, regulations, reporting)?
- In your country, how easy is it for private businesses to challenge government actions and/or regulations through the legal system?
- In your country, how effective are the regulation and supervision of securities exchanges?<sup>36</sup>

The three questions are weighted equally, but only the first has anything to do with regulatory burdens per se. The second relates to ease of challenge through the legal system, not the burden of complying nor the cost to the government of enforcement. The third question is highly ambiguous as to what “effective” means. The police of a totalitarian state are “effective,” but one would not say they impose a negligible burden on society.

The first question is also ambiguous as to the kind of regulatory burden—substantive or process. A business leader answering the

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35. Schwab, *supra* note 33.

36. Crain & Crain, *supra* note 12 at appendix c, 68; Schwab, *supra* note 33.

question might find the regulatory burden extremely high (e.g., she runs a coal mine threatened by climate change-related regulations) but interpret the question as asking about process because of the reference to “administrative requirements.” In the same vein, the second question is inquiring about a particular part of the regulatory process that might be entirely independent from the rest. It is entirely possible that a country has few strict regulations, administers them in a very efficient way, but does not easily allow for judicial review. In such a case, the NAM methodology would erroneously peg that country as having a high regulatory burden. Finally, the third survey question is obviously focused on a specific part of the economy entirely distinct from the rest. This approach might be more defensible if the authors evaluated any other distinct segment of the economy, but they do not.

The use of the survey in the NAM study is further flawed because the perception of business leaders in a given country is, necessarily, subjective and grounded in previous history. If the culture is accustomed to a large, intrusive government (e.g., Finland, Singapore), then the perception of the same substantive regulatory burden will be very different than in a country with a tradition of a smaller federal government (e.g., the United States). In that same vein, recent events will also skew answers. Even with the relatively low substantive regulatory burden of the United States, if the survey were conducted in the aftermath of a major new regulation, the responses will be abnormally high.

*c. Calculating effect on absolute GDP creates an overly sensitive model.* The final, perhaps most damning flaw of the NAM report is the use of GDP instead of GDP growth when calculating the effect of regulation. In the NAM study, the authors’ model is being forced to explain the difference between OECD countries’ per capita GDP using a proxy for regulatory burden (determined from survey data) and a few other control variables unlikely to dramatically affect the outcome.<sup>37</sup> Naturally, then, the regulatory burden proxy has to

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37. Those variables are foreign trade as a percentage of GDP, the dependency ratio (i.e., the ratio of workers to retirees), the ratio of tax revenue to GDP, the ratio of capital investment to GDP, and size of the labor force. The NAM study authors note that those control variables are drawn from “empirical literature that examines differences in economic levels across countries over time.” Crain & Crain, *supra* note 12 at 32.

explain a disproportionately high share of GDP. Through that methodology, the “burden” of regulations that are less appealing to business executives in the United States causes a drain of \$1.4 trillion annually on GDP. By contrast, if the authors had correctly used GDP growth instead of per capita GDP—the standard practice in econometric studies of this nature<sup>38</sup>— they would have found that their measure of regulatory burden is positively correlated with growth. That is, of course, a nonsensical outcome, suggesting that something is wrong with the NAM model for regulatory burden.

In order to estimate the effect of regulation, the authors needed to construct a model of factors that contribute to GDP in order to isolate the effect of regulation. In reality, the single most powerful factor in predicting any year’s GDP is almost laughably simple: the previous year’s GDP. Consider it this way: India had a GDP of about \$2.6 trillion in 2017, while the United States had a GDP of \$19.4 trillion. Now suppose you had to predict which country, as of 2019, has a GDP of \$21.5 trillion. The United States is the obvious guess because it only needed to grow a small amount to get there.

To draw a parallel to the NAM methodology, now assume that your model cannot reference the previous year’s GDP. To figure out which country now has a GDP of \$21.5 trillion, you would essentially have to force the model to overweigh whatever other factors are being considered, such as the educational level of the country, or its weather. Whatever factor in which the United States is doing better than India suddenly looks far more important than it actually is.<sup>39</sup>

Using that same model and replacing regulatory burden with other survey data from the OECD business executive survey produces absurd results, showing how silly the model is in the first place. A deficit of public trust in politicians carries an annual cost to the United States of \$1.863 trillion. Organized crime imposes \$1.993 trillion.

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38. Richard W. Parker, *The Faux Scholarship Foundation of the Regulatory Rollback Movement*, 45 *ECOLOGY L. QUARTERLY* 845, 866 (2018).

39. One could inquire why the previous year’s GDP is so determinative. A helpful way to think about it is that the previous year’s GDP is the result of the entire history of the country to that year. Taking India and the United States as our examples. Everything from radically different experiences of colonialism to different climates to different geopolitical challenges factored into the previous year’s GDP. A model that neglects to account for the previous year’s GDP must instead recreate all those complicated factors explicitly in the model if it is to be equally accurate. Such a model is for all practical purposes impossible to create.

A lack of perfect judicial independence imposes a whopping \$1.352 trillion, about as much as NAM's economic regulatory burden.<sup>40</sup>

If GDP growth is used instead of per capita GDP, it turns out the effect of the regulatory burden as defined in the NAM study is not statistically significant and negative in sign—that is, regulatory burden seems to *increase* GDP growth. While the idea that regulatory burden increases growth is obviously incorrect, the statistical quirk indicates the underlying obtuseness of the NAM survey. The only way to find a massive regulatory burden in the data used by NAM is to use the wrong variable. Using the right variable simply reveals that the model does not work.

*d. Problems with the non-economic parts of the study.* While the other components in the \$2.028 trillion estimate of overall regulatory burden are far smaller than the \$1.4 trillion from economic regulation, they also have methodological flaws. To quote one review of the NAM study's environmental methodology: "[T]he number in question is taken from a 1991 study of pre-1988 vintage environmental regulations, which drew its number from an earlier general equilibrium exercise that has since been thoroughly examined and de-bunked by outside scholars."<sup>41</sup>

Other categories of regulation comprising the \$2.028 trillion estimate that do not fit comfortably with the concept of regulatory burden include tax and security compliance. The NAM study includes \$159 billion for tax compliance<sup>42</sup> and \$21 billion for homeland security compliance.<sup>43</sup> While the tax system is a burden placed on individuals and businesses by government, it does not directly restrict private sector activities. Homeland security regulations may incidentally restrict private sector activities—e.g., forbidding citizens from building nuclear power plants in their backyard—but including them as part of the regulatory burden potentially expands the concept of regulatory burden beyond recognition. If homeland security regulations are included, why not include costs imposed by the Department of Defense? Those costs include the exclusive use of some parts

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40. Richard W. Parker, *The Faux Scholarship Foundation of the Regulatory Rollback Movement*, 45 *ECOLOGY L. QUARTERLY* 845, 869 (2018).

41. *Id.* at 854.

42. Crain & Crain, *supra* note 12 at 39.

43. *Id.* at 37.

of the electromagnetic spectrum, the use of land for bases, the diversion of personnel from peacetime pursuits because of their employment in the military, etc. I have not seen any studies include those costs in overall regulatory burden, presumably because security is generally considered a core function of the state rather than regulation.

To summarize, this highly cited estimate of regulatory burden falls short because of methodological choices that seem tailor-made to support a high estimate. This is perfectly understandable—NAM is an advocacy organization, and it makes sense for it to overstate the cost of regulations with obtuse but non-fraudulent methodologies. However, a neutral observer should not use the NAM estimate as a starting point for understanding the effect of Trump's deregulatory actions, even if the administration itself cites the \$2 trillion figure.

*2. \$1.9 trillion in regulatory costs—by simply not trying to produce a credible estimate*

The difficulty of estimating regulatory costs has led to stunning examples of misplaced trust in think tank estimates. For example, the Trump administration cited a May 2017 study by the Competitive Enterprise Institute (CEI), *Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates And the Need to Compile Them Anyway*,<sup>44</sup> that pegged annual regulatory costs at about \$1.9 trillion.<sup>45</sup> Many other Republican elected officials have cited CEI's estimate, including presidential candidates, senators, and representatives.<sup>46</sup> The

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44. Clyde Wayne Crews Jr., *Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway* (Jan. 8, 2017) (Working Paper) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2502883](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2502883).

45. Navarro, *supra* note 3, at 6.

46. Examples include former Governor of Florida Jeb Bush, Michael C. Bender and Bloomberg News, *Jeb Bush Says Regulation Changes Can Lift Wages*, CHI. TRIB. (Sept. 22, 2015), <https://www.chicagotribune.com/news/sns-wp-blm-news-bc-bush-wages22-20150922-story.html>; Senator James Lankford, Press Release, Office of Senator Lankford, Federal Fumbles 100 Ways the Government Dropped the Ball (2015), [https://www.lankford.senate.gov/imo/media/doc/Federal\\_Fumbles\\_2015.pdf](https://www.lankford.senate.gov/imo/media/doc/Federal_Fumbles_2015.pdf); Senator Mike Rounds, Press Release, Office of Senator Rounds, Rounds Introduced RESTORE To Permanently Address Regulatory Reform, (May 20, 2015), <https://www.rounds.senate.gov/newsroom/press-releases/rounds-introduces-restore-to-permanently-address-regulatory-reform>; Senator Ron Johnson, Press Release, Office of Senator Ron Johnson, How Will You Pay Your Family's \$15,000 in Regulatory Costs? (Apr. 18, 2014), <https://www.ronjohnson.senate.gov/public/index.cfm/in-the-news?ID=bca085fa-18b5-4bf0-9283-2180950524b6>; Senator Shelley Moore Capito, Lori Robertson, *GOP Convention Day 2*, FACTCHECK (July 20, 2016) <https://www.factcheck.org/2016/07/gop->

\$1.9 trillion formulation was so popular that it started being misinterpreted as the burden solely attributable to Obama administration regulations.<sup>47</sup>

For a report cited so widely, it surprisingly lacks even a veneer of credibility. The report cites studies that use methodology similar to that of the more serious but methodologically hopeless NAM study discussed at length above and extrapolates from OMB reports published around the turn of the century.<sup>48</sup> Using this hodgepodge of questionable or outdated sources, the report concludes that the regulatory burden is very large. The salient, damning technical features of this report are identical to those of the NAM study: using GDP instead of GDP growth; using survey data; and using relative regulatory efficiency as a proxy for absolute regulatory burden.

What is distinctive about the CEI report is that it is explicitly presented as flippant and partisan. The title should be a warning that the estimate is not particularly meaningful, and the report itself gleefully agrees. The paper, to its credit, several times states that its numbers are not in any sense real. Its language is forthright and non-academic: "I'm more apt to call the figures I assemble 'placeholders' for a subset of costs than concretely known costs, and in most instances the reader can interpret them that way. After all, *we 'measure' GDP, and that's not measurable either. . . .*"<sup>49</sup> Perhaps even more bluntly: "A wave of assumptions and guesses without scholarly pretension underlie this tally, but the intent is serious."<sup>50</sup> Later, when explaining an estimate of the cost of "economic regulation," the author explains: "By summing these estimates and then folding them in N-dimensional hyperspace, blowing on them twice and taking the

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convention-day-2/; Senator Mike Lee, Sen. Mike Lee and Rep Mark Walker, *Make government accountable again*, WASH. EXAMINER, <https://www.washingtonexaminer.com/make-government-accountable-again>); and Representatives Bob Goodlatte and Lynn Jenkins. Glenn Kessler, *The claim that American households have a \$15,000 regulatory 'burden'*, WASH. POST (Jan. 14, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/01/14/the-claim-that-american-households-have-a-15000-regulatory-burden/>.

47. David Sherfinski, *Obama's regulations in 2016 to drain economy by \$2 trillion*, WASH. TIMES (May 31, 2017), <https://www.washingtontimes.com/news/2017/may/31/obamas-regulations-in-2016-to-drain-economy-by-2-t/>.

48. Crews, *supra* note 44, at 12.

49. *Id.* at 9.

50. *Id.* at 10.

non-derivative, we arrive at an estimate of economic regulatory costs of [\$402.05 billion annually].”<sup>51</sup>

This report, which is more a provocative bit of art meant to highlight the lack of serious estimates of regulatory costs than a meaningful source of information, pervades discussions of overall regulatory burden. In addition to the Trump administration and the senators and representatives discussed earlier, many media outlets have presented the CEI study as credible. To be sure, most are conservative-leaning, but some are assuredly mainstream, including *USA Today*;<sup>52</sup> *Wall Street Journal*;<sup>53</sup> *The Hill*;<sup>54</sup> *Forbes*;<sup>55</sup> and the *Daily Caller*.<sup>56</sup>

And, of course, many think tanks and right-leaning groups have repeated the CEI study’s claims, including: the U.S. Chamber of Commerce;<sup>57</sup> Freedomworks;<sup>58</sup> the Federalist Society (through an affiliated enterprise called the “Regulatory Transparency Project”);<sup>59</sup> the Heartland Institute;<sup>60</sup> the Mises Organization;<sup>61</sup> and the Club for Growth.<sup>62</sup>

51. *Id.* at 37.

52. Luke Hilgemann, *More Regulations Equals Less Business*, USA TODAY, (Feb. 28, 2015), <https://www.usatoday.com/story/opinion/2015/02/28/economy-health-businesses-entrepreneurship-column/22590839/>.

53. *Washington’s Hidden Tax: \$1.9 Trillion*, WALL STREET J., (May 11, 2015), <https://www.wsj.com/articles/washingtons-hidden-tax-1-9-trillion-1431385233>.

54. J.T. Young, *Time for a Regulatory Budget*, THE HILL, (Nov. 15, 2018), <https://thehill.com/opinion/white-house/417019-time-for-a-regulatory-budget>.

55. Clyde Wayne Crews Jr., *Obama’s 2016 Federal Budget and Middle Class Economics*, FORBES, (Feb. 2, 2015), <https://www.forbes.com/sites/waynecrews/2015/02/02/obamas-fy-2016-federal-budget-and-middle-class-economics/#3d7c6eaf67e3>.

56. Ethan Barton, *Economy Hit with Hidden \$1.9 Trillion Tax from Federal Regulations*, DAILY CALLER, (May 4, 2016), <https://dailycaller.com/2016/05/04/economy-hit-with-hidden-1-9-trillion-tax-from-federal-regulations/>.

57. *The Regulatory Impact on Small Business: Complex. Cumbersome. Costly*, U.S. CHAMBER OF COM. FOUND., (Mar. 2017), [https://www.uschamberfoundation.org/smallbizregs/assets/files/Small\\_Business\\_Regulation\\_Study.pdf](https://www.uschamberfoundation.org/smallbizregs/assets/files/Small_Business_Regulation_Study.pdf).

58. Patrick Hedger, *Regulatory Review April 21-May 4, 2018*, FREEDOMWORKS, (May 4, 2018), <https://www.freedomworks.org/content/regulatory-review-april-21-may-4-2018>.

59. *Time for a Regulatory Budget*, REG. TRANSPARENCY PROJECT (Nov. 21, 2018), <https://regproject.org/time-regulatory-budget/>.

60. Kenneth Artz, *Federal Regulations Cost Americans \$1.9 Trillion in 2017*, THE HEARTLAND INST., (Jul. 19, 2018), <https://www.heartland.org/news-opinion/news/federal-regulations-cost-americans-19-trillion-in-2017>.

61. Tho Bishop, *CEI: Federal Regulations Cost \$1.9 Trillion Annually*, MISES INST., (May 10, 2018), <https://mises.org/power-market/cei-federal-regulations-cost-19-trillion-annually>.

62. John Merline, *Federal Regulations Now Cost Almost \$1.9 Trillion, Study Finds*, CLUB FOR GROWTH, (May 4, 2016), <https://www.clubforgrowth.org/31016-2/>.

