

GOVERNANCE

Pillars of regulatory reform and oversight

By Chris Cargill
President

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MOUNTAIN STATES
POLICY CENTER



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KEY INFORMATION COLUMN

Size and scope of regulations has translated into a \$13,000 loss in real income for every American.

Idaho and Montana governors have seen need to limit regulatory burden.

Introduction

Like it or not, regulations play a role in our everyday lives. Some dictate where and how we can eat. Others place restrictions on what we can sell or how we can operate a business.

In Tamarack, Idaho, it was once illegal to buy onions after dark without a permit. Nationally, 18 U.S. Code 2074 makes it a crime to “knowingly issue or publish any counterfeit weather forecast.”¹ Bacon processing plants in California still require a fax machine.² And federal regulators have reimposed rules to limit the amount of water your dishwasher can use. As a result, dishwashing cycles are now much longer.³

Whether they be at the local, state, or federal level, all laws and regulations have cost. In fact, a study by the Journal of Economic Growth concluded that regulations have slowed economic growth by as much as two percent per year.⁴

Economists at the Mercatus Center at George Mason University found the size of the regulation state significantly slows economic growth and has translated into a \$13,000 loss in real income for every American.⁵

Rules and regulations come in all shapes and sizes. They can be tallied by pages, words, and even economic significance.

Luckily, policymakers in the Mountain States have recognized the need to limit the regulatory burden. Idaho Governor Brad Little has touted his Red Tape Reduction Act – an effort to make Idaho one of the least regulated states in the nation.⁶ Numerous national reports give Idaho top marks for the effort.⁷

Montana Governor Greg Gianforte has labeled red tape reduction as one of his top priorities.⁸ In the most recent Montana legislative session, he signed into law more than 100 bills to eliminate commissions, streamline applications and do away with burdensome and outdated requirements.

This should not be confused with an attempt to do away with every law, rule and regulation. To the contrary, those that are well-designed and consistently

¹ 18 U.S. Code 2074, Cornell University, Legal Information Unit, available at <https://www.law.cornell.edu/uscode/text/18/2074>

² State regulatory processes are ripe for reform, by Matthew Nolan and Jonathan Wolfson, Governing, August 31, 2023, available at <https://www.governing.com/policy/state-regulatory-processes-are-ripe-for-reform>

³ How federal regulations make dishwashing worse, by Christian Britschgl, Reason Magazine, November 2022, available at <https://reason.com/2022/10/17/use-that-dishwasher/>

⁴ Federal regulation and aggregate economic growth, by John Dawson & John Seater, The Journal of Economic Growth, March 21, 2013, available at <https://link.springer.com/article/10.1007/s10887-013-9088-y>

⁵ The Cumulative Cost of Regulations, Mercatus Center, George Mason University, by Bentley Coffey, Patrick McLaughlin and Pietro Peretto, April 26, 2016, available at <https://www.mercatus.org/research/working-papers/cumulative-cost-regulations>

⁶ Executive Order 2019-02, The Red Tape Reduction Act, Office of Governor Brad Little, January 21, 2019, available at <https://gov.idaho.gov/wp-content/uploads/2019/01/eo-2019-02.pdf>

⁷ QuantGov, Reg Census API, Mercatus Center at George Mason University, available at <https://www.quantgov.org/regcensus-explorer>

⁸ Gianforte holds signing ceremony for ten bills in ongoing regulation-reform effort, by Jonathon Ambarian, KTVH, April 20, 2023, available at <https://www.ktvh.com/news/68th-session/gianforte-holds-signing-ceremony-for-ten-bills-in-ongoing-regulation-reform-effort>

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The federal government has reduced the volume of regulations just once – in 2019.

