

PROMPTING A REGULATORY RESET IN ARIZONA

James Broughel

Senior Research Fellow, Mercatus Center at George Mason University

Arizona State Senate, Committee on Government

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Chair Farnsworth, Vice Chairman Borrelli, and members of the committee:

Thank you for the opportunity to submit this testimony. My name is James Broughel, and I am a senior research fellow at the Mercatus Center at George Mason University and an adjunct professor at the Antonin Scalia Law School. My research focuses on state regulatory institutions, economic growth, and the economic analysis of regulations.

My testimony today centers around Senate Bill 1211 (SB1211), which is currently being considered by this committee. Specifically, I have three main points to convey:

1. The accumulation of unnecessary regulations can slow down economic growth and can weaken the effectiveness of regulations that are justified to protect health, safety, and the environment.
2. Despite real progress in recent years to reduce red tape, Arizona's regulatory institutions could be strengthened to ensure that regulatory clutter does not continue to accumulate.
3. A regulatory reset—which involves sunseting the entire code of regulations—is an effective way to conduct periodic spring cleaning of unnecessary regulations. Such an approach has been successfully implemented in Idaho and Rhode Island, and constitutes a sensible, bipartisan way to ensure removal of obsolete regulations.

THE COSTS OF REGULATORY ACCUMULATION

The accumulated body of regulations in a state has an effect on the economy that is greater than the sum of the effects of each individual regulation.¹ The effect of regulation on the economy can be thought of as akin to dropping pebbles in a stream.² The first pebble is insignificant, a thousand pebbles may slow the flow, but a hundred thousand pebbles could dam the stream even when that last pebble was, by itself, also insignificant.

The empirical connection between regulation and economic growth is well documented in the peer-reviewed academic literature:

1. James Broughel, *Regulation and Economic Growth: Applying Economic Theory to Public Policy* (Arlington, VA: Mercatus Center at George Mason University, 2017).

2. Michael Mandel and Diana G. Carew, *Regulatory Improvement Commission: A Politically Viable Approach to US Regulatory Reform* (Washington, DC: Progressive Policy Institute, 2013).

- A 2013 study in the *Journal of Economic Growth* estimates that federal regulation slowed the growth of the US economy by 2 percentage points per year on average from 1949 to 2005.³ This estimate suggests that, had federal regulation remained at its 1949 level, 2011 GDP would have been about \$39 trillion larger, or 3.5 times larger, than it actually was.⁴
- A study published by the Mercatus Center estimates that economic growth has been slowed by 0.8 percentage points per year on average by federal regulations implemented since 1980.⁵ That number suggests that had the federal government imposed a cap on regulation levels in 1980, then by 2012 the economy would have been \$4 trillion larger, which amounts to \$13,000 per person in the United States.
- Researchers at the World Bank estimate that the economies of countries with the least burdensome business regulations grow 2.3 percentage points faster annually than countries with the most burdensome regulations.⁶
- The authors of a study published in the *Quarterly Journal of Economics* say the following about gains (or lack thereof) from more stringent regulation: “We do not find that stricter regulation of entry is associated with higher quality products, better pollution records or health outcomes, or keener competition. But stricter regulation of entry is associated with sharply higher levels of corruption, and a greater relative size of the unofficial economy.”⁷

In addition to slowing economic growth, the accumulation of regulations prevents regulators from doing their jobs effectively. Regulators should be prioritizing those justified regulations that promote public health, keep the environment clean, and maintain safe workplaces. However, all regulations carry the same force of law and must therefore be treated equally. This means that in practice counterproductive regulations distract regulators from doing their jobs to the best of their ability.

STATE REGDATA

Much of the research focusing on the effects of regulation on growth looks at the national level, largely because historically there have not been good ways to measure and compare regulation at the state level. However, that is beginning to change as a result of work being done by me and my colleagues at the Mercatus Center.

In 2019, my colleagues and I launched State RegData, a first-of-its-kind effort to quantify regulation across the 50 states.⁸ State RegData scans and analyzes legal text, in this case state administrative codes. In this way, modern technology is allowing us to overcome barriers traditionally associated with parsing millions of words of regulatory text.

As an example of these barriers, generally speaking state regulatory codes are too large for any single individual to read from start to finish. The online version of the Arizona Administrative Code (AAC) contained 5.6 million words in 2017.⁹ It would take an ordinary person about 312 hours—or almost 8 weeks—to read the entire AAC, assuming the person reads regulations 40 hours per week as a full-time

3. John W. Dawson and John J. Seater, “Federal Regulation and Aggregate Economic Growth,” *Journal of Economic Growth* 18, no. 2 (2013): 137–77.