Ironically, one of the few things the CEI study gets correct is the dearth of serious studies of overall regulatory costs. In the absence of such studies, the field is occupied by the CEI study, the NAM study discussed previously, a few other similar partisan exercises, and the official estimate issued by OMB.

*3. OMB: \$78 to \$115 billion, but with a non-comprehensive approach*

The Office of Management and Budget annually issues its own estimate of total regulatory costs by summing the cost estimates of major rules, agency by agency, for rules finalized over the past ten years. The 2017 edition, the first issued under the Trump administration, pegged the range of regulatory costs at \$78 to \$115 billion.<sup>63</sup> Its methodology is far more conservative than that of the right-leaning think tanks. OMB simply identifies rules for which agencies have identified the costs, then adds the costs together.<sup>64</sup>

This approach is inherently less risky than developing a model to estimate total regulatory burden, but it has clear shortcomings. Not every rule has a cost estimate, and not every rule is included in OMB's analysis. For example, OMB includes in its review only "major" rules that have an estimated cost of at least \$100 million over at least one year.<sup>65</sup> In its 2017 review of regulations issued from fiscal year 2007 through fiscal year 2016, OMB reviewed 2,670 final rules, of which 609 were "major" rules. During that period, federal agencies issued 36,255 final rules.<sup>66</sup>

Clearly, the aggregation of all those smaller rules without formal cost estimates might have a substantial effect. It is not certain that they do, however, because many of the rules in question have essentially zero impact on private sector compliance costs. OMB under both Republican and Democrat administrations has asserted that major rules constitute a majority of regulatory costs.<sup>67</sup> Taking that asser-

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63. 2017 DRAFT REPORT, *supra* note 12, at 2.

64. OMB formerly used a model-based approach, producing estimates far higher than their current ones. Those estimates are cited by studies like *Costberg* as cover for high estimates. Given that the organizations that put them out 18 years ago do not use the same methodology now, those studies should not be given similar credence.

65. 2017 DRAFT REPORT, *supra* note 12, at 8.

66. *Id.*

67. *Id.*

tion at face value means that the costs could not be more than doubled by these non-major rules. Even doubled, the \$78 to \$115 billion OMB estimate of overall regulatory costs would be a small fraction of the costs estimated by the model-based studies described above.

The reliability of agency cost-benefit analysis has been studied and does not dramatically alter the conclusions above. Agencies tend to systematically overestimate both costs and benefits.<sup>68</sup> On the costs side, agencies often underestimate the ability of the private sector to cope with a restriction. If a particular technology is outlawed, another arises to take its place, or a wholly unrelated process arises to achieve the same end. To be fair, agencies probably should not lower cost estimates to reflect uncertain technological solutions. However, at the very least, this tendency should counteract the urge to raise OMB's cost estimates to reflect non-major rules.<sup>69</sup>

#### *4. Overall regulatory burden as a symptom of broader empirical problems*

The studies analyzed above suggest a profound truth about empirical estimates of regulatory burdens: they have often been either comprehensive or credible, but not both. To the extent there was a nationwide debate about the regulatory burden before the Trump administration, it was based on an unrealistic image of how economically significant the costs of regulation are. If one trusted the most recent federal estimates, there was little economic impact from overregulation *per se*, even if regulation could be more efficient. If one looked to think tank and industry estimates, regulation was strangling off perhaps as much as 20% of GDP annually. Those studies of total regulatory burden set the stage for estimates of Trump-specific savings from deregulation.

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68. CONG. RESEARCH SERV., METHODS OF ESTIMATING THE TOTAL COST OF FEDERAL REGULATIONS, at 11 (Jan. 21, 2016).

69. While this paper does not focus on regulatory benefits, the explanation for how agencies overestimate benefits is probably similar in some respects. If a rule is meant to stop a particular activity, but industry can carry out a similar activity with a new technology or process, it is entirely conceivable that the intended benefits will be dampened. A very common conservative criticism is that agencies deliberately overestimate benefits in order to justify regulatory action. The tendency of costs to be overestimated as well suggests that other factors carry more explanatory weight.

*C. Existing Estimates of Trump's Regulatory Cost Savings*

Understanding the difficulties of estimating regulatory burden helps explain the existing estimates of Trump's regulatory cost reductions. These estimates generally match the pattern that preceded Trump: federal estimates based on aggregation of specific rules might not tell the whole story, and partisan extrapolations based on poor modeling or skewed data are simply not credible. The significant difference from overall regulatory burden estimates is that partisan passions engendered by the Trump era have made methodological errors even more egregious.

OMB's estimate paints a frankly unimpressive picture. OMB's official estimate of deregulatory savings from the beginning of the Trump presidency through the end of fiscal year 2018 was \$23.57 billion. However, taking a closer look at the specific deregulatory actions included in that figure, it's clear that the overwhelming majority of identified rules and savings come from actions deemed "deregulatory," but which are really just tweaks in payment formulas. As I discuss below, using a generous definition of what constitutes a true "deregulatory" action, as of the end of fiscal year 2018, there had been only three major deregulatory actions by the Trump administration accounting for a total of about \$100 million in annual cost reduction.

Think tank and media estimates of deregulatory savings paint a different picture, but largely by measuring something other than the real or predicted economic effects of finalized actions. Instead, they project forward based on unrealistic assumptions about hypothetical actions. For example, if the Trump administration delays implementation of a regulation that will have a \$1 billion cost, this delay is portrayed as "potentially" saving up to \$1 billion. In every case, the regulation will either go forward as planned at a later date, or at best will be replaced by another rule that might cost, say, \$950 million instead of \$1 billion. Breathless assertions of "potential" savings appear intended to produce positive headlines rather than actual assessments of regulatory savings.

Ultimately, there is little choice for now but to accept the federal estimates because the think tank/industry estimates have major, identifiable flaws. But the failure of the think tank/industry studies, detailed further below, helps point the direction toward the synthesis of approaches that will constitute Part II of this article.

1. *Gossamer think tank estimates: \$60 billion or \$86 billion in “potential” savings*

Think tank estimates of regulatory savings generally take one of two approaches. The first is to present regulatory cost estimates in a carefully worded, accurate, but misleading way, which allows less rigorous media outlets to further muddy the waters with simpler but incorrect headlines. This approach allows the think tanks to be technically correct, but they must operate in such a confusing manner that their results are like fine glass: beautiful, but easily destroyed by the slightest mistake in handling.

An example: the *Washington Free Beacon* declared on April 20, 2017—exactly three months into the Trump administration—“Trump Rolls Back \$60 Billion More in Regulatory Savings.”<sup>70</sup> The article linked to a study by the American Action Forum (AAF), which describes itself as “lead[ing] the center-right on economic and fiscal policy issues.”<sup>71</sup> Other media outlets cited the same report and claimed \$86 billion in savings. The *Washington Examiner* ran the headline: “Trump reg cuts save immediate \$3.7 billion, \$86 billion overall.”<sup>72</sup> An opinion piece in *The Hill* was more breathless still: “Study: Trump has eliminated \$86B in regs.”<sup>73</sup>

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70. Elizabeth Harrington, *Report: Trump Rolls Back \$60 Billion More in Regulatory Savings*, WASH. FREE BEACON (Apr. 20, 2017), <https://freebeacon.com/issues/report-trump-rolls-back-60-billion-regulatory-savings/>.

71. Sam Batkins, *Tracking Regulatory Modernization in the Trump Administration*, AMERICAN ACTION FORUM, (Jun. 5, 2017), <https://www.americanactionforum.org/insight/tracking-regulatory-modernization-trump-administration>.

72. Paul Bedard, *Trump Reg Cuts Save Immediate \$3.7Billion, \$86 Billion Overall*, WASH. EXAMINER (May 9, 2017), <https://www.washingtonexaminer.com/trump-reg-cuts-save-immediate-37-billion-86-billion-overall>.

73. Tim Devaney, *Study: Trump Has Eliminated \$86B in Regs*, THE HILL (Apr. 20, 2017), <https://thehill.com/regulation/329720-study-trump-has-eliminated-86b-in-regs>.

The bizarre difference in something as simple as the bottom line arises from AAF's very careful wording. The \$60 billion figure came in the conclusion of the study, which stated (emphasis added):

Regulatory reform has taken many shapes during the Trump administration: CRA votes, increased flexibility in compliance, and formal reviews of major rules. As AAF has documented, *this has the ability to generate* more than \$60 billion in cost savings . . . .<sup>74</sup>

To their credit, the authors included in the actual report a specific estimate of estimated future savings: "\$4.1 billion in total net present value costs" between CRA resolutions and executive actions.<sup>75</sup> The \$60 billion figure links to another AAF report, which tracks "executive actions seeking regulatory rescissions and formal delays."<sup>76</sup> A table then describes the total cost of each rule being delayed. The information is presented as "*Totals: \$55.1 billion in affected costs.*"<sup>77</sup> Note that this is the total cost of delayed rules, not the total savings from repealed rules. A delayed rule will simply impose the same costs at a later date.

To summarize that circuitous journey: the administration delayed some rules, AAF displayed a table showing "totals" of "affected costs" related to those rules, and a media source interpreted that as actual cost savings. In reality, the \$55.1 billion figure is meaningless. It is the total, final cost of rules that continued in some form with a mere delay in implementation. The actual completed deregulatory actions selected by AAF accounted for \$4.1 billion in present value, and "rule delays" added another \$12.2 billion in "affected costs."<sup>78</sup> That vague accounting yielded the conclusion that deregulation "has the ability to generate more than \$60 billion in cost savings . . . ."<sup>79</sup>

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74. Sam Batkins, *Fiscal Benefits of the CRA, Regulatory Reform*, AMERICAN ACTION FORUM (April 20, 2017), <https://www.americanactionforum.org/insight/fiscal-benefits-cra-regulatory-reform/> (emphasis added).

75. Batkins, *supra* note 71.

76. *Id.*

77. *Id.* (emphasis in original).

78. The AAF accounting also includes rules that are only deregulatory in a technical sense.

79. Batkins, *supra* note 74.

The \$86 billion figure's provenance is simpler, but even more erroneous. The AAF study notes that one of the rules undone by a Congressional Review Act vote was the Department of Education's "Accountability and State Plans" measure.<sup>80</sup> The report notes that the regulatory measure contained conditions for accessing federal appropriations for state and local educational agencies.<sup>81</sup> Those funds totaled \$86.9 billion.<sup>82</sup> AAF explicitly notes: "This denunciation of the regulation, however, does not speak to the form of a substitute rule or if the \$86 billion in spending will return (which it likely will)."<sup>83</sup> The \$86 billion is thus not cost savings by any fair discernment of regulatory costs, a fact which did not stop multiple media outlets—and a book by Laura Ingraham and the Trump reelection campaign—from claiming it.<sup>84</sup>

While organizations like AAF, to their credit, usually stay on the right side of the line between truth and falsehoods in their confusing but transparent analyses, their reports tend more toward puffery than actual analysis. Tabulating the value of every rule that might be changed in some way and then presenting that as "potential" savings is, at best, unhelpful in determining the actual effect of deregulatory actions. At worst, it is knowingly misleading less meticulous entities like the *Washington Free Beacon* into generating bombastic propaganda.

## 2. *Hybrid think tank/industry estimates: sloppy language, unrealistic assumptions, big mistakes*

In some cases, think tanks entirely or partially rely on industry estimates, which can lead to skewed accounting. While industry estimates can be credible, they understandably carry the stigma of self-interest and sometimes do not stand up to scrutiny. This was particularly evident in the context of the seventeen deregulatory Congressional Review Act (CRA) resolutions signed into law by President Trump. While Trump's deregulatory agenda is generally confined to

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. LAURA INGRAHAM, BILLIONAIRE AT THE BARRICADES: THE POPULIST REVOLUTION FROM REAGAN TO TRUMP 249 (2018); *First 100 Days: The Truth Mainstream Media Refuses to Tell*, DONALD J. TRUMP, <https://www.donaldjtrump.com/100>.

the executive branch, the CRA resolutions largely terminated rules adopted toward the end of the Obama administration.<sup>85</sup> When fourteen of the seventeen rules had been terminated, AAF issued an analysis of the economic effect of the CRA resolutions up to that point.<sup>86</sup> It dutifully surveyed the regulatory impact analyses for the rules in question, which in their estimation added up to \$3.7 billion in total regulatory costs.<sup>87</sup> AAF also included industry cost estimates, which it pegged at a shockingly high \$34.8 billion.<sup>88</sup>

Three aspects of AAF's analysis are worth delving into. First, obviously, the vast difference between the federal agencies' estimates and industry's demands explanation. Second, on closer inspection, the summation of the federal agency estimates appears to be flat-out incorrect. Third, the numbers are, whether innocently or not, presented in a misleading manner that prompted outsiders to add together the two estimates.

The summation of federal estimates should have been the easiest part of this exercise: simply take the agency cost estimates from the regulatory impact analyses of each rule and add them up. Obviously, one would need to take the costs over the same period in order to give some sense of comparison. AAF either used an undisclosed methodology or made a mistake in finding the federal cost estimates. For example, the stream buffer rule's official annual compliance cost estimate is \$81 million for industry and \$720,000 for regulators from 2020 to 2040.<sup>89</sup> AAF claimed that the federal estimate for total cost was "\$1.2 billion" over an unspecified period.<sup>90</sup> It is not simply the

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85. Two of the 17 CRA resolutions struck down rules promulgated by the Consumer Financial Protection Bureau (CFPB), which due to its independence was able to continue adopting substantive new rules for some time during the Trump administration. One of the CRA resolutions blocked a CFPB rule adopted during the Trump administration. See S.J.Res.57, "A joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by Bureau of Consumer Financial Protection relating to 'Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act'", 115th Cong. (2018) <https://www.congress.gov/bill/115th-congress/senate-joint-resolution/57>

86. Sam Batkins, *The Congressional Review Act in 2017*, AMERICAN ACTION FORUM (May 10, 2017) <https://www.americanactionforum.org/insight/15550/>.

87. *Id.*

88. *Id.*

89. Stream Protection Rule, 81 Fed. Reg. 93066 (2016) (to be codified at 30 C.F.R. pts. 700, 701, 773, 774, 777, 779, 780, 782, 784, 785, 800, 816, 817, 824, 827), <https://www.federalregister.gov/documents/2016/12/20/2016-29958/stream-protection-rule#p-3034>.

90. Batkins, *supra* note 86.

annual cost estimate multiplied by 20 years (\$1.6 billion), and it is not the present discounted value of \$81 million over 20 years (\$868 million). AAF may have derived the \$1.2 billion from the federal estimate, but if so, it is not clear how.

Why harp so much on \$1.2 billion? As far as I can find, only one federal entity of any kind endorsed the \$1.2 billion figure—the communications team at the White House, which used the number in a press release.<sup>91</sup> However, if we are estimating the effect of Trump’s deregulatory actions, then repeal of the stream buffer rule did not save the economy \$1.2 billion in 2017. Taken at face value, repeal would have saved \$81 million annually had the rule been in effect.

The failure to get the federal estimate right pales in comparison to the unreliability of the industry estimate for the cost of the stream buffer rule—\$29 billion, or 83% of AAF’s total supposed savings from the CRA deregulatory actions. That estimate utterly dwarfs the federal estimate of \$81 million per year, and singlehandedly explains almost all of the difference between the federal and industry cost estimates.

Such a vast difference suggests a major methodological problem, and, indeed, the industry estimate which was later used by AAF has one: sampling. The report’s author simply asked respondents to estimate changes in production and costs because of the stream buffer rule. There were thirty-six mine owners included in the survey “from firms representing over 66% of the national coal production in the U.S.”<sup>92</sup> The report does not specify the mines, so we have no way of knowing if their costs are representative. We also cannot know the validity of the responses, since mine owners would have an incentive to offer an inflated estimate.