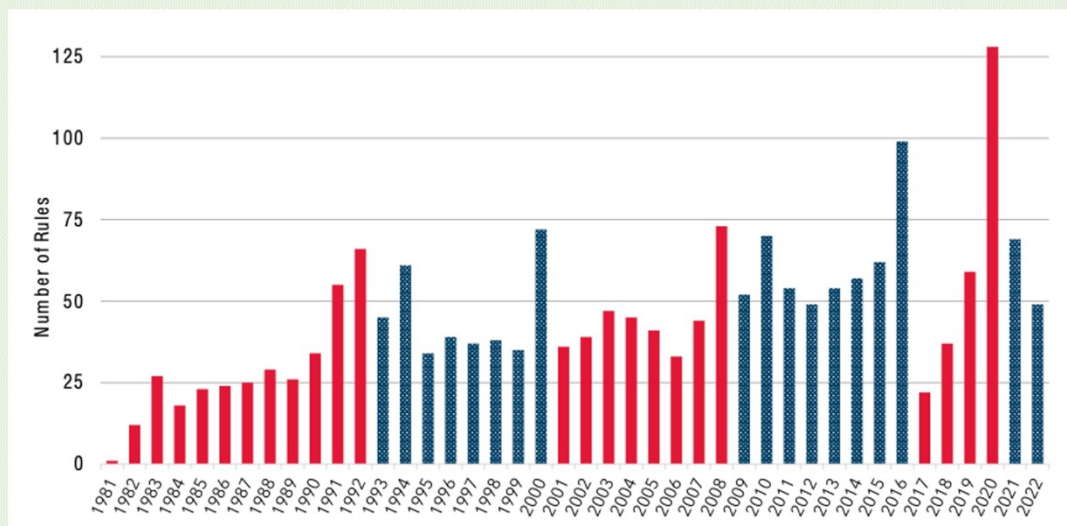
reviewed protect not only business owners and workers but also consumers and citizens.

Still, lawmakers in the region and across the nation can and should do more. Thousands of rules and regulations no longer relevant or needed remain on the books. As policymakers consider the rules that govern rules and regulations, they should take care to ensure they are simple, predictable, and reviewable.

The federal regulatory burden

At the federal level, the regulatory burden seems to increase regardless of the political party in control. Over the past two decades, the United States Government has reduced the volume of regulations just once – in 2019.⁹

Economically Significant Final Rules by Presidential Year



U.S. regulatory text now numbers more than 100,000,000 words.

Fifty-three years ago, in 1970, the U.S. had roughly 400,000 regulatory restrictions. Today, that number has more than doubled.¹⁰ Remarkably, regulatory text in the U.S. now numbers more than 100 million words. Canada, meantime, has less than 90,000 words in regulatory text. The most regulated industries in the United States include chemical manufacturing and petroleum and coal products manufacturing.

⁹ Census of Regulatory Restrictions, by Kofi Ampaabeng, Patrick McLaughlin and Thurston Powers, Mercatus Center at George Mason University, May 27, 2022, available at <https://www.mercatus.org/research/research-papers/census-regulatory-restrictions>
¹⁰ Ibid

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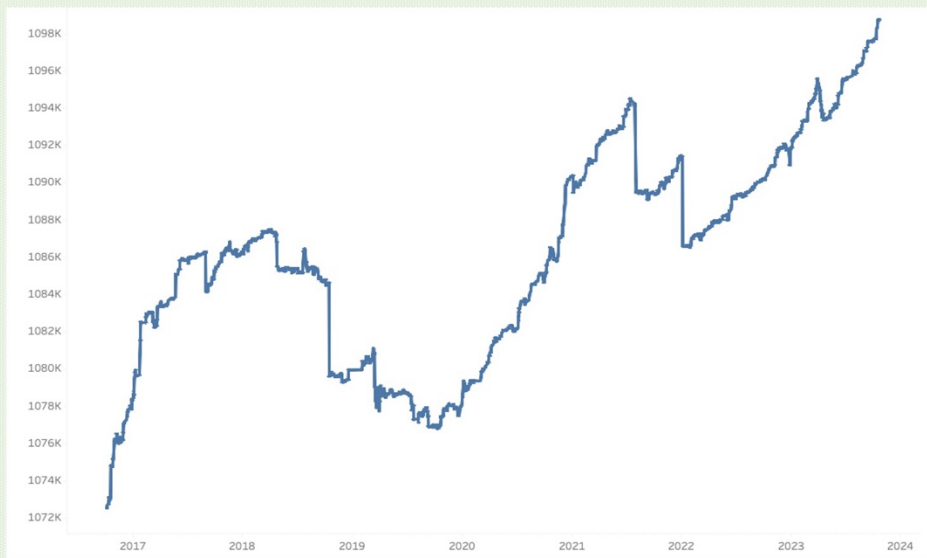
Many rules and requirements are repetitive, outdated or simply not workable.