4. Patrick A. McLaughlin, Nita Ghei, and Michael Wilt, “Regulatory Accumulation and Its Costs: An Overview” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, 2018).

5. Bentley Coffey, Patrick A. McLaughlin, and Pietro Peretto, “The Cumulative Cost of Regulations” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2016).

6. Simeon Djankov, Caralee McLiesh, and Rita Maria Ramalho, “Regulation and Growth,” *Economic Letters* 92, no. 3 (2006): 395–401.

7. Simeon Djankov et al., “The Regulation of Entry,” *Quarterly Journal of Economics* 117, no. 1 (2002): 1–37.

8. James Broughel and Patrick A. McLaughlin, “Ranking the States by Regulation,” *National Review*, October 17, 2019.

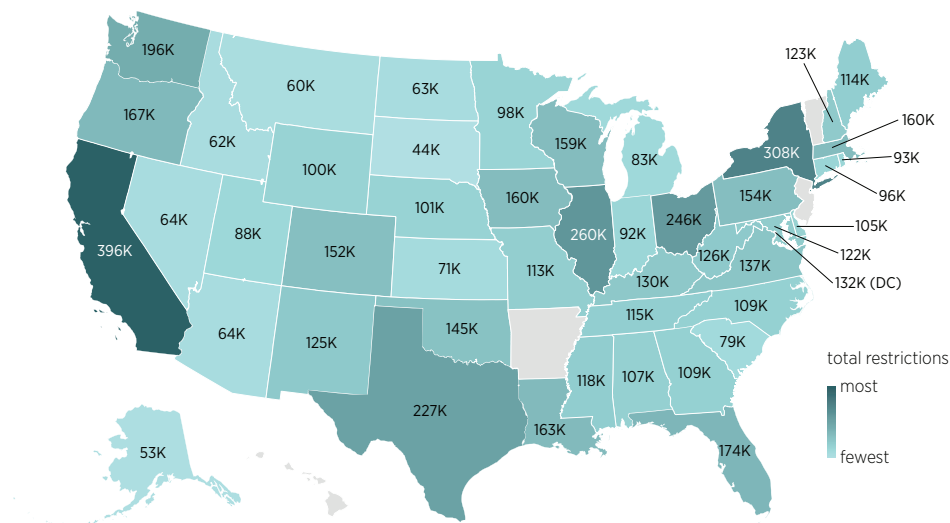
9. James Broughel, Oliver Sherouse, and Daniel Francis, “A Snapshot of Arizona Regulation in 2017” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, June 2017).

job.¹⁰ This creates an impediment to researchers like myself who want to make sense of all the laws on the books. This is also a problem for entrepreneurs who need to understand the law to maintain compliance when starting or maintaining a business.

As part of our project, we pull key information from state codes, including word counts and counts of regulatory restrictions, which are instances of the terms *shall*, *must*, *may not*, *prohibited*, and *required*. These restrictions can signify legal constraints and obligations of various kinds.¹¹ Using machine-learning algorithms, we are also able to estimate which industries are most targeted by state regulation and assess which types of regulation are most prevalent.

Arizona had 63,919 regulatory restrictions in its administrative code as of mid-2017.¹² To put that in context, the average state has roughly 131,000 restrictions, putting Arizona lower than the average state. That said, Arizona has about 20,000 more restrictions in its regulatory code than South Dakota, the least regulated state as of mid-2019. In late 2019, the state of Idaho claimed to surpass South Dakota as the least regulated state, at 41,000 restrictions.¹³ It is worth noting again that Arizona’s numbers are from 2017, so it’s possible that the numbers have changed somewhat since then. More data will be available in the near future.

FIGURE 1. STATE-LEVEL REGULATORY RESTRICTIONS



Note: State RegData includes data on 46 states and the District of Columbia that were gathered and analyzed between June 2015 and August 2019. Uncolored states are those for which the number of regulatory restrictions has not been calculated. Source: Patrick A. McLaughlin et al., State RegData (dataset), QuantGov, Mercatus Center at George Mason University, Arlington, VA, accessed September 9, 2019 <https://quantgov.com/state-regdata/>; Bing Maps (data), © GeoNames, HERE, MSFT.

A REGULATORY RESET

Governor Doug Ducey has made regulatory reform a top priority of his administration. Since taking office in 2015, he has signed multiple executive orders related to regulatory reform and has also

10. This assumes the person reads 300 words per minute for 40 hours per week.

11. Restrictions can also occur in legal text for other purposes, such as for definitional purposes. At times, restrictions may relate to government employees, rather than the private sector.