There is good reason to suspect that a nonrepresentative sample was used: the report was prepared in 2015 for the National Mining Association, an industry group with an interest in maximizing the ap-

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91. See CONG. RESEARCH SERV., THE OFFICE OF SURFACE MINING’S STREAM PROTECTION RULE: AN OVERVIEW (Jan. 2017), [https://www.everycrsreport.com/files/20170111\\_R44150\\_aeb8ad15c32441ec3bdb6788400bda94f4aa8d86.pdf](https://www.everycrsreport.com/files/20170111_R44150_aeb8ad15c32441ec3bdb6788400bda94f4aa8d86.pdf) (no mention of a \$1.2 billion cost estimate); see also WHITE HOUSE, PRESIDENT DONALD J. TRUMP UNLEASHES AMERICA’S ENERGY POTENTIAL (Jun. 27, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-unleashes-americas-energy-potential/>.

92. RAMBOLL ENVIRON, ECONOMIC ANALYSIS OF PROPOSED STREAM PROTECTION RULE 12 (2015), [https://www.eenews.net/assets/2015/10/26/document\\_gw\\_01.pdf](https://www.eenews.net/assets/2015/10/26/document_gw_01.pdf).

parent cost of the regulation.<sup>93</sup> Methodological problems notwithstanding, the \$29 billion figure has been cited by dozens of Republican politicians and right-leaning think-tanks, practically never with any documentation.<sup>94</sup>

On the basis of its survey, the authors of the National Mining Association report calculated that there would be a decrease in coal production of between 263.1 and 629.7 million short tons because of the stream protection rule over the life of the rule.<sup>95</sup> When the report was written, that constituted about 35%–72% of annual U.S. coal production.<sup>96</sup> For comparison, the Obama-era Department of the Interior predicted the rule would decrease coal production by a total of 0.08% from 2020 to 2040.<sup>97</sup>

Finally, AAF presented the two estimates (\$3.7 billion and \$34.8 billion) as agency cost and industry cost, which a casual reader might take to mean the regulation's cost to the federal government and the cost to the industries affected.<sup>98</sup> Indeed, media outlets like the *Washington Times* did interpret the language in that way.<sup>99</sup> As we have

93. See *id.* The report also became the subject of debate because it projected up to 77,000 lost jobs, a figure later cited by Senator Rand Paul and President Trump. Glenn Kessler, *Did President Trump Save 77,000 Coal Mining Jobs?*, WASH. POST (Feb. 27, 2017, 1:00 AM), [https://www.washingtonpost.com/news/fact-checker/wp/2017/02/27/did-president-trump-save-77000-coal-mining-jobs/?utm\\_term=.1ad368cd1d2a](https://www.washingtonpost.com/news/fact-checker/wp/2017/02/27/did-president-trump-save-77000-coal-mining-jobs/?utm_term=.1ad368cd1d2a).

94. See, e.g., *The Development and Potential Implementation of the Office of Surface Mining, Reclamation, and Enforcement's Proposed Stream Protection Rule: Hearing Before the Comm. on Energy and Nat. Res. U.S. S.*, 114th Cong. 1 (2015) (statement of Sen. Lisa Murkowski, Chairman, S. Comm. on Energy and Nat. Res.), <https://www.govinfo.gov/content/pkg/CHRG-114shrg98945/pdf/CHRG-114shrg98945.pdf>.

95. RAMBOLL, *supra* note 92, at 19.

96. *Id.*

97. Stream Protection Rule, 81 Fed. Reg. 93,066, 93,069 (December 20, 2016) (codified at 30 C.F.R. pts. 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, and 827), <https://www.govinfo.gov/content/pkg/FR-2016-12-20/pdf/2016-29958.pdf>.

98. Stephen Dinan, *GOP Rolled Back 14 of 15 Obama Rules Using Congressional Review Act*, WASH. TIMES (May 15, 2017), <https://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congress/> (“The American Action Forum, a conservative-leaning think tank, calculated repealing the rules could save the economy millions of hours of paperwork and \$3.7 billion in regulatory costs to the federal agencies, and perhaps \$35 billion in compliance costs for industry.”); Press Release, Am. Action Forum, *AAF Analysis Finds Congress Could Save \$40 Billion in Regulatory Costs Using the CRA* (Jan. 30, 2017), <https://www.americanactionforum.org/press-release/aaf-analysis-finds-congress-save-40-billion-regulatory-costs-using-cra/> (citing nearly \$40 billion in regulatory costs).

99. Dinan, *supra* note 98.

seen, however, it is actually referring to the cost estimate *from* agencies or *from* industry.

## II. TOWARD A BETTER ESTIMATE OF REGULATORY SAVINGS

Now that we understand the existing estimates and their limitations, we can try to come up with a good faith estimate of our own for annual regulatory costs saved through Trump administration deregulatory actions. We have seen the divide in overall regulatory burden studies between statistical models of regulatory costs and federal agency estimates for particular rules. Cognizant of the pitfalls of each approach, I split regulatory savings into two categories. The first is “hard” regulatory savings, the reduction in cost attributable to specific completed deregulatory acts. To establish “hard” savings, I review OMB’s compilation of deregulatory actions, removing rules that are either not specifically attributable to President Trump or which are only “deregulatory” in a technical sense. The second regulatory savings category, “soft” benefits, is composed of nebulous but important savings from things like a reduced expectation within the business community of near-term regulation. To get some understanding of the scale of “soft” benefits, I review available data on business investment and the various factors which would weaken “soft” benefits.

### *A. Distilling “Hard” Deregulatory Activities: About \$200 Million Annually*

The first step in assessing full regulatory costs must be an accounting of specific actions. The OMB estimate discussed earlier is a good place to start. Once we establish a clear definition for “deregulation,” we can find qualifying rules among OMB’s list.

#### *1. What should count as “deregulation,” and how does it differ from OMB’s definition?*

Defining “deregulation” in a meaningful way requires understanding what people actually mean by “regulation.” The original

meaning of the term is to control by rule, or direct.<sup>100</sup> Scholars, politicians, and commentators who believe the federal government has too many requirements want to *deregulate*, to allow deviation from a federally prescribed norm. Logically, deregulation would then be removing a mandatory standard for participants in a given industry.

That simple logic does not reflect the actual classification scheme used by OMB. Pursuant to Executive Order 13771, OMB's definition of "deregulation" is, simply, "an action that has been finalized and has total costs less than zero."<sup>101</sup> That expansive definition can lead to absurd situations where easing eligibility for federal benefits counts as deregulation if it requires less effort on the part of private entities to apply for the benefits.

For the sake of simplicity, I propose adding a caveat to OMB's definition: a regulatory action that amends eligibility for a federal benefit is not deregulation. Such actions might be independently desirable on efficiency or other grounds, but they are not removing a mandatory standard for participation in a private industry. Such rules are better understood as agencies setting the terms by which agencies interact with outsiders, not the terms by which those outsiders can participate in a non-government activity. Put another way, a deregulatory action must reduce private sector costs that accrue primarily because of a federal restriction on activity, not because of an offer of federal funds.<sup>102</sup> Expenses incurred in the pursuit of federal funds would include such obviously non-regulatory burden categories as lobbying expenses, job-search costs for would-be federal employees, time spent on grant applications, and even arguably campaign donations or parties thrown on behalf of elected officials. None of those expenses relate to the federal government's standardization of private sector activity.

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100. *Regulate*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/regulate> (last visited Mar. 4, 2020).

101. OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMO M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS" (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

102. Rules that alter the eligibility for federal benefits could be desirable in and of themselves, either for efficiency reasons (e.g., making a form easier to fill out) or, from a certain ideological vantage point, because they reduce the size of government (e.g., imposing work requirements for welfare benefits). In either case, the goal is not deregulation per se.

One other caveat is necessary: we must not count cost reductions for deregulatory actions that have not gone into effect. This is a major departure from the OMB methodology, which counts rules once they are finalized. It is important at this stage to remember our original purpose: judging the economic effect of deregulation. To achieve that end, it does not make sense to count rules that never actually forced anyone to do anything. The distinction between “finalized” and “in effect” may seem fine, but it is vital in assessing actual impact on the economy. Frequently, major rules are finalized, but then stayed by court action.<sup>103</sup> While the litigation is pending—sometimes for years—the rule cannot fairly be said to be a regulatory burden since no companies actually have to meet it. On the flip side, if a deregulatory rule has not yet actually altered an existing requirement, its effect on “hard” costs is minimal. Furthermore, litigation against the rule might succeed, whether by outright winning in court or by delaying the rule’s implementation until a new president takes office and withdraws the rule.

To be sure, the reduced expectation of future regulation can have a major economic effect. However, for purposes of our analysis, we will analyze those “soft” effects of deregulation separately. For now, we concern ourselves only with the quantifiable effects of deregulatory actions already taken.

## *2. Merging OMB’s estimate of “hard” savings with actual deregulation*

The official federal estimate for the total cost savings of Trump’s deregulatory actions is \$23.57 billion as of the end of fiscal year 2018, comprising \$570 million in fiscal year 2017 and \$23 billion in fiscal year 2018.<sup>104</sup> As discussed earlier, the \$23.57 billion figure is over an indefinite time horizon, meaning it is the present value of all expected future savings. The figure actually amounts to \$1.6 billion annually.<sup>105</sup> These numbers must be seen as the most credible estimate

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103. The Clean Power Plan is one obvious recent example which will be discussed later in this article.

104. OFFICE OF INFO. AND REGULATORY AFFAIRS, REGULATORY REFORM RESULTS FOR FISCAL YEAR 2018 (2018), <https://web.archive.org/web/20190608110347/https://www.reginfo.gov/public/do/eAgendaEO13771> (last visited Mar. 4, 2020).

105. Alan Levin & Alyza Sebenius, *Trump Claims \$1.6 Billion a Year Saved from Cutting Red Tape*, BLOOMBERG (Oct. 16, 2018, 6:00 PM), <https://www.bloomberg.com/>

of “hard” regulatory savings to date, but even they must be taken with a grain of salt. OMB’s numbers are the product of agency estimates, and the agencies in question are headed by and replete with Trump administration political appointees. It is in their interest to inflate the number as much as possible. However, OMB’s report has one important factor in its favor: OMB’s estimate is startlingly low. Because OMB had every incentive to inflate, the low estimate presents a significant case for credibility, at least as a starting point for our analysis.<sup>106</sup>

*a. How significant is \$1.6 billion in annual regulatory savings?* If that truly is the total value of Trump deregulation, then deregulation is very nearly meaningless in the overall economy—a maximum \$3.2 billion drop in a roughly \$40 trillion ocean of U.S. GDP in 2017 and 2018. Worse still, because the number is only costs avoided and does not include the benefits given up through repeal of the rules in question, the true effect of deregulation would be lower still.

From another perspective, the \$1.6 billion in annual savings claimed by the Trump administration OMB could be as much as 2% of the overall regulatory burden if one accepts OMB’s total regulatory burden range of \$78 billion to \$115 billion.<sup>107</sup> Viewed through that prism, Trump’s deregulatory effort might seem more substantial. However, there are important caveats to that manner of examining the \$1.6 billion figure. From a purely technical perspective, the \$1.6 billion annual figure includes the withdrawal of regulations that were not finalized. OMB’s overall estimate of a \$78 to \$115 billion burden counted only final rules, so the \$1.6 billion in deregulatory actions does not directly compare to the \$78 to \$115 billion estimate of annual overall cost.

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news/articles/2018-10-17/trump-administration-claims-23-billion-in-regulation-savings.

106. This is analogous to the criterion of embarrassment in biblical interpretation, which broadly suggests that parts of the Bible which would have been most embarrassing for the authors to concede are the most likely to be grounded in historical fact. If they were not grounded in fact, why would the authors include them? *See, e.g.*, JOHN P. MEIER, *A MARGINAL JEW: RETHINKING THE HISTORICAL JESUS. VOLUME I: RETHINKING THE HISTORICAL JESUS*, ANCHOR BIBLE REFERENCE LIBRARY 168 (1991).

107. 2017 DRAFT REPORT, *supra* note 12, at 2.

*b. Narrowing the OMB list of deregulatory rules* A more substantial flaw in the OMB list is its legalistic methodology. Few of the actions included are the sort one would associate with real, substantive deregulation. Some background is necessary to appreciate this point. By OMB terminology, a significant regulation has a non-zero economic effect; major regulation has an economic effect of greater than \$100 million.<sup>108</sup>

At the end of fiscal year 2018, OMB reported eliminating 176 regulatory actions while issuing “only 14 new significant regulatory actions,” concluding that it had achieved a twelve to one ratio of deregulatory to regulatory actions.<sup>109</sup> This is misleading. OMB is comparing *all* deregulatory actions with new *significant* regulatory actions. There were actually fifty-seven significant deregulatory actions compared to fourteen significant regulatory actions—a four to one ratio on significant actions. However, one can break the numbers down further by including only *major* actions. There were nineteen major actions, four of which were classified as regulatory.<sup>110</sup> We are now reduced to a universe of fifteen major deregulatory actions.

Of those fifteen actions, twelve are primarily concerned with redistributing payments among program recipients or changing the manner in which people or entities are billed or compensated under existing federal programs. These actions are considered “deregulatory” by OMB because they incidentally reduce private sector costs, but under the definition of “deregulation” developed above, they should not be considered deregulatory. These actions do not relate to restrictions on activities by the private sector. Rather, they relate to the manner in which outside groups obtain federal benefits. The purpose

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108. OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 101, at 3; 2017 DRAFT REPORT, *supra* note 12, at 8.

109. OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, THE 2018 REGULATORY REFORM REPORT: CUTTING THE RED TAPE, UNLEASHING ECONOMIC FREEDOM 3 (2018), <https://www.whitehouse.gov/wp-content/uploads/2018/10/2018-Unified-Agenda-Cutting-the-Red-Tape.pdf>.

110. OMB categorized 20 major deregulatory actions, but actual inspection of the rules reveals one that was apparently miscategorized. A rule on disposal of coal combustion residues was classified major by OMB in its report, but the regulatory impact analysis associated with the rule says it is not a major rule. *See* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One), 83 Fed. Reg. 36,435, 36,451 (Jul. 30, 2018) (codified at 40 C.F.R. pt. 257), <https://www.federalregister.gov/documents/2018/07/30/2018-16262/hazardous-and-solid-waste-management-system-disposal-of-coal-combustion-residuals-from-electric>.

of the actions is thus not related to reducing regulatory burden on the private sector, and it is not reasonable to consider them part of a broader deregulatory agenda.

As an example typical of the twelve actions in question, the Medicare rule “Updates to the Quality Payment Program” tweaks an existing program offering higher Medicare payment rates for physicians who follow best practices for treatment.<sup>111</sup> Adjustments to the methods of evaluating physician performance for calendar year 2018 resulted in a \$13.9 million reduction to the private sector cost of collecting the information required to participate in the program.<sup>112</sup> However, the agency predicts those changes will lead to “[a]dditional federal expenditures includ[ing] approximately \$675 to \$900 million in [] incentive payments to [qualifying physicians].”<sup>113</sup> This is an action that increases federal expenditures by almost a billion dollars, but counts as *deregulatory* because it reduces the cost to doctors of filling out paperwork to access federal benefits. The action is, in all probability, perfectly reasonable. However, it is silly to consider it part of a deregulatory agenda.

Without those twelve actions, we are left with only three major deregulatory actions that qualify as “deregulatory” consistent with the criteria outlined earlier. I will describe each rule in detail below.