It can be assumed that most Americans support regulations that have the goal of keeping the public safe and healthy. But it is also true that many rules and requirements are repetitive, outdated or simply not workable.

Consider a recent Federal Aviation Administration proposal that would increase the number of flight time hours required to be a public charter plane pilot by 25% - from 1,200 to 1,500. Is there any evidence that the rule would increase safety? No. In fact, the FAA issued a report saying the economic cost of such a requirement would be \$6.4 billion, while there would be “no [safety] benefit.”¹¹

As part of the Railway Safety Act of 2023, there are minimum crew size requirements.¹² Would that improve safety? The Federal Railroad Administration has admitted it does not have evidence to show one-person crews are any less safe. Further, as the Mercatus Center notes, the requirement will increase personnel costs that will require cuts elsewhere.¹³

United States Federal Regulation Tracker



This past year, federal regulators proposed new rules requiring banks with more than \$100 billion in assets to increase their capital by as much as 20%, which is

¹¹ United States Department of Transportation & Federal Aviation Administration Pilot Certification & Qualification Requirements for Air Carrier Operations, Final Rule Regulatory Evaluation, July 15, 2023, available at <https://www.regulations.gov/document/FAA-2010-0100-1925>

¹² Railway Safety Act of 2023, 118th Congress, 1st Session, available at https://www.brown.senate.gov/imo/media/doc/railway_safety_act_of_2023_text.pdf

¹³ The unintended consequences of the FRA's minimum train crew size rule, by Patrick McLaughlin, Mercatus Center at George Mason University, December 21, 2022, available at <https://www.mercatus.org/research/public-interest-comments/unintended-consequences-fras-minimum-train-crew-size-rule>

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Researchers say federal agencies are crafting bigger rules over time, in terms of both length and economic impact.

Montana, Idaho and Wyoming rank relatively high in terms of limiting the regulatory burden.

likely to have a devastating impact on the economy.¹⁴ Federal reserve chairman Jerome Powell says raising the capital requirements “also increases the cost of, and reduces access to, credit.”¹⁵

Researchers at the Columbian College of Arts and Sciences at The George Washington University conclude the trend shows federal agencies are “crafting bigger rules over time, in terms of both length and economic impact.”¹⁶

Efforts at the state level

The fight to reduce ineffective and burdensome regulations has received the most traction at the state level. In 2023 alone, Idaho legislators have reviewed more than 120 new or updated rules from state bureaucracy, on topics including daycare licensing, bail agents, insurance fees, corporate governance, juvenile detention centers, podiatry, physical therapy, invasive species stickers and more.¹⁷

Still, the state of Idaho stands far ahead of other states when it comes to the overall regulatory burden. In fact, Idaho consistently ranks at or near the top of the list of states with the fewest regulations.¹⁸

It’s not just the number of rules but also the amount of text that can be overwhelming. Idaho’s 2022 restrictions, for example, totaled 36,612 – the lowest in the country. However, its total regulatory words hit 3.9 million. In Montana, bureaucratic rules tallied 59,908, with total regulatory words at 4.7 million. Wyoming dealt with 72,218 restrictions in 2022, with nearly 4.1 million words.¹⁹

Washington state is the outlier in the region, with more than 200,000 restrictions in 2022 that included 18 million words. The state with the highest number of restrictions and words is California, at 403,774 and 22 million, respectively.

Idaho started on the path to its low regulatory burden with Governor Brad Little’s Red Tape Reduction Act.²⁰ It continued its effort with zero-based regulation – an executive order that forces regular reviews of rules and

¹⁴ Agencies request comment on proposed rules to strengthen capital requirements for large banks, Board of Governors of the Federal Reserve System, July 27, 2023, available at <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20230727a.htm>

¹⁵ Statement by Chair Jerome Powell, U.S. Federal Reserve, July 27, 2023, available at <https://www.federalreserve.gov/newsevents/pressreleases/powell-statement-20230727.htm>

¹⁶ Federal agencies are publishing fewer, but larger regulations, by Mark Febrizio, Columbian College of Arts and Sciences at The George Washington University, December 20, 2021, available at <https://regulatorystudies.columbian.gwu.edu/federal-agencies-are-publishing-fewer-larger-regulations#:~:text=The%20pace%20of%20rulemaking%20has,page%20length%20and%20economic%20impact>