12. Broughel, Sherouse, and Francis, “A Snapshot of Arizona Regulation in 2017.”

13. James Broughel and Krista Chavez, “Idaho Is the Least Regulated State and a Model for the Rest of the Country,” *The Bridge*, January 2, 2020.

prioritized reforms to the state’s occupational licensing regulations.¹⁴ The most recent executive order related to regulatory reform was signed in January of 2020.¹⁵ Among other things, the order continued a moratorium on new regulations that has been in place since 2015, and it established a process whereby for each new regulation requested by an agency, three will be recommended for elimination.

Governor Ducey has certainly taken productive steps to rein in red tape. However, there are at least two reasons to believe that a regulatory reset, like the one proposed in SB1211, could help take reforms to the next level. These are

1. the default policy for regulations is that they remain on the books, which biases the regulatory system toward maintaining the status quo; and
2. enhanced legislative oversight of the rulemaking process would return some authority over rulemaking to elected representatives and, by extension, to the people of Arizona.

A problem with many regulatory systems is that agencies have a “status quo bias.” That is, the path of least resistance is often to maintain the current stock of regulations on the books. Even when regulators know a regulation is not working as intended, they often have little incentive to admit it, as this could draw unwanted scrutiny (including budget cuts) from legislators or negative attention from the media and the public. Thus, the best option for them is often to just let things be.

The way to overcome this problem is to switch the burden of proof for regulations, and that can be done with the assistance of sunset provisions, which are automatic expiration dates for regulations. Without a sunset provision, regulations remain on the books by default unless regulators repeal them through the regulatory process. Repeal can be hard to do since administrative procedure acts are sometimes set up with the specific intention of locking in existing regulations.¹⁶

A lack of sunset provisions at the federal level helps explain why 68 percent of federal regulations have never been updated.¹⁷ But with a sunset provision, regulations are discarded by default unless they are forced back through the regulatory process where they have to be justified anew and can be amended to accommodate changes that have occurred in the marketplace since the regulation was enacted. Clutter is thereby removed quickly and easily, and regulations are modernized on a routine basis.

Some states have even experimented with mass sunsets, which I refer to as a “regulatory reset,” where the entire administrative code expires all at once. Mass resets and sunset provisions may sound like dramatic policy, but in fact they have been tried and proved successful in other jurisdictions.

Idaho has a sunset provision, for example, that provides that all state regulations expire on July 1 of each year unless extended by an act of the legislature.¹⁸ At least three other states have similar sunset provisions: Utah, Tennessee, and Colorado.¹⁹ In 2019, the Idaho legislature even opted not to pass a rule reauthorization bill. As a consequence, 19 percent of rule chapters, 10 percent of pages, and 19,000

14. H. B. 2569, 54th Leg. 1st Reg. Sess. (Ariz. 2019).

15. Ariz. Exec. Order No. 2020-02 (2020).

16. McNolgaast, “The Political Origins of the Administrative Procedure Act,” *Journal of Law, Economics & Organization* 15, no. 1 (1999): 180–217.

17. William D. Eggers and Mike Turley, *The Future of Regulation: Principles for Regulating Emerging Technologies* (New York: Deloitte Insights, 2018).

18. IDAHO CODE ANN. § 67-5292 (2019).

19. Note that the sunset provisions in Utah and Idaho apply to all regulations, while the sunset provisions in Tennessee and Colorado apply to just newly filed regulations. UTAH CODE ANN. § 63G-3-502(2) (LexisNexis 2019); TENN. CODE ANN. § 4-5-226(a) (2019); COLO. REV. STAT. § 24-4-103(8)(c) (2019).

regulatory restrictions were allowed to expire virtually overnight.²⁰ Remaining rules were extended through the issuance of emergency regulations promulgated by the executive branch.

This has all gone incredibly smoothly. All told, as part of its regulatory reforms, the governor's office claims to have cut or simplified 75 percent of all rules and eliminated 250 rule chapters, 1,804 pages of regulations, and close to 31,000 regulatory restrictions.²¹ Furthermore, the state legislature now has an opportunity to play a critical role in reviewing the governor's changes when it decides whether to reauthorize the new administrative code in 2020. Idaho now claims to be the least regulated state in the nation,²² and it is hoping to lock in these successes by institutionalizing what it calls a "zero-based regulation" approach.²³ The idea is that every few years, regulations should go away by default unless they can be justified anew. That is precisely the aim of sunset provisions in general and of Arizona SB1211 in particular.

The only area where Idaho's regulatory reset could have perhaps gone more smoothly is with respect to time. After the legislature failed to reauthorize the code, the Little administration had slightly more than two months to determine which rules to keep and which to let expire. That's why states might want to consider a reform closer to the Rhode Island model. Rhode Island initiated a regulatory reset too, but agencies were given far more advance time to review their rules and arguably were able to cut more red tape as a result.