*c. The major Trump deregulatory acts that have taken effect.* One of the three major deregulatory acts changed the definition of an “employer” under the Employee Retirement Income Security Act of 1974 (ERISA).<sup>114</sup> Without getting into the technical details, the change enables many more people to qualify for association health plans, which are a lower-cost, lower-coverage alternative outside of the Affordable Care Act. While clearly deregulatory in the sense of allowing citizens to do something they could not do before, expanding the availability of association health plans does not unambiguously reduce regulatory costs. Indeed, the agency noted in the Federal Register, “On balance, deficit increasing effects are likely to dominate, making the proposal’s net

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111. Medicare Program; CY 2018 Updates to the Quality Payment Program; and Quality Payment Program: Extreme and Uncontrollable Circumstance Policy for the Transition Year, 82 Fed. Reg. 53,568, 53,569 (Nov. 16, 2017) (codified at 42 C.F.R. pt. 414), <https://www.govinfo.gov/app/details/FR-2017-11-16/2017-24067>.

112. *Id.* at 53,577.

113. *Id.*

impact on the federal budget negative.”<sup>115</sup> As for overall effects, the agency could only state: “While the impacts of this proposed rule, and of AHPs themselves, are intended to be positive on net, the incidence, nature and magnitude of both positive and negative effects are uncertain.”<sup>116</sup> Since the agency proposing the rule does not itself feel comfortable asserting specific regulatory cost savings from this “deregulatory” action, it stands to reason we should not assign any.

The second of the three major deregulatory actions is the “Omnibus Essential Fish Habitat Amendment 2,” which allows greater fishing in some areas off the shore of the northeastern United States.<sup>117</sup> The issuing agencies under the Department of Commerce predicted annualized cost savings of \$60 to \$62 million.<sup>118</sup> Some commentators have pointed out that this rule simply adopted the recommendations of the New England Fishery Management Council, which were issued in December 2016, before the Trump administration took office. Even if its genesis arguably predates the Trump administration, the rule does reduce a classic regulatory burden: restriction of access to public land. We can consider it an actual deregulatory action.

The third of the three major deregulatory actions is probably the most prominent: rescinding a 2016 regulation requiring greater capture of methane generated while drilling for oil on federal and Indian lands.<sup>119</sup> The cost savings from that rule depend slightly on perspective. The Bureau of Land Management (BLM) stated that the action would reduce compliance costs for energy companies by \$1.32 to \$2.03 billion over ten years.<sup>120</sup> BLM did not subtract from that figure the value of the methane captured, which would directly accrue to the entities bearing the regulatory burden. Sale of the methane captured under the rule was expected to produce \$629 to \$824 million

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114. Definition of “Employer” Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 614 (Jan. 5, 2018) (codified at 29 C.F.R. pt. 2510).

115. *Id.* at 632.

116. *Id.* at 626.

117. Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Essential Fish Habitat, 82 Fed. Reg. 51,492 (Nov. 6, 2017) (codified at 50 C.F.R. pt. 648).

118. *Id.* at 51,497.

119. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924 (Feb. 22, 2018) (codified at 43 C.F.R. pts. 3160, 3170).

120. *Id.* at 7939.

over the same time span.<sup>121</sup> If one subtracts the revenue accrued from methane sales, the cost reduction is \$496 million to \$1.4 billion over ten years. On an annualized basis, that amounts to \$71 to \$199 million. A deregulatory action, sure, but, like the fishing rule, one that carries relatively minor cost savings.

From this review of OMB's list of deregulatory actions, we derive a sum total of "hard" savings of \$131 to \$261 million annually: \$71 to \$199 million from repeal of the methane capture rule, and \$60 to \$62 million from the fisheries rule. If we generously date those rule changes to the beginning of his administration, President Trump reduced "hard" regulatory costs by \$262 to \$522 million total by the end of fiscal year 2018.<sup>122</sup>

### *3. Will major deregulatory actions currently under way dramatically change the tally?*

OMB's fiscal year 2018 review covered only finalized actions, so it is worth taking stock of major regulatory actions that have since been finalized or will likely be finalized before the end of President Trump's first term. While those actions are not relevant for determining regulatory savings' role in current economic growth because they have not gone into effect, we should consider whether they would meaningfully affect the overall estimation of Trump administration deregulation. Upon review, it is unlikely that these major rules would significantly contribute to economic growth.

*a. Clean Power Plan repeal and replacement.* Some of the biggest potential sources of regulatory savings present the most difficult methodological issues: the Clean Power Plan (CPP) and the redefinition of "waters of the United States" rule (WOTUS).

The CPP was finalized under President Obama in 2015, then stayed in February 2016 by the Supreme Court.<sup>123</sup> That litigation was still ongoing when President Trump came into office.<sup>124</sup> The D.C.

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121. *Id.*

122. Assuming a 7% discount rate, as the Trump administration OMB does in its discounting calculations. *See, e.g., id.*

123. Order in Pending Case, *West Virginia v. EPA*, (S. Ct. February 9, 2016) (No. 15A773), [https://www.supremecourt.gov/orders/courtorders/020916zr\\_21p3.pdf](https://www.supremecourt.gov/orders/courtorders/020916zr_21p3.pdf).

124. *See* Supplemental Brief of Respondent EPA in Support of Abeyance, *West Virginia v. EPA* (D.C. Cir. May 15, 2017) (No. 15-1363), <http://blogs2.law.columbia.edu/climate->

Circuit essentially halted proceedings pending potential settlement.<sup>125</sup> The Environmental Protection Agency (EPA) subsequently announced it would repeal the CPP and replace it with the Affordable Clean Energy (ACE) plan.<sup>126</sup> The EPA finalized the rule repealing the CPP and replacing it with ACE on July 8, 2019, with ACE taking effect on September 6, 2019.<sup>127</sup> Both the repeal and the replacement plan will likely be the subject of litigation, and the fate of both actions is unclear.

The extent to which the attempt to switch from CPP to ACE has resulted in regulatory savings is very much in the eye of the beholder. At the very least, even if the repeal and replace actions get stuck in court until after Trump's presidency, there are cost savings involved in the absence of the CPP for four years. Against that logic, though the CPP has not gone into effect yet, it is easy to envision a scenario in which it does. To wit, legal challenges to both the repeal of the CPP and the promulgation of ACE could be successful, and then the EPA would be forced to keep the CPP. Or, if the courts do not issue a final ruling before the 2020 elections, a new administration could abandon the repeal and replace effort, allowing CPP to go into effect.

One aspect of the repeal and replace effort makes its immediate effects easy to estimate. Under the ACE rule, states have three years from September 6, 2019 to propose how they will comply with the rule. The ACE rule has thus likely not caused any significant regulatory costs as of the publication of this article. At the same time, given that the CPP never took effect, it is not clear that we should accord any savings to the repeal effort. And, as stated earlier, the repeal effort might be derailed by lawsuits, or delayed until after the election when another president might abandon the repeal. It is premature to count any "savings" that may not materialize.

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change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170515\_docket-15-1363\_brief-1.pdf.

125. See Order No. 15-1363, *West Virginia v. EPA* (D.C. Cir. Apr. 28, 2017), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170428\\_docket-15-1363\\_order.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170428_docket-15-1363_order.pdf).

126. *EPA Proposes Affordable Clean Energy (ACE) Rule*, EPA.GOV, (Aug. 21, 2018), <https://web.archive.org/web/20181231222845/https://www.epa.gov/newsreleases/epa-proposes-affordable-clean-energy-ace-rule>.

127. <https://www.federalregister.gov/documents/2019/07/08/2019-13507/repeal-of-the-clean-power-plan-emission-guidelines-for-greenhouse-gas-emissions-from-existing>.

There can be “soft” cost savings from the repeal effort even if its legal status remains in limbo. Companies presumably make investments to become compliant with the rule, perhaps before it is even finalized. If a company were on the verge of investing to comply with the CPP in November 2016, then canceled those investments after the election of President Trump, that seems like paradigmatic savings from deregulation. Those effects would be evident in our discussion of “soft” benefits, so we need not consider them here.

Of course, speculation about avoided investments to comply with regulation has a flip side as well. Companies that already made investments to comply with the CPP may have gained little or nothing from the deregulation. Indeed, those companies may suffer as much by the deregulation as the initial regulation if the investments in compliance rendered them uncompetitive with other companies that did not make similar investments.

While the net effect of these competing forces is unclear, in theory, the net effect of the potential repeal of the CPP would be counted under the “soft” effects methodology, which will be discussed at length later in this article.

*b. Waters of the United States redefinition.* WOTUS presents a different issue: a rule that is partially in effect. The Obama administration EPA issued a clarification of the term “waters of the United States,” used in the Clean Water Act to describe EPA’s jurisdiction to regulate water.<sup>128</sup> Multiple lawsuits ensued.<sup>129</sup> The rule was stayed by a district court in August 2015, hours before it was to take effect.<sup>130</sup> The Trump administration proposed and finalized a rule repealing the 2015 definition, and a rule replacing that would reduce the

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128. Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37,054 (Jun. 29, 2015) (codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401), <https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states>.

129. See, e.g., Pam MacLean, *Sixteen States Sue EPA over Clean Water Rule*, REUTERS (Jun. 29, 2015), <https://www.reuters.com/article/us-usa-environment-water-epa/sixteen-states-sue-epa-over-clean-water-rule-idUSKCN0P92QJ20150629>.

130. See Memorandum Opinion and Order Granting Plaintiffs’ Motion for Preliminary Injunction, *North Dakota v. EPA* (D. N.D. 2015), <https://cases.justia.com/federal/district-courts/north-dakota/nddce/3:2015cv00059/31173/70/0.pdf?ts=1440758970>.

scope of EPA's jurisdiction.<sup>131</sup> As of this writing, some states are still governed by the pre-2015 standard, and some are governed by the 2015 standard.<sup>132</sup>

The crux of the WOTUS dilemma is whether to count deregulatory benefits from a rule that technically is in effect in some places and not others. The intuitive "fair" answer would be to count the benefits from undoing WOTUS in the states where it has gone into effect and not to count the savings from states where it has not gone into effect. EPA did not publish its cost-benefit analysis in a state-by-state breakdown, however, so this approach is easier to conceive than to execute.

As of this drafting, WOTUS is in effect in 26 states, disproportionately states with smaller GDP.<sup>133</sup> So, to the extent there are regulatory savings from the repeal effort, they would come from those states.

Another methodologically messy aspect of the WOTUS repeal is that the Trump administration argues states will regulate some of the areas over which EPA would have had jurisdiction under the Obama-era WOTUS definition.<sup>134</sup> If state regulators do not take up the slack, the avoided costs of the WOTUS rule are much greater.

The two sources of uncertainty—application in some states and not others, and how state regulators react to the withdrawal of EPA jurisdiction—can be set against each other to create a rough but fair estimate. We know the pre-2015 rule is already in effect in half of the states, so the benefits of going back to the pre-2015 rule are zero for them. We can thus reasonably choose EPA's estimate for savings ac-

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131. See Press Release, EPA, EPA Finalizes Affordable Clean Energy Rule, Ensuring Reliable, Diversified Energy Resources while Protecting our Environment (Jun. 19, 2019), EPA.GOV, <https://www.epa.gov/newsreleases/epa-finalizes-affordable-clean-energy-rule-ensuring-reliable-diversified-energy>.

132. See *Definition of "Waters of the United States": Rule Status and Litigation Update*, EPA.GOV, <https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update> (last visited Mar. 4, 2020).

133. Seven of the 10 largest states by GDP are not currently subject to WOTUS—California, Texas, New York, Florida, Pennsylvania, Ohio, and New Jersey. See LAURA GATZ, CONG. RESEARCH SERV., R45424, "WATERS OF THE UNITED STATES" (WOTUS): CURRENT STATUS OF THE 2015 CLEAN WATER RULE (Dec. 12, 2018), <https://fas.org/sgp/crs/misc/R45424.pdf>.

134. Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4201 (Feb. 14, 2019) (codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401). [https://www.epa.gov/sites/production/files/2019-02/documents/revised\\_definition\\_of\\_waters\\_of\\_the\\_united\\_states.pdf](https://www.epa.gov/sites/production/files/2019-02/documents/revised_definition_of_waters_of_the_united_states.pdf).

cruing if most states do regulate the waters in question. The span of EPA's range of avoided costs is massive: \$28 to \$497 million.<sup>135</sup> Hewing to the lower end of that range to compensate for states where the Obama WOTUS never went into effect, we can select \$100 million in annual savings as a realistic if somewhat arbitrary choice. If the WOTUS definition change survives court appeal, the cost reduction contributed by this particular case would likely not dramatically swing the overall estimate of deregulatory cost savings.

*c. Outer continental shelf energy exploitation.* On January 4, 2018, the Bureau of Ocean Energy Management (BOEM) released a draft proposal for outer-continental shelf development over the period 2019–2024.<sup>136</sup> That plan would partially replace an Obama-era plan for 2017–2022.<sup>137</sup> On its face, the plan opened up a wide array of new offshore territory for oil and gas leases, most notably in the mid-Atlantic, off the gulf coast, and off the Alaskan coast.<sup>138</sup> However, BOEM has not yet released a final proposal, and what areas will be opened for lease remains unclear. For example, then-Secretary of the Interior Ryan Zinke announced that Florida's offshore areas would be exempted from oil and gas leases, prompting calls for additional exemptions from many other states.<sup>139</sup>

Even if the final plan sticks closely to the draft plan, it is still very difficult to estimate the cost savings. There will only be “savings” if the oil and gas industries actually lease the areas in question. The extent of subsequent exploitation is also an open question—most leases are essentially left fallow, to be used only if the price of oil reaches a certain level. For example, in the western Gulf of Mexico, as of April 2019, there were 310 active leases, but only fifty-eight of them were

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135. *Id.*

136. BUREAU OF OCEAN ENERGY MGMT., NATIONAL OCS OIL AND GAS LEASING PROGRAM, <https://www.boem.gov/National-OCS-Program/> (last visited Jan. 27, 2020).

137. See BUREAU OF OCEAN ENERGY MGMT., 2017–2022 OUTER CONTINENTAL SHELF OIL AND GAS LEASING PROPOSED FINAL PROGRAM (2016), <https://www.boem.gov/2017-2022-OCS-Oil-and-Gas-Leasing-PFP/>.

138. See BUREAU OF OCEAN ENERGY MGMT., 2019–2024 NATIONAL OUTER CONTINENTAL SHELF OIL AND GAS LEASING DRAFT PROPOSED PROGRAM (2018), <https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/>.

139. See Ryan Zinke (@SecretaryZinke), TWITTER (Jan. 9, 2018, 4:20 PM), <https://twitter.com/secretaryzinke/status/950870010242719745?lang=en>; Pamela King, *States Call for the Fla. Treatment in their case against drilling*, E&E News (Jan. 18, 2018).

actually producing oil or gas.<sup>140</sup> That decision will depend on the current and expected future price of oil and natural gas. As of this writing, offshore leases under Trump have actually yielded less revenue than lease sales under Obama, a fact largely attributable to lower oil prices under Trump and more easily recoverable resources onshore in recent years.<sup>141</sup>

There is also a significant chance that some or all of the proposed plan will be blocked in court as arbitrary and capricious. Secretary Zinke seemed to announce the exemption of Florida by tweet, citing then-Governor Rick Scott's leadership: "As a result of discussion with Governor Scott's [*sic*] and his leadership, I am removing Florida from consideration for any new oil and gas platforms."<sup>142</sup> That explanation drew immediate suggestion that decisions not to exempt other areas would lead to lawsuits alleging an arbitrary and capricious process of granting exemptions.<sup>143</sup>

Under these circumstances, it is impossible to offer a reasonable guess as to the regulatory cost savings from the Trump administration's plan to open up more area for leasing. It seems safe to assume that opening more areas for drilling will not cause regulatory costs to go up, but whether they go down and by how much is essentially impossible to determine. In any event, the proposed plan has not been finalized, and given the low price of oil, it is unlikely that the additional available land will significantly affect total regulatory savings.