¹⁷ 2023 Session Administrative Rules Reviewed, Idaho State Legislature, available at

<https://legislature.idaho.gov/sessioninfo/2023/interim/adminrules/>

¹⁸ QuantGov, Reg Census API, Mercatus Center at George Mason University, available at <https://www.quantgov.org/regcensus-explorer>

¹⁹ Ibid

²⁰ Executive Order 2019-02, The Red Tape Reduction Act, Office of Governor Brad Little, January 21, 2019, available at <https://gov.idaho.gov/wp-content/uploads/2019/01/eo-2019-02.pdf>

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restrictions.²¹ In fact, roughly 20% of each of Idaho’s agency rules are reviewed annually.

Bureaucratic Rules & Regulations by State (2022)

State	Rank (lowest)	Rules	Words
Idaho	1 st	36,612	3,978,329
Montana	5 th	59,908	4,761,522
Wyoming	8 th	72,218	4,092,624
Washington	42 nd	200,364	18,009,548
Oregon	43 rd	209,207	19,057,361
California	50 th	403,774	22,005,369



Most states have the authority to review administrative rules, but that doesn’t mean lawmakers can do anything about them.

Most states (41) have authority to review administrative rules, but that doesn’t necessarily mean lawmakers can easily do anything about them. For example, the National Conference of State Legislatures points out that a legislature’s veto authority over an administrative rule “may be required through enactment of a statute (13 states) or passage of a resolution (15 states).”²²

Separation of powers

Article One, Section One of the U.S. Constitution says, “all legislative powers shall be vested in a Congress of the United States.” State Constitutions follow a similar path, vesting first powers in the people via their elected representatives – before anything or anyone else.

Policymaking is the exclusive prerogative of the legislative branch of our government. But over the past few decades, a virus of executive overreach and lawmaking from the bench seems to have sullied the notion of separation of powers.

²¹ Executive Order 2020-01, Zero Based Regulation, Office of Governor Brad Little, January 1, 2021, available at <https://gov.idaho.gov/wp-content/uploads/2020/01/eo-2020-01.pdf>

²² Separation of Powers: Legislative oversight, National Conference of State Legislatures, November 17, 2022, available at <https://www.ncsl.org/about-state-legislatures/separation-of-powers-legislative-oversight>

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Chevron deference allows agencies to craft rules and regulations unless Congress clearly defines the language of a statute.

Policymakers should be committed to separation of powers.

The consistent and appropriate theme from recent U.S. Supreme Court decisions has been a return to a constitutional framework for making laws.

Specifically, justices have been relying on something called the “major questions doctrine.” Put simply, it asks whether Congress has clearly delegated authority to resolve major policy questions. If it hasn’t, then Congress must decide the issue.

In the coming months, the Supreme Court will hear the case *Loper Bright Enterprises v. Raimondo*, which could overturn a four-decades long precedent called the *Chevron* doctrine.²³ That legal theory contends that, unless Congress clearly defines the language within a statute, it is up to bureaucrats to come up with the details. Justice Clarence Thomas has stated that “*Chevron* gives federal agencies unconstitutional power.”²⁴

If the Court revokes *Chevron*, this holds our representatives in Congress directly accountable, given *Chevron* only comes into analysis when Congress has not been entirely clear on the legislative process. In reversing *Chevron*, Congress is held accountable to answer big policy questions – something the founders originally intended.

Recommendations

At the state level, policymakers should be doing more to reduce burdensome regulations and take responsibility for those still on the books. Perhaps the best way to accomplish this goal is to be committed to separation of powers.

Legislative oversight

In too many cases, bureaucrats take on the role of rulemaking and implementation – even though they were never elected to write laws. Legislatures should never delegate sweeping lawmaking authority to regulatory agencies.