In 2016, Rhode Island put an expiration date on its entire code, set to occur on December 31, 2018.²⁴ This was done as part of an effort to create an online regulatory code, but it was also meant to be a red tape cutting exercise to streamline rules for businesses.²⁵ By the time the reset had taken place, the state had eliminated 31 percent of its total rule volume.²⁶ Notably, SB1211 seems to be similarly structured to the Rhode Island reset.

Also notable is that the Rhode Island and Idaho resets did not ignite significant controversy. This is likely because so many of the regulations allowed to expire were uncontroversial ones. For instance, Idaho had regulations on the books related to a game show that never existed.²⁷ It had regulations governing pay phones (remember those?), rules related to the attire of the state's deputy veterinarian, and even 20-year old regulations addressing nonnative snail populations that never turned out to be a significant pest problem in the state.²⁸

Of course, at some point regulations that are more controversial should be scrutinized as well, and this helps explain why Idaho is ramping up its use of tools like economic analysis.²⁹ But it is quite telling that so many regulations could be eliminated in these two states without hardly anyone raising any

20. Cynthia Sewell (@CynthiaSewell), "Idaho @GovernorLittle announces more regulatory cuts on the horizon in Idaho. Goal: 55%-60% may be cut by end of year. #IDpol #IDleg," Twitter, July 19, 2019, 1:35 p.m., <https://twitter.com/CynthiaSewell/status/1152270706714894336>.

21. Idaho Exec. Order 2020-01 (2020).

22. James Broughel and Krista Chavez, "Idaho Is the Least Regulated State and a Model for the Rest of the Country," *The Bridge*, January 2, 2020.

23. Idaho Exec. Order 2020-01 (2020).

24. S. 3015 Gen. Assemb., Jan. Sess. (R.I. 2016).

25. State of Rhode Island General Assembly, "Governor Signs Bill to Improve Rhode Island's Regulatory Climate for Businesses," press release, July 1, 2016, http://www.rilin.state.ri.us/pressrelease/_layouts/RIL.PressRelease.ListStructure/Forms/DisplayForm.aspx?List=c8baae31%2D3c10%2D431c%2D8dcd%2D9dbbe21ce3e9&ID=12078&Web=2bab1515%2D0dcc%2D4176%2Da2f8%2D8d4beebdf488.

26. Rhode Island Office of the Governor, "Governor Raimondo Announces Largest Successful Regulatory Reform Effort in State History," press release, October 15, 2018, <https://www.ri.gov/press/view/34428>.

27. Broughel and Chavez, "Idaho is the Least Regulated State."

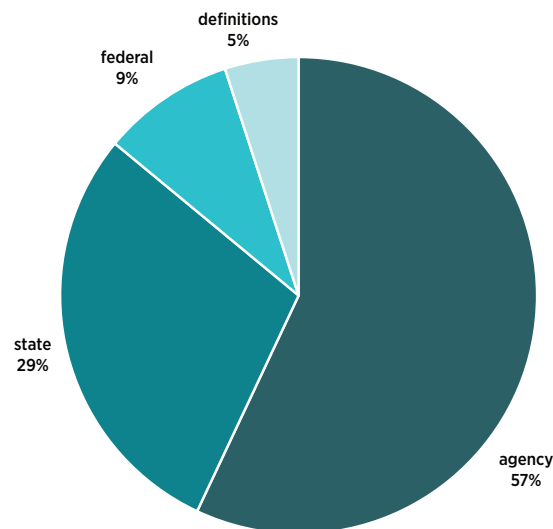
28. "Idaho Quits Worrying About Snails," *Wall Street Journal*, June 28, 2019.

29. Idaho Exec. Order 2020-01 (2020).

significant concerns. This suggests a considerable amount of regulations on the books are obsolete. But don't be fooled, such regulations can nonetheless be costly by adding unnecessary complexity to the legal system.

There is reason to believe Arizona is well positioned for a regulatory reset, as state agencies already possess a wealth of information as a result of their five-year periodic review process.³⁰ This information can assist them in the process of identifying which regulations to allow to expire. For instance, agencies already have information about which regulations are mandated by state or federal law and which are discretionary. Discretionary regulations are those the agency could modify or remove without a legislative change. Figure 2 presents the breakdown of Arizona regulations by original authority.

FIGURE 2. COMPOSITION OF ARIZONA REGULATIONS IN 2017, BY ORIGINAL AUTHORITY



Source: James Broughel and Katherine Konieczny, "Regulator Discretion at the State Level: The Case of Arizona" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, June 2018).