*d. Opening up land for energy exploration.* The Trump administration has made opening onshore land for oil and gas production a top priority, which has had a significant effect on production. BLM reported \$358 million in revenue from oil and gas leases in 2017, representing an 86% increase from 2016.<sup>144</sup> In 2018, that

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140. BUREAU OF OCEAN ENERGY MGMT, COMBINED LEASING REPORT (Apr. 1, 2019), <https://www.boem.gov/Combined-Leasing-Statistics-April-2019/>.

141. Nichola Groom, *U.S. Gulf Oil, Gas Lease Sale Sees Higher Interest from Drillers*, KITCO NEWS, (Mar. 20, 2019, 3:09 PM), <https://www.kitco.com/news/2019-03-20/U-S-Gulf-oil-gas-lease-sale-sees-higher-interest-from-drillers.html>.

142. Ryan Zinke (@SecretaryZinke), TWITTER (Jan. 9, 2018, 3:48 PM), <https://twitter.com/SecretaryZinke/status/950876846698180608>.

143. Umair Irfan, *Florida Got an Exemption to the Offshore Drilling Plan*, VOX (Jan. 12, 2018, 11:59 AM), <https://www.vox.com/energy-and-environment/2018/1/10/16870450/ocs-offshore-drilling-oil-gas-lease-zinke-florida>.

144. Bureau of Land Mgmt., *BLM Oil and Gas Lease Sales Generate \$360 Million in 2017*, WWW.BLM.GOV, (Jan. 31, 2018), <https://www.blm.gov/press-release/blm-oil-and-gas->

figure shot up another 205% to \$1.1 billion.<sup>145</sup> That figure is just the federal share of the benefits.

It is possible to make a rough calculation of private sector benefits from these actions. The Department of the Interior released a report in fiscal year 2017 stating that oil, gas, and coal production on federal lands and waters generated \$67.22 billion in direct economic contributions.<sup>146</sup> Of that total, roughly three-quarters are from on-shore production.<sup>147</sup> The leased area that produced that value was 25.7 million acres.<sup>148</sup> Put another way, the leased area produced about \$2,600 per acre leased. The Trump administration's lease sales were for about 793,000 acres in 2017 and 1.5 million acres in 2018.<sup>149</sup> If we assume equal productivity from existing and new federal leased areas, the 2017 and 2018 sales generated \$2.1 billion and \$3.9 billion respectively.

That is not, however, the end of the calculation. From that total, we should subtract the average annual newly leased acreage under the Obama administration. The regulatory "burden" relieved by the Trump administration through the lease sales is the newly leased land *beyond* what the Obama administration would have leased anyway. The average BLM annual lease sale from fiscal year 2009 to fiscal year 2016 was 1.35 million acres, comparable to Trump administration leases in either 2017 or 2018.<sup>150</sup>

Another complication is pending lawsuits. A federal court has already frozen 300,000 acres leased under the Trump administration in Wyoming. The judge in that case ruled that the sale was arbitrary and capricious because the Trump administration did not take into

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lease-sales-generate-360-million-2017.

145. Press Release, Dep't of the Interior, Energy Revolution Unleashed: Interior Shatters Previous Records with \$1.1 Billion in 2018 Oil and Gas Lease Sales (Feb. 6, 2019), <https://www.doi.gov/news/energy-revolution-unleashed-interior-shatters-previous-records-11-billion-2018-oil-and-gas>.

146. U.S. DEP'T OF THE INTERIOR, ECONOMIC REPORT FY 2017, 11 (Oct. 19, 2018), [https://www.doi.gov/sites/doi.gov/files/uploads/fy\\_2017\\_econ\\_report\\_final\\_11\\_1\\_18.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/fy_2017_econ_report_final_11_1_18.pdf).

147. See MARC HUMPHRIES, CONG. RESEARCH SERV., R42432, U.S. CRUDE OIL AND NATURAL GAS PRODUCTION IN FEDERAL AND NONFEDERAL AREAS 3 (2018), <https://crsreports.congress.gov/product/pdf/R/R42432>.

148. *Id.* at 9.

149. See DEP'T OF THE INTERIOR, *supra* note 146.

150. See U.S. BUREAU OF LAND MGMT., OIL AND GAS STATISTICS tbl.4, <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics> (last visited Aug. 8, 2018).

account the effect of the carbon released through expanded use of oil and gas.<sup>151</sup> 300,000 acres is actually larger than the difference between the average newly leased acreage under Obama (1.35 million acres) and the 1.5 million acres leased by Trump in 2018. We are thus in the bizarre situation where the slipshod manner of the Trump administration's deregulatory action could actually mean that the net regulatory burden *increased*.

All these data points dampen the potential deregulatory impact of the land leases. If we simply ignore the litigation hold on the 300,000 acres, the impact of the additional lease sales under President Trump was something like \$650 million in 2018.

The above analysis suggests that, at \$650 million, increased federal land leases are one of the largest sources of deregulatory cost savings under President Trump. However, this amount is still an incremental increase in deregulatory savings, not an economic game-changer. Furthermore, if the theory of regulatory burden in this case is that perfectly good land was available for lease but held back because of regulatory caprice, it stands to reason that such land will decline in quantity as the Trump administration proceeds. We should therefore expect that the cost savings will not be \$650 million every year.<sup>152</sup>

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151. Juliet Eilperin, *Federal Judge Demands Trump Administration Reveal How Its Drilling Plans Will Fuel Climate Change*, WASH. POST (Mar. 20, 2019, 11:27 AM), <https://www.washingtonpost.com/climate-environment/2019/03/20/federal-judge-casts-doubt-trumps-drilling-plans-across-us-because-they-ignore-climate-change/>.

152. The price of oil and gas will have a much larger impact on these benefits than the amount of land leased. A considerable portion of leased land is not productive every year precisely because it is only economical to work that land at certain oil prices. See HUMPHRIES, *supra* note 147, at 9 (showing about half of leased onshore land is not productive).

*e. Freezing CAFE standards.* In July 2018, the National Highway Traffic Safety Administration and EPA proposed freezing Corporate Average Fuel Economy (CAFE) and carbon dioxide standards for passenger cars and light trucks for model years 2021 through 2026.<sup>153</sup> They issued a joint draft regulatory impact analysis for the proposed rule.<sup>154</sup>

If the proposed rule goes into effect and the agencies' draft cost estimates are taken at face value, freezing CAFE and CO2 standards is the single most consequential act in the deregulatory agenda by a vast margin. The agencies project annualized cost savings of \$19.2 to \$24.2 billion.<sup>155</sup>

As with other non-finalized rules, there are a number of reasons to discount the significance of these projects. First, the rule has not been finalized and is not in effect, so these projections do not help us explain the current economic boom. Second, even if the rule were finalized, the significant savings would not start kicking in until 2021, at which point President Trump might no longer be in office.<sup>156</sup>

As with other major rules not yet in effect, a future administration could change the rules again. A court could also overturn the rule, as with the other examples discussed above. There is even a strong possibility that states like California will institute their own CAFE-like standards.<sup>157</sup> Because of the size of the California market, manufacturers might be forced to follow those standards, undoing most of the cost savings anticipated by the federal rule.<sup>158</sup>

This is most likely the rule where only considering regulatory costs and ignoring benefits gives the most skewed perspective. CAFE

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153. U.S. Envtl. Prot. Agency, THE SAFER AFFORDABLE FUEL EFFICIENT (SAFE) VEHICLES PROPOSED RULE FOR MODEL YEARS 2021-2026, EPA.GOV, <https://www.epa.gov/regulations-emissions-vehicles-and-engines/safer-affordable-fuel-efficient-safe-vehicles-proposed> (last updated Sept. 27, 2018).

154. NAT'L HIGHWAY SAFETY ADMIN. & U.S. ENV'T PROT. AGENCY, THE SAFER AFFORDABLE FUEL-EFFICIENT (SAFE) VEHICLES RULE FOR MODEL YEAR 2021-2026 PASSENGER CARS AND LIGHT TRUCKS (July 2018), [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/ld\\_cafe\\_my2021-26\\_pria\\_0.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/ld_cafe_my2021-26_pria_0.pdf) [hereinafter NAT'L HIGHWAY SAFETY ADMIN.].

155. *Id.* at 13.

156. *See id.* at 33. Note that the standards are unaffected until 2021.

157. Coral Davenport, *Automakers Plan for Their Worst Nightmare: Regulatory Chaos After Trump's Emissions Rollback*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/10/climate/auto-emissions-cafe-rollback-trump.html>.

158. *See id.*

standards have a vast impact because they relate to most automobile purchases in a country that buys around \$80 billion in cars *a month*.<sup>159</sup> As with the tweaks to Medicare transfer rules discussed earlier, the sheer volume of trade being regulated means small “deregulatory” acts will carry an outsized effect. Thus, even a small tweak to CAFE standards will have a vast effect on regulatory costs.

The real distortion here comes from looking at costs and not benefits of regulation. While every regulation we have discussed has benefits, in the paradigmatic regulatory case, the costs are mostly monetary, and the benefits come in the form of health improvements or the like. CAFE standards, by contrast, have an obvious immediate economic benefit: lowering fuel costs for consumers.<sup>160</sup> The regulation has some deadweight loss because consumers might not want more fuel-efficient cars. However, a large portion of the costs and benefits are simply a tradeoff between increased cost of cars and increased cost of fuel.

To more clearly illustrate that phenomenon, imagine a situation where there are two possible building materials for the \$1 billion water bottle market: plastic and steel. Assume consumers are essentially indifferent between the two such that without regulation, the market is 50% plastic bottles, 50% steel bottles. Then imagine EPA issues a regulation banning plastic water bottles because it is discovered that the plastic causes cancer. Even ignoring the health benefits, the costs and benefits are essentially equal. Assume further that former plastic consumers smoothly transition to steel, and steel manufacturers hire the workers who formerly made plastic bottles.

This scenario highlights the slipperiness of “regulatory burden” as a concept. There are winners and losers, but the economy overall is not harmed. However, in our exercise of only counting regulatory costs, it appears that this regulation had a \$500 million cost. To distill the essence of the problem, when a regulation is essentially just the government forcing a move along the Pareto frontier (i.e., moving from one state of maximum utility to a different but equal in utility state), examining only the regulatory costs will mislead as to the

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159. See RETAIL SALES: AUTOMOBILE DEALERS, FRED, Fed. Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/MRTSSM4411USN> (last updated Mar. 17, 2020).

160. There are, of course, other benefits to CAFE standards, e.g., lower CO2 emissions. That sort of benefit is more typical of an ordinary regulation, where the public at large accrues the benefits in a less direct way than straightforward lower costs.

actual importance of the regulation. The more a regulation resembles this situation, the more misleading the costs-only approach will be.

As applied to President Trump's proposed CAFE standards, annualized cost savings are \$19.2 to \$24.2 billion, but *net* annualized savings are only \$6.7 to \$9.5 billion.<sup>161</sup> If the proposed CAFE standards end up going into effect, those savings would still be larger than all the finalized deregulatory actions to date, but the savings are not hugely significant in the context of the overall economy.

Ultimately, we cannot count the CAFE and CO2 standards toward regulatory benefits of the administration thus far because the rules are not finalized and have not gone into effect. Indeed, California recently reached an agreement with the automotive industry on a different set of standards that would render the new federal CAFE and CO2 standards moot.<sup>162</sup> However, the case raises methodological questions that cast uncertainty on the relatively large potential regulatory savings of this purported deregulation victory.<sup>163</sup>

*f. Tariffs: non-traditional additions to the “regulatory burden”?*  
If one were to define the “regulatory burden,” a perfectly serviceable definition might be “the cost of requirements on the private sector imposed by the executive branch without congressional involvement.” Tariffs seem to fit that definition perfectly well, as they impose an obligation to pay additional money to purchase goods from certain providers. In practice, businesses may end up uprooting existing business arrangements to avoid the tariff, the sort of activity usually considered a cost of regulation.

Most traditional accounting of regulatory costs do not include tariffs. A plausible reason for the omission is that a tariff seems more like a tax than a regulation. Historically, tariffs were used more for

161. NAT'L HIGHWAY SAFETY ADMIN., *supra* note 154, at 13.

162. See Shannon Van Sant, *California Signs Deal with Automakers to Produce Fuel-Efficient Cars*, NPR (Jul. 25, 2019, 9:19 PM), <https://www.npr.org/2019/07/25/745389326/california-signs-deal-with-automakers-to-produce-fuel-efficient-cars>.

163. Among other things, experts question the assertion that freezing CAFE standards will result in 6 million fewer cars being on the road by 2029. See, e.g., Jessica McDonald, *The Facts on Fuel Economy Standards*, FACTCHECK.ORG (May 3, 2019), <https://www.factcheck.org/2019/05/the-facts-on-fuel-economy-standards/>. Other studies claim that the NHTSA ignored 6 million used cars, and that incorporating those cars into the calculations wipe out the supposed benefits of the new rules. *Rules to Boost Fuel Economy for Vehicles Will Do More Good Than Harm, New Study Shows*, PHYS.ORG (Dec. 6, 2018), <https://phys.org/news/2018-12-boost-fuel-economy-vehicles-good.html>.

their revenue-generating capacity than as a method to regulate the economy. In the Trump administration, however, tariffs are frequently framed as a “trade war” and used as a means to alter the economy, specifically to increase the domestically produced share in markets ranging from solar panels to dairy products. It is difficult to come up with a substantive, non-formalistic reason not to consider tariffs as a form of regulation in this context.

Practically, most assessments of regulatory burden probably do not include tariffs because under current law, the executive branch does not need to produce a detailed regulatory impact analysis for new tariffs like it has to for proposed rules. Without a formal federal analysis, we must rely on outside sources, which can be biased or use shoddy methodology. Still, as discussed below, the range of estimates established by academic and industry sources suggest the costs of the trade war far outstrip the savings due to deregulation.

Two National Bureau of Economic Research papers have assessed the costs of the trade war as \$7.2 billion and \$16.8 billion annually.<sup>164</sup> One assessment of the U.S.-China trade war cited in the *New York Times* estimated that current planned tariffs on both sides of the trade war would reduce U.S. GDP growth by 0.3% annually, or roughly \$64 billion.<sup>165</sup> *Reuters* described the consensus estimate of direct U.S. losses from the trade war thus far as 0.1–0.2% of GDP, which would amount to \$21 to \$43 billion annually.<sup>166</sup>

A caveat to this line of reasoning is that the losses cited above do not discriminate between losses due to U.S. tariffs and losses due to Chinese tariffs. However, it seems fair to note that the Trump administration started the current trade war, and retaliatory tariffs are

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164. Pablo D. Fajgelbaum et. al, *The Return to Protectionism* (NBER, Working Paper No. 25638, 2019) (estimating \$7.2 billion in aggregate real income loss); Mary Amiti et. al., *The Impact of the 2018 Trade War on U.S. Prices and Welfare* (NBER, Working Paper No. 25672, 2019) (estimating \$1.4 billion in monthly cost).

165. Peter S. Goodman, *The Global Economy Was Improving. Then the Fighting Resumed*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/business/us-china-trade-war-economy.html> (estimating 0.3% annual GDP loss); U.S. BUREAU OF ECONOMIC ANALYSIS, GROSS DOMESTIC PRODUCT, BEA 20-07, (2019), <https://www.bea.gov/news/2020/gross-domestic-product-fourth-quarter-and-year-2019-second-estimate> [hereinafter BEA 2019 ESTIMATE] (estimating 2019 GDP at \$21.429 trillion).