As the Pacific Legal Foundation writes, policymakers can prevent this in three ways²⁵:

²³ United States Supreme Court docket No. 22-451, *Loper Bright Enterprises vs. Raimondo*, available at <https://www.supremecourt.gov/docket/docketfiles/html/public/22-451.html>

²⁴ The Supreme Court case that could hold Congress more accountable, by Olivia Johnston, Mountain States Policy Center, June 30, 2023, available at <https://www.mountainstatespolicy.org/the-supreme-court-case-that-could-hold-congress-more-accountable>

²⁵ Three essential pillars of regulatory reform, Pacific Legal Foundation, available at https://pacificlegal.org/wp-content/uploads/2023/10/PLF380_3-Pillars-of-Reform.pdf

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Joint oversight committees, targeted reviews and sunset provisions should be adopted.

The executive and judicial branches also have a role to play in limiting the size and scope of regulations.

Legislative Joint Committees

Legislators must ensure agencies do not go outside of their bounds of authority and are not able to pass rules that would never survive the legislative process. To accomplish this, lawmakers should adopt a Joint Committee on Administrative Rules to conduct periodic reviews. This oversight already exists in many states, but some are more practical and powerful than others. Lawmakers should require actionable information and analysis throughout the year when agency rules are proposed and issued.

Targeted Reviews

Some state legislatures are required to approve almost all rules before they go into effect. This should be the policy in all 50 states. While there is concern this could overwhelm lawmakers or lead to a mass rubberstamping of controversial rules, there are ways to ease the burden. Lawmakers could simply state that every major rule, as defined by the legislature, be approved by the legislative body before it goes into effect. To further define “major rule,” lawmakers could earmark a small portion of an agency’s budget to fund economic and regulatory analysis.

Sunset Provisions

No law, rule or regulation should exist forever. Sunset reviews require lawmakers to determine, on a regular basis, whether rules and/or regulations should be retained, reformed, or perhaps repealed. Rules and regulations tend to pile up over time, especially if there is no effort to determine whether they are still applicable. Lawmakers should ensure that all laws, rules and regulations are periodically examined.

Executive responsibility

Executives have the responsibility of signing and implementing laws, and any rule that has the force of law should be signed by the Governor. Far too often, state rules are signed and put into place by unelected bureaucrats who may not need to consider the best interests or concerns of citizens because citizens cannot remove them from office. It is more difficult for a state’s chief executive to claim he or she didn’t know about a controversial rule if they were required to approve the rule before it took effect.

Judicial deference

Judges are constitutionally required to interpret the law without bias. Unfortunately, many judges have decided to defer their role and responsibilities

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Policymakers should take care to ensure rules are always simple, predictable, and reviewable.

Nothing in this publication shall be construed as an attempt to aid or hinder the passage of any legislation.

to agency interpretation. To ensure the judiciary understands and doesn't skirt its duty, the legislature should require judges to interpret statutes, regulations, and other documents without giving any deference to an agency's legal interpretation. If the text is still unclear, judges should default to a reasonable interpretation that limits agency power and maximizes individual liberty. In other words, the tie should go to the citizen, not the government.

Conclusion

All recommendations contained in this publication apply to all levels of government. Thanks to separation of powers, ensuring oversight and lessening the regulatory burden are achievable. Each of the three branches have a role and responsibility. As the National Governors Association writes, "well-designed regulations protect workers, consumers and the environment while promoting entrepreneurship and economic growth."²⁶

Idaho and Montana deserve credit for attempting to reform the regulatory state. But as new policymakers consider the rules that govern rules and regulations, they should take care to ensure they are always simple, predictable, and reviewable.

²⁶ Learning from state regulatory streamlining efforts, National Governors Association, July 1, 2022, available at <https://www.nga.org/publications/learning-from-stateregulatory-streamlining-efforts/>

ABOUT THE AUTHOR

For more than 20 years, Chris Cargill has worked in communications and public policy. Chris has deep roots in our region and is a graduate of Gonzaga University with a degree in broadcast communications and political science. His experience includes a decade in television news as well as 13 years for another state based think tank.



Chris' work has been published in the Idaho Statesman, The Coeur d'Alene Press, The Helena Independent Record, the Spokesman-Review, The Seattle Times, the Tri-City Herald and Real Clear Policy, as well as many other regional newspapers. He is also a familiar voice on radio stations throughout the region.

Chris & his wife Lisa are the proud parents of two boys, including one who has special needs - one of the many reasons why he is so passionate about education choice options for families.

In his spare time, Chris spends time with family, serves on his local city council, and enjoys whatever down time he can in the great outdoors on his family property in North Idaho.