It is concerning that more than half of the regulations on the books in Arizona are discretionary. This suggests that the legislature has delegated away much of its authority to make law. A regulatory reset combined with an annual sunset provision could help to address this problem because it simultaneously encourages the expiration of many discretionary rules while also restoring some of the traditional constitutional balance of power between the executive and legislative branches of government.

CONCLUSION

Arizona has made real progress trimming red tape over the past several years. The state should be proud of its accomplishments. However, there is more work to be done, as institutional features of the regulatory process lead to regulatory inertia. Even those regulations that virtually everyone agrees have outlived their usefulness may be maintained simply because that is the path of least resistance.

Forcing a regulatory reset can shift the current focus away from maintaining the status quo and toward creating a dynamic regulatory system responsive to ever-changing marketplace conditions. Furthermore, Arizona is well positioned to enact such a reform given the wealth of information agencies already possess as a result of reviews in recent years.

30. ARIZ. REV. STAT. § 41-1056 (LexisNexis 2020).

States such as Idaho and Rhode Island prove that this can work, and they have been leading the nation when it comes to regulatory reform. Arizona remains a step behind. However, SB1211 before this committee has the potential to make Arizona a leader in regulatory reform across the nation. That would be quite an accomplishment.

Thank you for the opportunity to submit this testimony. I welcome any questions you may have.

ATTACHMENTS (4)

James Broughel, "Idaho Repeals its Regulatory Code," *The Bridge*, May 9, 2019.

James Broughel, "Idaho Is the Least Regulated State and a Model for Other States," *The Bridge*, January 2, 2020.

James Broughel, Oliver Sherouse, and Daniel Francis, "A Snapshot of Arizona Regulation in 2017" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, June 2017).

James Broughel and Catherine Konieczny, "Regulator Discretion at the State Level: The Case of Arizona" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, June 2018).



CELEBRATING
40 YEARS AT
MASON

Idaho Repeals Its Regulatory Code

Thursday, May 9, 2019

Authors: James Broughel

Something rather remarkable just happened in Idaho. The state legislature opted to—in essence—repeal the entire state regulatory code. The cause may have been dysfunction across legislative chambers, but the result is serendipitous. A new governor is presented with an unprecedented opportunity to repeal an outdated and burdensome regulatory code and replace it with a more streamlined and sensible set of rules. Other states should be paying close attention.

The situation came about due to the somewhat unconventional nature of Idaho's regulatory process. Each year, the state's entire existing body of regulations expires unless reauthorized for an additional year by the legislature. In most years, reauthorization happens smoothly, but not this year.

Instead, the legislature wrapped up an acrimonious session in April without passing a rule-reauthorization bill. As a result, come July 1, some 8,200 pages of regulations containing 736 chapters of state rules will expire [1]. Any rules the governor opts to keep will have to be implemented as emergency regulations, and the legislature will consider them anew when it returns next January.

Governor Brad Little, sworn into office in January, already had a nascent red tape cutting effort [2] underway, but the impending regulatory cliff creates some new dynamics. Previously, each rule the governor wanted cut would have had to be justified as a new rulemaking action; now, every regulation that agencies want to keep has to be justified. The burden of proof has switched.

The new scenario creates multiple touch points when rules could end up on the cutting room floor. First, when regulations expire on July 1, many will not be refiled. Second, the public will have the opportunity to comment on regulations that are resubmitted. In some cases, public hearings are likely to take place, presenting another opportunity to reshape, and cut, some regulations. Finally, when the legislature returns next year, it will need to pass a reauthorization bill for those regulations Governor Little's administration wants kept. Even more red tape can be trimmed then.

Of course, many regulations serve a justified purpose. The challenge for the Little administration will be to hone in on those rules that add costs disproportionate to any benefits produced, whilst preserving and perhaps even strengthening any rules that are working well.

The Idaho case also highlights the power of sunset provisions—or automatic expiration dates built into laws or regulations. In the past, academic research [3] has found that sunset provisions are sometimes ineffective. Legislatures and agencies often readopt [4] regulations without much thought. To work well, sunsets may need to be structured such that large swaths of rules expire simultaneously, with reauthorization responsibilities falling to the legislature rather than

regulators. Sunsets are perhaps most useful when rules are allowed to lapse and then forced back through the rulemaking process all over again. That way they can be subjected to public scrutiny, cost-benefit analysis, and perhaps even court challenges.

The main constraint now facing Idaho state agencies is time—they could use more of it. Regulators have just two months to decide which rules should stay and which should go. With more time, they might be able to tweak and modernize those regulations deemed necessary; instead, many rules may simply be readopted without changes.