166. Marius Zaharia, *Explainer: Counting the Cost of the U.S.-China Trade War So Far*, REUTERS (May 6, 2019, 3:11 AM), <https://www.reuters.com/article/us-usa-trade-china-explainer/explainer-counting-the-cost-of-the-u-s-china-trade-war-so-far-idUSKCN1SC0N2>; BEA 2019 ESTIMATE, *supra* note 165 (estimating 2019 GDP at \$21.429 trillion).

reasonably foreseeable costs to imposing tariffs. The administration undoubtedly thought the benefits would outweigh the costs, but that is precisely the rationale for regulation offered by every president, and we are only tallying costs in this exercise. Additional tariffs have been imposed on steel, aluminum, solar panels, and washing machines.

Even taking the low end of the estimate range, the regulatory burden imposed by tariffs is larger than the most sanguine estimates of “hard” deregulatory cost savings by the Trump administration.

### *B. Estimating “Soft” Effects of Deregulation*

While it is relatively easy to examine “hard” estimates of cost savings from deregulation, those estimates could never plausibly account for major macroeconomic effects on the economy. To find some aspect of deregulation that could act on a macroeconomic level, we need to estimate the “soft” savings—the economic effect of the decreased expectation of regulation driven by the executive branch. That decreased expectation could arise from the specific deregulatory acts described above as well as by simple rhetoric. For example, President Trump has mentioned “deregulation” or criticized excessive regulation sixty-three times to date on Twitter during his presidency.<sup>167</sup> The decreased expectation of regulation could in theory lead to increased investment, increased entrepreneurship, and decreased marginal compliance costs (e.g., hiring one less in-house compliance lawyer).

A full examination of the relevant data shows no strong evidence for the existence of “soft” effects that can be distinguished from broader economic trends. There was an increase in business investment in 2017 that was slightly more pronounced in the United States than Europe, but not significantly so, and to detect any difference one must choose the right date range. In the two months following President Trump’s election, business confidence increased more in Europe than in the United States. Without evidence of unique “soft” deregulatory benefits in the United States, and keeping in mind the

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167. See, e.g., Donald Trump (@realDonaldTrump), TWITTER (May 2, 2019, 9:29 AM), <https://twitter.com/realDonaldTrump/status/1123987855053873154>; Donald Trump (@realDonaldTrump), TWITTER (Aug 7, 2017, 4:09 AM), <https://twitter.com/realdonaldtrump/status/894515865802223616>.

evidence of significant state and judicial pushback, there is a strong case for assessing “soft” deregulatory benefits under the Trump administration as almost zero.

1. *Lack of clear evidence on a general slowdown in regulation*

Before embarking on an empirical approach to estimating “soft” effects, we should discuss the difficulty of proving a general slowdown in regulation in the first place. Intuitively, it seems obvious that there has been a regulatory slowdown under President Trump, a claim enthusiastically made by both the President’s supporters and detractors.<sup>168</sup> Surprisingly, a closer look reveals that the evidence is somewhat equivocal. CEI, the entity that issued the “Tip of the Costberg” report discussed at length earlier in this article, hosted a congratulatory blog post on the Trump administration’s 2018 deregulatory efforts.<sup>169</sup> The perceived success highlighted in the post relied on the number of discrete rules and the total pages printed in the *Federal Register* in each year. To its credit, CEI noted the ways in which page counts and discrete rules do not directly measure regulatory burden.<sup>170</sup> Other methods focus on the use of imperative language, i.e., how often words like “shall” appear.<sup>171</sup>

While it is worthwhile to attempt to measure regulatory burden, these methods are, at best, rudimentary. At worst, they are meaningless. There is no reason the repeal of a given rule (i.e., a deregulatory action) would be shorter in word or page count than the original adoption, especially if the rule is relatively old. And if, as is often the case, the original rule is being replaced by a less restrictive rule (e.g., the CPP repeal), the new rule will logically have a similar or identical

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168. See, e.g., David L. Bahnsen, *Sometimes Trump: Now More Than Ever*, NAT’L REV., (July 30, 2019, 12:25 PM), <https://www.nationalreview.com/2019/07/sometimes-donald-trump-now-more-than-ever/> (crediting “the sweeping efforts at deregulation” of the Trump administration for the state of the economy).

169. Clyde Wayne Crews, *Trump’s 2018 Deregulatory Effort: 3,367 Rules, 68,082 Pages*, COMPETITIVE ENTERPRISE INST. (Dec. 31, 2018), <https://cei.org/blog/trumps-2018-deregulatory-effort-3367-rules-68082-pages>.

170. Among other reasons, there is no inherent reason to expect a different page count for a deregulatory action, a moderately strict regulatory action, and a very strict regulatory action. Since each deregulatory action is a “rule,” simply counting rules is also misleading. In addition, of course, one massively expensive rule can easily outweigh a hundred smaller rules.

171. See, e.g., Patrick McLaughlin, *Regulatory Data on Trump’s First Year*, MERCATUS CTR. (Jan. 30, 2018), <https://www.mercatus.org/publications/regulatory-data-trump-first-year>.

amount of imperative language. A simple example: “the limit on particulate matter shall be 1 part per billion” and “the limit on particular matter shall be 0.1 parts per billion” would show up as identical in the methodologies described above despite the latter being 90% less restrictive.

Statistics aside, while the Trump administration has clearly proposed (but not necessarily put into effect) many deregulatory acts that a Hillary Clinton administration would not have proposed, it is difficult to determine evidence to support this assumption. It is easy to observe that the Trump administration advocates for more deregulation than the Clinton administration likely would have. It is far more difficult to identify specific rules the Clinton administration would have issued that the Trump administration has not. The Obama administration had already acted in areas like climate change, CAFE standards, WOTUS, etc. What other major rules would the Clinton Administration have pushed?

The clearest example of a new issue where a different administration may have pursued a different course is EPA regulation of per and polyfluoroalkyl substances (PFAS). Used primarily for firefighting, PFAS chemicals have been found to contaminate drinking water. PFAS creates birth defects; affects growth, learning, and behavior of infants; increases risk of cancer; and increases cholesterol levels.<sup>172</sup> Researchers have indicated that there are PFAS-contaminated sites in forty-three states.<sup>173</sup>

Democrats have alleged that the Trump EPA is not moving fast enough to create drinking water standards for PFAS.<sup>174</sup> The Obama-era EPA recommended that water should not contain more than seventy parts per trillion of PFAS and similar chemicals, but the Trump-

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172. See *Per- and Polyfluoroalkyl Substances (PFAS) and Your Health*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, <https://www.atsdr.cdc.gov/pfas/health-effects.html> (last updated Jan. 21, 2020); Zeyan Liew et. al, *Developmental Exposures to Perfluoroalkyl Substances (PFAS): An Update of Associated Health Outcomes*, U.S. National Library of Medicine (Mar. 5, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6348874/>.

173. Brian Pascus, *New Study Claims 43 States Expose Millions to Dangerous Chemical in Drinking Water*, CBS NEWS (May 7, 2019), <https://www.cbsnews.com/news/drinking-water-may-contain-pfas-chemicals-in-43-states-according-to-new-study-by-environmental-working-group/>.

174. Rebecca Beitsch, *Lawmakers, Trump Agencies Set for Clash Over Chemicals in Water*, THE HILL (May 27, 2019), <https://thehill.com/policy/energy-environment/445514-lawmakers-trump-agencies-set-for-clash-over-chemicals-in-water>.

era EPA has yet to take action.<sup>175</sup> We might guess that a Clinton administration would have been more likely to act on PFAS. PFAS regulation is thus a plausible area where the Trump administration may be saving regulatory costs. It is, however, impossible to say exactly what savings there might be from lax PFAS regulation. Obviously, the Trump EPA may still act, which introduces inherent uncertainty. It seems unlikely that PFAS regulatory costs would be hugely significant, let alone that the difference in Trump and Clinton EPA regulatory costs would be substantial. A much more profound uncertainty arises from the fact that the Trump EPA's inaction is leading states to regulate PFAS on their own.<sup>176</sup> If Trump administration inaction leads individual states to impose stricter regulations than the Clinton administration would have, it is entirely possible that PFAS regulatory costs could end up higher under the Trump administration than they would have been under a Clinton administration.

## 2. *The case for "soft" effects of deregulation*

There is a widespread assumption among both policy professionals and the public at large that regulation has decreased under President Trump.<sup>177</sup> Many policy professionals argue that the Trump administration has not actually reversed many Obama-era rules, but rather, that the slowing of new rules is making a major difference.<sup>178</sup>

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175. See U.S. EVTL. PROT. AGENCY, FACT SHEET: PFOA & PFOS DRINKING WATER HEALTH ADVISORIES, (2016), [https://www.epa.gov/sites/production/files/2016-06/documents/drinkingwaterhealthadvisories\\_pfoa\\_pfos\\_updated\\_5.31.16.pdf](https://www.epa.gov/sites/production/files/2016-06/documents/drinkingwaterhealthadvisories_pfoa_pfos_updated_5.31.16.pdf).

176. See Brady Dennis & Juliet Eilperin, *States Aren't Waiting for the Trump Administration on Environmental Protections*, WASH. POST (May 19, 2019, 5:14 PM), [https://www.washingtonpost.com/national/health-science/states-arent-waiting-for-the-trump-administration-on-environmental-protections/2019/05/19/5de853fc-7722-11e9-b3f5-5673edf2d127\\_story.html](https://www.washingtonpost.com/national/health-science/states-arent-waiting-for-the-trump-administration-on-environmental-protections/2019/05/19/5de853fc-7722-11e9-b3f5-5673edf2d127_story.html).

177. See, e.g., *Government*, GALLUP, <https://news.gallup.com/poll/27286/government.aspx> (last visited Feb. 3, 2020).

178. See, e.g., *New Report Grades Trump Record on Deregulation*, AM. COUNCIL FOR CAP. FORMATION (Mar. 13, 2019), <http://accf.org/2019/03/13/new-report-grades-trump-record-on-deregulation/> ("The flow of new regulations has diminished significantly in President Trump's first two years in office. . . ."); see also Danny Vinik, *Under Trump, Regulation Slows to a Crawl*, POLITICO (June 7, 2017), <https://www.politico.com/agenda/story/2017/06/07/trump-regulation-slowdown-000446>. ("The 'two-for-one' order, signed January 30, applies only to 'significant' regulations with an economic impact exceeding \$100 million or meeting other specified criteria, and it may be working in a counterintuitive way: Although it was touted as a way to roll back old rules, its main impact appears to be simply erecting obstacles to new regulations.")

The empirical case for this phenomenon rests on two points: (1) there has been a significant increase in business investment under President Trump, and (2) the increase is not solely due to other factors such as the tax cuts enacted into law at the end of 2017. From a comparison of the evolution of business investment in the U.S. and the European Union over 2017 in particular, one could make the case for as much as \$58 billion in annual increased investment from deregulation.

*a. Increase in gross business investment.* One would expect that a decrease in regulation would spur entrepreneurship, and the data does indicate increased business formation since the 2016 election. From the fourth quarter of 2016 to the first quarter of 2019, seasonally adjusted quarterly business formation increased from 74,288 to 78,130, having peaked in the first quarter of 2018 at 81,960.<sup>179</sup>

Gross business investment has similarly increased significantly under President Trump, from a seasonally adjusted annual rate of \$3.246 trillion at the beginning of the fourth quarter of 2016 to \$3.783 trillion at the end of the fourth quarter in 2018.<sup>180</sup> That difference, \$537 billion, provides a convenient rough limit on how much Trump deregulation could have helped the economy.<sup>181</sup> That figure obviously dwarfs the hard estimates of regulatory savings discussed above, which topped out at about \$1 billion.

*b. Accounting for the 2017 tax cuts and non-deregulatory factors.* Of course, even a partisan Trump supporter could not reasonably claim all of that increase is due to deregulation. According to nonpartisan studies, the 2017 tax cuts resulted in a decrease in annual tax revenue of about \$164 billion.<sup>182</sup> Over the course of 2018, business investment increased by \$254 billion.<sup>183</sup> However, the tax cuts did not take effect

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179. FED. RESERVE BANK OF ST. LOUIS, GROSS PRIVATE DOMESTIC INVESTMENT, <https://fred.stlouisfed.org/series/GPDI> [hereinafter FED. RESERVE BANK].

180. *Id.*

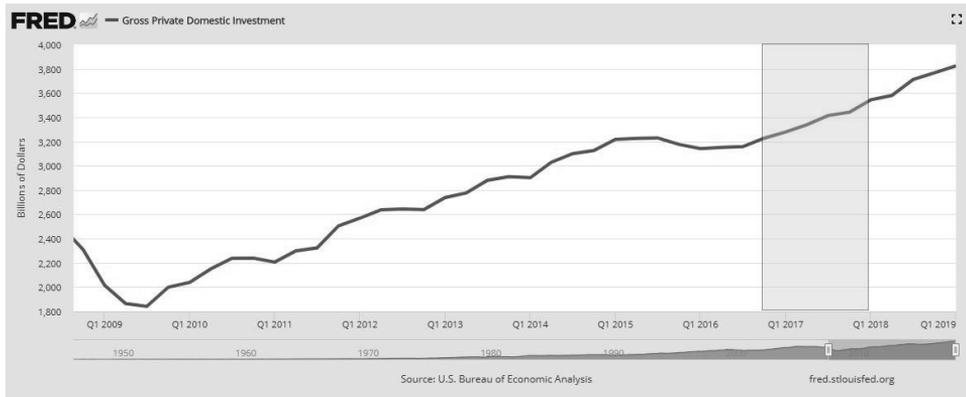
181. Private domestic investment would not, of course, include agency regulatory savings (i.e., the lower cost to the agencies of enforcing fewer rules or of lessening enforcement of existing rules), but those are so small compared to \$537 billion that they can be safely ignored.

182. Howard Gleckman, *The Price of Tax Cuts and Spending Hikes*, TAX POLICY CTR. (Oct. 17, 2018), <https://www.taxpolicycenter.org/taxvox/price-tax-cuts-and-spending-hikes>.

183. FED. RESERVE BANK, *supra* note 179.

until the first quarter of 2018,<sup>184</sup> so we can at least somewhat isolate deregulatory effects by examining investment increases from the fourth quarter of 2016 (measured October 1, 2016, roughly five weeks before the election) through the fourth quarter of 2017. Over that period, gross business investment increased by \$296 billion.<sup>185</sup>

*Fig. 1—U.S. quarterly gross private domestic investment; highlighted section is fourth quarter 2016 through fourth quarter 2017.*



What share of that increase can be plausibly attributed to deregulation? Obviously, the global economy has so many influences that truly isolating the role of deregulation is practically impossible. However, we can make a reasoned guess by comparing U.S. economic performance to that of the European Union, a similarly sized first-world economy.<sup>186</sup> While business investment was increasing in the United States, it was also increasing in the European Union, which was not in the midst of a particular deregulatory push.<sup>187</sup>

184. Act of Dec. 22, 2017, Pub. L. No. 115-97, Title I, Sec. 111001(a), 115 Stat. 2054.

185. FED. RESERVE BANK, *supra* note 179.

186. See generally WORLD BANK, GDP (CURRENT US\$) - EUROPEAN UNION, UNITED STATES, CHINA, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=EU-US-CN> (last visited Feb. 29, 2020).