Nevertheless, whether intentionally or not, Idaho deserves credit for advancing the frontier of regulatory reform in a new and innovative way. Any state without a sunset provision should consider setting one up, modeled after the Idaho approach. Forcing a fresh start by repealing the entire regulatory code may be the newest arrow in the red tape cutter's quiver. Time will tell whether Governor Little and company's aim is true.

Photo credit: The White House/flickr

Source URL: <https://www.mercatus.org/bridge/commentary/idaho-repeals-its-regulatory-code>

Links

[1] <https://apnews.com/3c58858586d9454bbe53a575f2bb82c0>

[2] <https://gov.idaho.gov/pressrelease/governor-little-signs-two-new-executive-orders-reducing-regulatory-burdens-on-idahoans/>

[3] <https://www.jstor.org/stable/10.1086/468098>

[4] <https://www.mercatus.org/publications/cutting-red-tape-new-jersey-regulatory-reform-christie>

<https://www.mercatus.org>



CELEBRATING
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Idaho is the Least Regulated State and a Model for the Rest of the Country

Thursday, January 2, 2020

Authors: James Broughel, Krista Chavez

Last month, Idaho Governor Brad Little announced [1] that the state cut more than 1,800 pages [2] of regulations in 2019, bringing its total regulatory count down to just 41,000 restrictions. If this new count is accurate, it would make Idaho the least regulated state in the nation, according to recent research [3] from the Mercatus Center.

That's great news for Idaho. But what does this development mean for the future of regulatory policy more generally?

First, the Idaho experience demonstrates that state governments can significantly reduce regulations without much fanfare or controversy. Idaho claims to have cut or simplified an astounding 75 percent of its rules. This regulatory reform is being done transparently with input from the public in the form of written comments and public meetings. Early next year, state legislators will also have a say when they decide whether or not to give final approval to Governor Little's new streamlined administrative code.

Some of the cuts may have been uncontroversial because they were considered low-hanging fruit. For example, Idaho had rules on the books related to a TV game show [4] that was never produced. These types of rules probably aren't burdening the public, but they do unnecessarily clutter the code, which over time adds complexity that ultimately can dissuade would-be entrepreneurs from starting businesses or expanding them.

Cutting low-hanging fruit makes sense, but future reformers in Idaho and elsewhere should prioritize extending such reviews beyond merely eliminating obviously outdated and unnecessary regulations. Reforms should also include reviewing rules that may sound good in theory but may not achieve their objectives in practice.

Lawmakers can better distinguish beneficial regulations from ineffective and harmful ones by relying more on economic analysis in the review process. This is not a new idea: the federal government has applied a form of cost-benefit analysis to new regulations for decades. And while that process is far from perfect, it enjoys bipartisan support and is better than conducting *no* analysis.

In general, the states lag far behind the federal government in using economic analysis to evaluate their regulations. This is a drawback because it means regulations are unlikely to be evidence-based. But it also presents an opportunity [5] because states can experiment in areas where the federal government has come up short. For instance, the federal government rarely bothers to

analyze the stock of existing regulations, focusing instead on new rules. This is a major problem, but it's one area where the states can lead the way.

Furthermore, regulatory analyses produced by federal agencies tend to be highly political, often wielded to promote rules rather than to assess them. But this need not be the case, as more objective analytical institutions exist—even within the federal government—whose experience can be instructive. For instance, the legislative branch has a number of research arms, such as the Congressional Research Service (CRS) or the Government Accountability Office (GAO), that produce high-quality, informed research, mostly free of politics. These entities tend to be more objective than executive branch regulatory agencies, perhaps because congressional analytical offices have to serve both major political parties, whereas regulatory agencies serve the party of whatever president is in power.

As legislators around the country consider creating [6] their own institutions to analyze regulations, they should house these responsibilities in existing trusted bodies within the state legislature (similar to CRS and GAO), such as an audit office or a budget scoring authority. In cases where this is impractical or where executive branch regulatory agencies are already doing the work, it makes sense to create an oversight role for the courts and to give judges the power to vacate rules not backed by rigorous economic analysis. Just the threat of judicial review can be an incentive to rigorously review regulations because regulators are highly sensitive to legal challenges.

Idaho's path toward becoming the least regulated state offers a road map for other states. The state's recent experience shows that it's not inevitable that a state's regulatory code grows ever larger and more complicated year after year. Indeed, major cuts in regulations are possible and need not be controversial. The question is whether states and the federal government will go beyond cutting superficial regulations to systematically and analytically review their entire regulatory infrastructure. The Idaho experience demonstrates the first steps in this process. Now it's time for the states and federal government to take reforms to the next level.