187. Cf. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, OECD REGULATORY POLICY OUTLOOK 2018, EUROPEAN UNION, [https://www.oecd-ilibrary.org/sites/9789264303072-en/1/2/7/11/index.html?itemId=/content/publication/9789264303072-en&\\_csp\\_=46cd5ed37844c9dc6cf21c84716ab307&itemIGO=oecd&itemContentType=book#in](https://www.oecd-ilibrary.org/sites/9789264303072-en/1/2/7/11/index.html?itemId=/content/publication/9789264303072-en&_csp_=46cd5ed37844c9dc6cf21c84716ab307&itemIGO=oecd&itemContentType=book#in)

As measured by the OECD, investment increased by 4% in the United States in 2017, and 3.1% in the European Union.<sup>188</sup> Because we are seeking the maximum possible estimate, we will ascribe the entire difference between U.S. and E.U. business investment in that year to “soft” deregulatory effects. With that assumption, about 23% of the \$296 billion increase in U.S. business investment can be attributed to deregulation. That corresponds to about \$68 billion over five quarters, or an annualized increase of \$54 billion.

### *3. The evidence against “soft” deregulatory effects under Trump.*

There are broadly two categories of evidence against “soft” deregulatory effects under Trump: data suggesting the increase in business investment was due to factors other than deregulation, and data suggesting that actual deregulation under President Trump has been less substantive than one would expect. One would expect “soft” effects to arise from the collective experience of regulated companies, and if the individuals at those companies do not actually see changes in regulation, it is less likely that they would change their behavior (i.e., increase business investment) in response to the deregulatory agenda. These considerations suggest that “soft” effects are likely negligible.

*a. Business investment increases under Trump are almost exactly ordinary.* From the fourth quarter 2016 through the fourth quarter 2017, gross business investment increased on average 1.7% per quarter.<sup>189</sup> While this represents a solid increase, it is not particularly remarkable. If we zoom out to examine all gross private domestic investment figures since 1947, the average is almost exactly the growth seen under President Trump: 1.8% quarterly.<sup>190</sup> Recent presidents have not deviated substantially from that trend. Average gross business

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indicator-d1e17930 (last visited Feb. 29, 2020) (describing a push toward better regulation that began in 2015).

188. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, INVESTMENT (GFCF), <https://data.oecd.org/gdp/investment-gfcf.htm> (last visited Mar. 2, 2020).

189. FED. RESERVE BANK OF ST. LOUIS, NET DOMESTIC INVESTMENT: PRIVATE: DOMESTIC BUSINESS, <https://fred.stlouisfed.org/series/W790RC1Q027SBEA> (last visited Mar. 2, 2020).

190. FED. RESERVE BANK, *supra* note 179.

investment increase under President Obama was 1.6%t per quarter.<sup>191</sup> The 0.1% difference is entirely due to the first two quarters under President Obama, when investment was still decreasing in the aftermath of the 2008 financial crisis. If those first two quarters are omitted, President Obama's average is 2.0%. It is difficult to see a deregulatory benefits increase when business investment increase was essentially unchanged.

Another way to look at the data is to see how often, over five consecutive quarters, business investment performed similarly under President Obama to how it did under President Trump in 2017. There were twenty-seven periods of five consecutive quarters in President Obama's presidency, excluding the last quarter, where the supposed soft effects of Trump's election would have started. Of the twenty-seven possible sets of five quarters, twenty-one saw growth higher than the first five quarters under President Trump.<sup>192</sup> Put another way, business investment growth under President Trump during the likeliest period for "soft" deregulatory benefits would have been an unusually slow period of business investment growth under President Obama.

One more point from business investment data: one of the clearest predictors of a large increase in business investment in any given quarter is a decrease in the quarters preceding it.<sup>193</sup> Business investment was down throughout much of 2016. Ergo, it would be reasonable to expect that under any president, business investment would have increased in 2017.

*b. Business confidence is not disproportionately higher in the United States than in Europe.* A number of observers have suggested that business confidence has increased under Trump, and data from the Organisation for Economic Cooperation and Development (OECD) bears this out.<sup>194</sup> However, business confidence increased slightly more in OECD countries in Europe than in the United States during the

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191. *Id.*

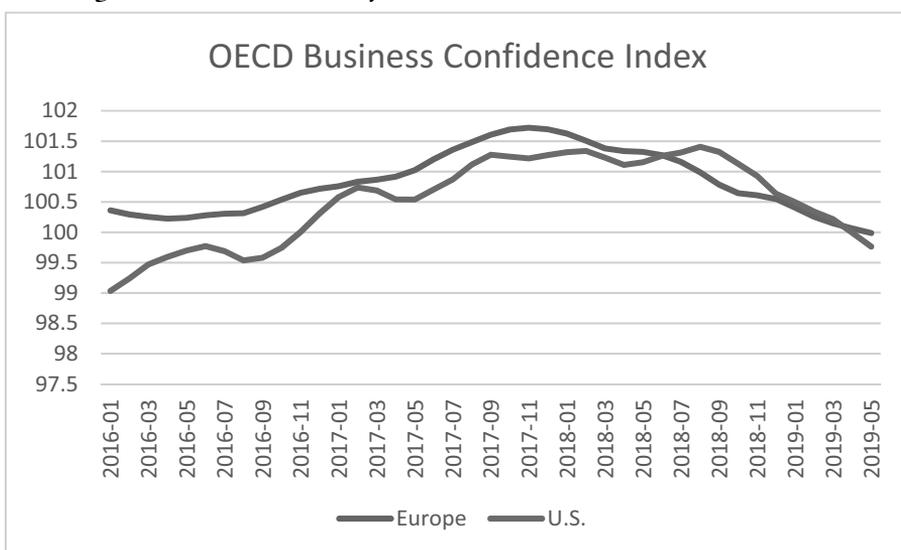
192. *Id.*

193. Since 2010, there has not been more than two consecutive quarters of decreasing gross private domestic investment.

194. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, BUSINESS CONFIDENCE INDEX (BCI) [hereinafter OECD, BCI], <https://data.oecd.org/leadind/business-confidence-index-bci.htm> (last visited Mar. 2, 2020).

Trump administration to date, and both started decreasing significantly around October 2018.<sup>195</sup> The chart below shows the time period of our particular interest, November 2016 to January 1, 2018, plus some context before and after. OECD adjusts this data so that 100 is the long-run historical average, and the U.S. was almost exactly at its historical average in November 2016. Note that the beginning of the increase in U.S. business confidence predates President Trump's election by about two months. Business confidence in the European OECD countries increased 0.97 points from December 2016 to December 2017, and rose by 0.96 points in the U.S.<sup>196</sup>

*Fig. 2 — OECD monthly business confidence index.*



The correlation coefficient between Europe's and the United States' business confidence in the OECD data is about 0.52 dating back to December 1976.<sup>197</sup> That falls between a medium-strength and a strong association. While business confidence in the United States and Europe can move in different directions at different speeds, they tend to stay relatively close to one another.

195. *Id.* OECD countries generally comprise the larger, wealthier countries in Europe. See "Member countries", OECD, <https://www.oecd.org/about/members-and-partners/>.

196. OECD, BCI *supra* note 194.

197. OECD, BCI *supra* note 194. Pearson correlation coefficient calculated by Excel using OECD data.

If the maximum benefits scenario were in fact happening, we would probably expect Europe and the United States to diverge somewhat in business confidence. It makes sense that booming business from deregulation would spill over to Europe somewhat, but it is improbable that the Europeans would be precisely as enthused about their economic outlook as the United States. While economic growth is not zero-sum, if nothing else, European manufacturers would suffer somewhat in the short run from the success of their U.S. competitors. Confounding outside factors could lead to this evidence, however, and there is an increase in business confidence in the United States at the time we are most concerned about. It is thus possible that business confidence could be about the same in the United States and Europe when a huge deregulation-led boom is happening in the United States, but it seems unlikely.

*c. Enforcement of existing regulations not obviously lower than it might have been under Clinton.* We have so far considered only the effect of explicitly changing rules through formal agency rulemaking. However, one could imagine a lack of enforcement by regulators as constituting de facto deregulation. Various cabinet officials have seemed to signal this sort of approach, perhaps best exemplified by former EPA Administrator Scott Pruitt.<sup>198</sup> EPA's annual inspections and evaluations reached a 21st-century low of 10,612 in 2018.<sup>199</sup>

However, when one examines enforcement data from the EPA, the enforcement story becomes less clear. The EPA's annual inspections and evaluations had been consistently trending downward since 2012.<sup>200</sup> Civil penalties against polluters hit a twenty-five-year low in 2018, but 2017 saw the second-highest level of civil penalties over that same time period.<sup>201</sup> Civil and criminal cases initiated by the EPA under President Trump were also lower than in Obama's years, but not radically so.<sup>202</sup> The value of pollution control expenditures

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198. Abigail Tracy, *E.P.A. Purges Scientist, Plans to Replace them with Industry Reps*, VANITY FAIR (May 8, 2017), <https://www.vanityfair.com/news/2017/05/epa-scott-pruitt-scientists-dismissed>.

199. ENVIRONMENTAL INTEGRITY PROJECT, LESS ENFORCEMENT: COMMUNITIES AT RISK 1 (2019) [hereinafter EIP], <http://www.environmentalintegrity.org/wp-content/uploads/2019/02/EIP-Enforcement-Report.pdf>.

200. *Id.*

201. *Id.* at 2.

202. *Id.* at 3.

required by consent decree plummeted in 2018, but was at near record-high levels in 2017.<sup>203</sup>

Data can, of course, mislead. There is a plethora of accounts of the Trump-era EPA declining to prosecute offenders. It may be that the EPA is enforcing existing rules selectively, essentially running up the score on small offenders while letting larger offenders off the hook.

The reasonable conclusion to draw from the anecdotal and data evidence is that it is not clear whether deregulation by lack of enforcement is happening, at least at the EPA. Lack of enforcement would be an unwieldy way to accrue regulatory benefits, particularly because firms cannot reasonably plan on lack of enforcement so long as *some* enforcement actions are taking place.

*d. Judicial review is weakening the deregulatory effort.* A rule can be finalized and go into effect only to be overturned by judicial review. In the context of analyzing reductions to the “regulatory burden,” we obviously should not count deregulatory acts that are overturned by the courts.<sup>204</sup> Every administration faces the problem of judicial review, but it has proven particularly irksome to Trump administration environmental deregulatory actions.

Many observers have offered anecdotal analyses suggesting the Trump administration is losing arbitrary and capricious review court cases more often than the Obama administration did.<sup>205</sup> I decided to check that common assumption with an empirical review. I reviewed 323 cases from the Trump and Obama administrations involving a ruling on whether a proposed EPA or Department of the Interior (DOI) rule was arbitrary and capricious.<sup>206</sup> Trump’s DOI won 69%

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203. *Id.* at 4.

204. There could be savings from deregulatory actions overturned by judicial review if enforcement of the rule is stayed while the case is ongoing. Those savings would likely be marginal because the regulated entities cannot rely on the regulation being repealed. They might be able to delay investments in compliance, but that would merely “save” the interest on the funds that otherwise would have been spent earlier.

205. See, e.g., Fred Barbash and Deanna Paul, *The real reason the Trump administration is constantly losing in court*, WASH. POST (Mar. 19, 2019), [https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9\\_story.html](https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html).

206. I chose EPA and DOI because both engage in the kind of environmental rule-making that are paradigmatic of the “regulatory burden.” DOI’s ambit is far larger than EPA’s, including, among other things, the Bureau of Indian Affairs and oversight of fisheries.

of cases and Obama's won 59%. However, Obama's EPA won 70% of its cases. As of May 12, 2019, Trump's EPA has won only 50%.

Of course, the dividing line between the presidencies blurs somewhat because court cases lag behind administrations. Thus, many of the cases in 2017 related to rules that originated in the Obama administration. As time has worn on, the Trump administration has won fewer cases. Across both agencies, the Trump administration won two-thirds of its arbitrary and capricious cases in 2017, slightly less than that in 2018, and only 50% in 2019 to date.

Overall, the Trump administration does not necessarily have any more severe a judicial review problem than previous administrations. However, environmental rules specifically are less likely to survive judicial review under President Trump than under President Obama. Because environmental rules constitute a large portion of potential deregulatory savings, deregulatory savings are likely to be lower in the long-run than they appear at first glance. The EPA under Administrator Pruitt endured anecdotal criticism for ineffectiveness, partially because major deregulatory efforts were overturned by judicial review.<sup>207</sup>

The legal troubles of the deregulatory efforts are already baked into the estimate of "hard" deregulatory savings. However, given that legal troubles seem to be getting worse as the Trump administration continues, judicial review is an independent reason to further discount the potential savings of major non-finalized actions such as the repeal and replacement of the CPP, the redefinition of WOTUS, and the freezing of CAFE and CO2 standards for cars.

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207. See, e.g., Michael Grunwald, *The Myth of Scott Pruitt's EPA Rollback*, POLITICO (Apr. 7, 2018), <https://www.politico.com/magazine/story/2018/04/07/scott-pruitt-epa-accomplishments-rollback-217834>.

*e. Trump deregulatory actions are leading states to impose new regulations.* State regulation greatly complicates the effort to assess “soft” deregulatory costs. States like California, disagreeing with federal deregulatory efforts, have begun developing their own regulations, in some cases stricter than what the pre-Trump standard was. CAFE standards, limits on CO<sub>2</sub> emissions, WOTUS, and PFAS regulation are all areas where deregulatory savings are being reduced, eliminated entirely, or even winding up greater than they were before or otherwise would have been.

Some of these state-led efforts may be overruled in court based on claims of federal preemption.<sup>208</sup> Such determinations would have to be made on a case-by-case basis, however. Thus, marginal business investment will likely be deterred if that investment is contingent both on the federal deregulatory rule surviving judicial review *and* the corresponding state-led regulation being overturned.

### III. THE MEANING OF DEREGULATION

We set out to establish whether deregulation has meaningfully contributed to economic growth, and the answer appears to be no. Bluntly, the cost savings from President Trump’s deregulatory acts have been trivial, particularly when compared to other federal interventions in the economy. For example, federal spending increased by \$127 billion from 2017 to 2018.<sup>209</sup> Even with the major tax cut at the end of 2017, federal receipts increased by about \$14 billion.<sup>210</sup> As discussed earlier, tariffs imposed on China and other major trading partners likely cost at least \$7.8 billion annually, and possibly as much as \$63 billion. The administration has promised \$16 billion in trade aid to farmers, suggesting that the trade war has inflicted at least that much in costs.<sup>211</sup> If the headlines proclaiming \$86 billion in regulatory savings were credible, the deregulatory agenda might

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208. Environmental & Energy Law Program Staff, *CAFE Standards and the California Preemption Plan*, ENVTL. & ENERGY L. PROGRAM HARV. L. SCH. (Aug. 24, 2018), <https://eelp.law.harvard.edu/2018/08/cale-standards-and-the-california-preemption-plan/>.

209. U.S. OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES tbl1.1, <https://www.whitehouse.gov/omb/historical-tables/>.

210. *Id.*

211. Ana Swanson, *Trump Gives Farmers \$6 Billion in Aide Amid Prolonged China Trade War*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/us/politics/farm-aid-package.html>.

compensate for trade headwinds. However, \$3.3 billion annually would not meaningfully alter the trajectory of the economy.

While this article is focused on providing a neutral empirical analysis of President Trump's deregulation, that analysis raises related questions which merit further discussion and which are difficult to discuss empirically:

To what extent does this article's analysis undermine the idea of deregulation producing economically significant cost savings, even outside of the context of the Trump administration?

Is the Trump administration pursuing an optimal deregulatory strategy?

Using lessons learned through the empirical analysis of this article, we can at least make some progress in answering these questions.

*A. Significant Deregulatory Savings are Possible, but Not Easily Achieved.*

Deregulation can produce significant cost savings, but is paradoxically less likely to do so if pursued with a monomaniacal focus on cost-cutting. A simple example helps elucidate the point: if the EPA rescinded rules against adding tetraethyl lead to gasoline, fuel economy and engine performance would likely increase, saving business and consumers billions of dollars.<sup>212</sup> However, virtually no one advocates for the reintroduction of leaded gasoline. One obvious reason is that the benefits of lead regulation far outweigh the costs—lead in the environment can cause trillions of dollars in losses from premature deaths, lowered intelligence, and increased propensity to violence. But, given the focus on regulatory costs and skepticism of benefits exhibited by anti-regulatory commentators, why would the Trump administration not propose deregulation of gasoline additives?

*1. Ignoring benefits triggers stronger reaction from courts and state governments.*

One can better understand the path to lower regulatory costs by

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212. See Tim Harford, *Why Did We Use Leaded Petrol for So Long?*, BBC (Aug. 28, 2017), <https://www.bbc.com/news/business-40593353>.

considering the factors we observed that whittled down the “soft” deregulatory effects of President Trump’s deregulatory efforts. If the federal government proposed a cessation of lead regulation, state governments would surely intervene, diluting the cost savings from the federal government ceasing lead regulation. A multiplicity of lawsuits would likely lead courts to first stay, then overturn the deregulatory rule entirely. The auto and engine manufacturers who might have benefited from the deregulation would not have the regulatory certainty necessary to actually profit from the deregulation of lead. In a simple model of the rulemaking process, we imagine that the EPA can act in a mostly unconstrained manner to reduce regulatory costs. However, in reality, federal agencies, states, and courts all have some share of power. Unilateral action simply does not work, even in the short-term.

The factors discussed earlier in the article underscore the weakness of the cost-obsessive focus, most notably intervention by the judiciary and state governments. There is ample reason to believe that a focus solely on costs will lead to deregulatory actions that disproportionately fail in court and within state governments. Courts generally evaluate challenges to regulatory action under the “arbitrary and capricious” standard of the APA. While formal numerical cost-benefit analysis is not required under that standard, failure to consider an important factor is grounds for overturning a rulemaking.<sup>213</sup> Entirely ignoring regulatory benefits would clearly be a failure to consider an important factor.

State governments systematically weaken the value of deregulatory action because of immediate political reality and the economic consequences of federalism. The political reality is that California is more pro-regulation than the country as a whole, and its economy is large enough that most companies cannot afford to ignore the California market. Thus, California has a veto of sorts in many areas of regulation. The federal government can attempt to preempt state regulation, but the prospects of success for preemption vary depending on the field.

More broadly, the economics of deregulation are such that companies can only enjoy the benefits to the extent that they are still able

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213. See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

to follow regulations in the markets in which they want to participate. For individual firms, the value of federal deregulation is often less than the value of participating in the California market. That dynamic suggests an increasing gap between federal and state regulatory goals leads to decreasing deregulatory savings from federal action.

*2. Deregulatory "savings" require strategies deeper than simple reaction.*

Courts and state governments mobilize to oppose deregulation that is directly framed as a partisan rejection of their values. All of the largest Trump deregulatory actions are rejecting Obama administration initiatives, and almost all of those deregulatory actions are rejecting initiatives from 2015 or later. The Clean Power Plan, redefinition of WOTUS, new CAFE and CO<sub>2</sub> emission standards for vehicles—the Trump administration is targeting all of them, and in each case the administration's efforts are being weakened or undermined entirely by courts or state governments. States have created regional initiatives to lower CO<sub>2</sub> emissions in the absence of the Clean Power Plan;<sup>214</sup> the prospects for the WOTUS redefinition in court remain murky;<sup>215</sup> and as we just discussed, California is almost single-handedly undoing the new CAFE and CO<sub>2</sub> emission standards for vehicles.

If courts and state governments are key obstacles to a deregulatory agenda, a wise deregulatory strategy would decrease the likelihood of their involvement. Repeal of recent opposition party initiatives increases the likelihood of intervention by courts and state governments. Repeal of recent rules will necessarily be high-profile and divisive, and consequently there will be more lawsuits filed against such repeals. The repeal effort will likely engender partisan disagreement, raising the probability that state-level opposition party lawmakers will act immediately to counteract the action's effects.

While a full empirical analysis would be necessary to evaluate when courts and state government interpose themselves in federal regulation, there are some obvious ways to avoid their intervention. First, if Congress acts instead of agencies on their own, the main ave-

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214. See "The Regional Greenhouse Gas Initiative", <https://www.rggi.org/>.

215. See Pamela King, *Wotus lawsuits start long, muddy legal battle*, E&E News, Oct. 24, 2019, <https://www.eenews.net/stories/1061365079>.

nue for judicial review—arbitrary and capricious review—is nullified. Congressional acts are not subject to arbitrary and capricious review. Congress can also manifest an intention for federal law to supersede state law in a particular field, making state intervention much more difficult. Second, if the administration must act without Congress, it should target areas outside of immediate public interest. For example, if the public is focused and aware of rules relating to climate change, regulatory activity relating to climate change will prompt the public to pressure state legislators to pass countervailing laws or litigation-focused advocacy groups to file lawsuits. Third, to the extent possible, agencies should present their actions as modifications of previous rules, not wholesale repeal. That will tend to lower the psychological salience of the action and reduce confrontation.<sup>216</sup>

These recommendations may evince cynicism about the regulatory process, but they actually correspond to broad theories of how the regulatory system should work. Congress's will should provoke less partisan reaction than an agency's because it more closely represents the will of the people. The further an issue is from immediate public scrutiny, the more appropriate it is for a technocratic agency to address it. When an agency must act to change an existing regulation, proceeding incrementally is less likely to create vast disruptions or new unintended consequences. Thus, good politics and good policy are fairly well aligned when it comes to regulatory agendas.

### *3. Potential lessons from flawed studies.*

There are a number of flaws in NAM's \$2 trillion annual regulatory costs study, but the kernel of truth within it is that improving the regulatory process can lead to larger savings than repeal of a discrete set of rules. Recall that the methodology of NAM's 2014 report rests on extrapolating a proportional increase in GDP from an increase in reported business satisfaction with the regulatory system. While the methodology that led to the \$2 trillion result was doubtlessly flawed, business satisfaction with the regulatory system was measured by survey questions relating to regulatory *process* more

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216. Cf. Mark R. Leary, *Emotional Responses to Interpersonal Rejection*, 17 *DIALOGUES IN CLINICAL NEUROSCIENCE* 435, 439 (Dec. 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4734881/> (describing rejection as triggering anger as a way to "prevent, terminate, or punish specific behaviors that are perceived as an immediate threat.")

than *substance*.<sup>217</sup>

The failure to address process generally stems from a lack of political will, not a lack of clear areas for improvement. For example, multiple offices within the same agency often administer the same program.<sup>218</sup> Failure to coordinate federal actions with state and local governments also leads to multiplication of paperwork and costs for businesses.<sup>219</sup> Cost-benefit analysis standards are weak and vary across the federal government.<sup>220</sup> Businesses frequently complain about a lack of transparency in the permitting process.<sup>221</sup> All of these problems could be solved, whether through legislation, executive order, or coordinated regulatory action. At the federal level, there have been many efforts over various administrations to increase regulatory efficiency.<sup>222</sup> While these efforts have varied in success, none has fundamentally addressed chokepoints in the process.

### *B. What is the Objective of the Trump Administration's Deregulatory Strategy?*

The above analysis suggests that the Trump administration's de-

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217. W. MARK CRAIN AND NICOLE V. CRAIN, THE COST OF FEDERAL REGULATION TO THE U.S. ECONOMY, MANUFACTURING AND SMALL BUSINESS: A REPORT FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS 68 (2014), <https://web.archive.org/web/20150323014159/https://www.nam.org/data-and-reports/cost-of-federal-regulations/federal-regulation-full-study.pdf>.

218. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-285SP, 2019 ANNUAL REPORT (2019), <https://www.gao.gov/reports/GAO-19-285SP/>.

219. See *id.*

220. See generally CONG. RESEARCH SERV., COST-BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULEMAKING PROCESS (Dec. 2014), <https://fas.org/sgp/crs/misc/R41974.pdf> ("An OMB report indicated that independent regulatory agencies provided some information [on] costs and benefits in 76 of the 118 major rules they issued from FY2003 to FY2012. Cabinet departments and other agencies estimated monetary costs and benefits for some, but not all, of their rules.")

221. See, e.g., William D. Eggers and Pankaj Kishnani, *Compliance Without Tears: Improving the Government-to-Business Experience*, DELOITTE (Aug. 24, 2016), <https://www2.deloitte.com/insights/us/en/industry/public-sector/relationship-between-government-and-business-customer-experience.html> (repeatedly emphasizing business complaints about lack of regulatory transparency).

222. See Stuart Shapiro and Deanna Moran, *The Checkered History of Regulatory Reform Since the APA*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 141 (2016), <http://www.nyuilpp.org/wp-content/uploads/2016/05/Shapiro-Moran-Regulatory-Reform-Since-the-APA-19nyujlpp141.pdf> (describing the failure of regulatory reforms such as the Regulatory Flexibility Act, the Paperwork Reduction Act, the Unfunded Mandate Reform Act, and the Small Business Regulatory Enforcement Fairness Act).

regulatory strategy was poorly conceived if the objective was maximizing savings. However, as a concluding note, it is worth discussing potential structural reasons why the administration has followed its chosen path. Putting aside for the moment criticisms based on incompetence, the Trump administration has not initiated any significant effort to change the regulatory process.<sup>223</sup> The issue is thus not one of competence, but of strategy. To judge whether the Trump administration's strategy is sound, we must consider how we measure success. This article has demonstrated the strong likelihood that if the Trump administration is seeking to lower regulatory costs enough to drive economic growth, it has not succeeded. However, the deregulatory agenda can serve many functions other than lowering cost. I will review a few possible functions of the current deregulatory agenda, though I stress that the true objective is unknown and likely a combination of multiple factors.

### *1. Keeping the Republican Party unified*

The importance of the deregulatory agenda may be its signaling value to wavering Republican elites. As many observers have noted, President Trump has challenged Republican Party orthodoxy on issues like trade. Because the notion of a deregulatory agenda primarily dates back to President Reagan in the minds of most Republican elites, it is comforting for otherwise skeptical Republicans that President Trump seems to pay homage to this part of the Republican platform.

If the intent of the deregulatory strategy is to visibly signal adherence to reducing the role of the federal government, it makes perfect sense to attempt to repeal high-profile regulations from the Obama administration. To modern-day Republicans almost twenty years removed from the Clinton administration, Obama-era initiatives constitute the most visible example of regulatory cost, even if they do not impose particularly massive costs on an economy-wide scale. Subsequent intervention by the judiciary and state governments does not

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223. Arguably, the administration's most significant attempt at process reform is ignoring co-benefits in environmental rules. While that change impacts multiple rules, it is best understood as an attempt to make specific substantive deregulatory actions easier, especially those relating to climate change. By its very nature, this change will not affect regulatory costs for anyone based on process. It can only affect regulatory costs by making particular rules easier to repeal.

affect the efficacy of the *signal* the Trump administration gives to Republicans when it loudly declares that it is repealing the Clean Power Plan.

### *2. Providing an alternative explanation for economic growth*

The Trump administration has enjoyed a period of consistent economic growth, albeit one that does not appear radically different from growth periods in the Bush or Obama administrations. To claim credit for that economic growth, the Trump administration and its supporters must point to some policy change. The tax cuts did not go into effect until 2018, so the cuts cannot explain the growth. The other major legislative policy initiative of the Trump administration, healthcare reform, collapsed in 2017. What other administration policy could be credited for the growth? Because deregulatory benefits are hard to measure, they provide a facially plausible explanation for growth, particularly if partisan estimates place savings dozens of times higher than neutral analyses. The use of deregulation as a plausible and difficult-to-disprove factor would explain why Republicans do not seem particularly interested in discovering the actual amount of deregulatory savings, but still cite deregulation to explain economic growth.

### *3. Pleasing specific constituencies*

The deregulatory initiatives to date have not created economically significant savings on a nationwide scale, but the hard and soft benefits are often focused among favored constituencies. While repeal of the Clean Power Plan and replacement with the Affordable Clean Energy rule does not produce major savings, what savings it does produce are focused among coal producers and coal plant operators. For a variety of sociological reasons outside the purview of this article, people involved in the coal industry are perceived to be a key part of President Trump's base of support in "Rust Belt" states.

Even more specifically, while the coal industry as a whole has continued to shed plants and employment despite President Trump's support, specific coal companies have profited from close relationships with regulators within the Trump administration.<sup>224</sup> Those

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224. Lisa Friedman, *How a Coal Baron's Wish List Became President Trump's To-Do*

companies can enjoy significant benefits from deregulation even if the overall regulatory benefit is low. This theory is further bolstered by President Trump's first EPA director, Scott Pruitt, becoming a lobbyist for an Indiana coal company soon after leaving the EPA.<sup>225</sup>

#### 4. *Ideological/psychological salience of specific regulatory issues*

Many of the major regulatory issues taken on by the Trump administration provoke the strongest partisan divide. For example, President Trump has repeatedly stated he does not believe in climate change, or believes that it might change back without human intervention. Democrats have complained frequently about the President's views. Even if the President does not particularly care about climate change, he may direct his agency heads to repeal climate change-related regulations simply to spite his opponents.

While this explanation may be simplistic, it helps to explain the administration's refusal to act incrementally in virtually any regulatory field despite the obvious vulnerabilities of acting in an all-or-nothing fashion. For example, the automobile industry is now in the awkward position of opposing the administration's CAFE and CO2 standards because they do not want extreme actions to provoke a Californian backlash.<sup>226</sup> Another example: the administration declared almost all offshore land available for oil and natural gas leases despite protests from nearly every coastal state, including Republican-leaning states.<sup>227</sup> These actions sound like a one-sentence directive designed for a press release, not a clever deregulatory plan that could actually go into effect.

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List, N.Y. TIMES (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/climate/coal-murray-trump-memo.html>.

225. Emily Hopkins, *Scott Pruitt Left the EPA Mired in Scandal. Now He is Lobbying Indiana Lawmakers*, INDIANAPOLIS STAR (Apr. 19, 2019, 9:08 AM), <https://www.indystar.com/story/news/environment/2019/04/18/scott-pruitt-now-lobbyist-indiana-legislature/3511759002/>.

226. See Robinson Meyer, *How the Carmakers Trumped Themselves*, ATLANTIC (Jun. 20, 2018), <https://www.theatlantic.com/science/archive/2018/06/how-the-carmakers-trumped-themselves/562400/> (statement of the President of Ford) ("We support increasing clean car standards through 2025 and are not asking for a rollback.")

227. See Madeleine Carlisle, *Trump's Offshore-Drilling Plan Is Roiling Coastal Elections*, ATLANTIC (Aug. 5, 2018), <https://www.theatlantic.com/politics/archive/2018/08/trumps-offshore-drilling-plan-is-roiling-coastal-elections/566726/>.

## CONCLUSION

The overall level of federal regulation has been a focus of Republican politics for decades. However, because Democrats are generally more interested in individual regulations than overall levels, the actual study of regulations writ large has become one-sided and atrophied. The lax standards of regulatory estimates allow for all manner of hyperbole, which reinforces the fear of the political right that regulations are imposing massive costs. That fear leads to broad attempts at deregulation that are weakened by state and judicial intervention. A more accurate understanding of regulatory costs would be an important first step toward a more coherent, effective regulatory agenda.