Subtitle:

Idaho finds a way to cut regulations without controversy

Source URL: <https://www.mercatus.org/bridge/commentary/idaho-least-regulated-state-and-model-rest-country>

Links

[1] <https://www.idahostatesman.com/news/politics-government/state-politics/article238042974.html>

[2] <https://gov.idaho.gov/pressrelease/idaho-cuts-and-simplifies-75-percent-of-rules-in-one-year-becomes-least-regulated-state-in-country/>

[3] <https://www.mercatus.org/publications/regulation/quantifying-regulation-us-states>

[4] <https://www.wsj.com/articles/idaho-quits-worrying-about-snails-11561763217>

[5] <https://www.mercatus.org/bridge/commentary/getting-state-economic-analysis-right>

[6] <https://www.mercatus.org/publications/urban-economics/principles-constructing-state-economic-analysis-unit>

<https://www.mercatus.org>



A Snapshot of Arizona Regulation in 2017

63,919 Restrictions, 5.6 Million Words, and 8 Weeks to Read

by James Broughel, Oliver Sherouse, and Daniel Francis

June 2017

It would take an ordinary person over three years to read the entire *US Code of Federal Regulations* (CFR), which contained almost 112 million words in 2017.¹ The sheer size of the CFR poses a problem not just for the individuals and businesses that want to stay in compliance with the law, but also for anyone interested in understanding the consequences of this massive system of rules. States also have sizable regulatory codes, which add an additional layer to the enormous body of federal regulation. A prime example is the 2017 version of the *Arizona Administrative Code*.²

A tool known as State RegData³—a platform for analyzing and quantifying state regulatory text—was developed by researchers at the Mercatus Center at George Mason University. State RegData captures information in minutes that would take an ordinary person hours, weeks, or even years. For example, the tool allows researchers to identify the industries most targeted by state regulation by connecting text relevant to those industries with restrictive word counts (also known as regulatory restrictions). These are words and phrases like “shall,” “must,” “may not,” “prohibited,” and “required” that can signify legal constraints and obligations.⁴ As shown in figure 1, the top three industries with the highest estimates of industry-relevant restrictions in the 2017 *Arizona Administrative Code* are chemical manufacturing, utilities, and ambulatory healthcare services.

1. “The QuantGov Regulatory Clock,” QuantGov, accessed May 11, 2017.

2. Arizona Secretary of State, *Arizona Administrative Code*, accessed May 11, 2017.

3. State RegData is part of a broader project called QuantGov, which seeks to quantify legal text. See Patrick A. McLaughlin and Oliver Sherouse, “QuantGov—A Policy Analytics Platform,” QuantGov, October 31, 2016.

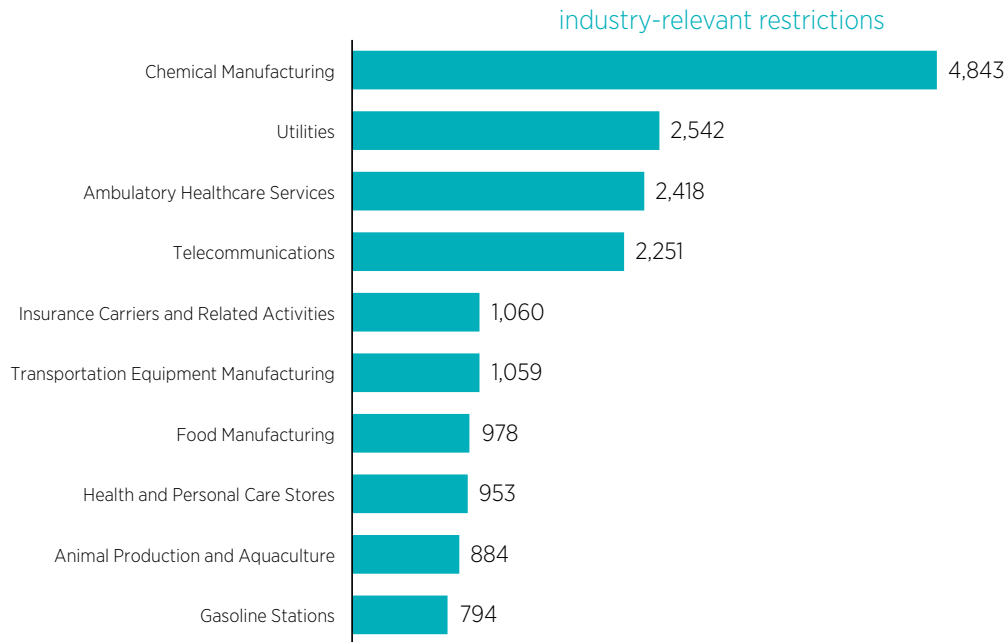
4. Restrictions can also occur in legal text for other purposes, such as for definitional purposes. At times, restrictions may relate to government employees, rather than the private sector.

For more information, contact

Sam Pfister, Associate Director of State Outreach, 217-836-6802, spfister@mercatus.gmu.edu
Mercatus Center at George Mason University, 3434 Washington Blvd., 4th Floor, Arlington, VA 22201

State RegData also reveals that the *Arizona Administrative Code* contains 63,919 restrictions and roughly 5.6 million words. It would take an individual about 312 hours—or almost 8 weeks—to read the entire Arizona code. That’s assuming the reader spends 40 hours per week reading and reads at a rate of 300 words per minute. For comparison, in 2017 there were over 1.15 million additional restrictions in the federal code.⁵ Individuals and businesses in Arizona must navigate all of these restrictions to remain in compliance.

Figure 1. The Top 10 Industries Targeted by Arizona State Regulation in 2017



Source: “State Administrative Codes—Arizona,” QuantGov, <http://www.quantgov.org/data/>.

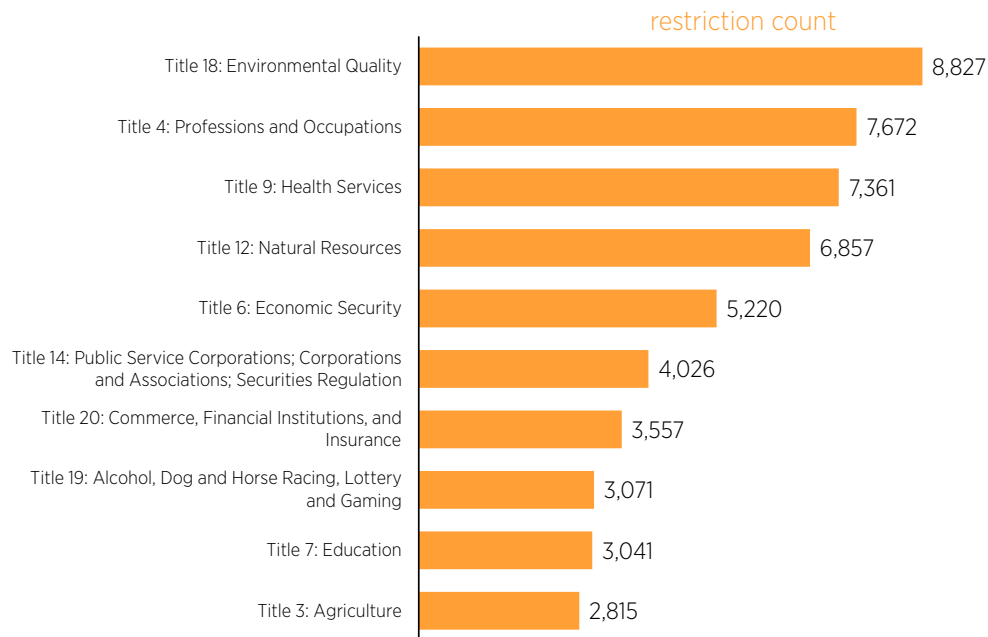
The titles of the *Arizona Administrative Code* are assigned based on the type of regulation housed within those titles. Figure 2 shows that in 2017, rules related to environmental quality, which are found in Title 18, contained over 8,800 restrictions. This makes it the biggest title, in terms of restrictions, in the Arizona code. Coming in second is Title 4, which is related to professions and occupations and includes over 7,600 restrictions.

Federal regulation tends to attract the most headlines, but it is important to remember that the nearly 112 million words and over 1.15 million restrictions in the federal code are just the tip of the iceberg when it comes to the true scope of regulation in the United States. States like Arizona write millions of additional words of regulation and tens of thousands of additional restrictions. State-level requirements carry the force of law to restrict individuals and businesses just as federal ones do.

5. “The QuantGov Regulatory Clock,” QuantGov.

Researchers are only beginning to understand the consequences of the massive and growing federal regulatory system on economic growth and other measures of well-being in the United States.⁶ Meanwhile, the effects of state regulation remain largely unknown. If this snapshot of Arizona regulation in 2017 is a good indicator, then the states are also active regulators, suggesting the true impact of regulation on society is far greater than that of federal regulation alone.

Figure 2. The Top 10 Titles in the 2017 Arizona Administrative Code



Source: “State Administrative Codes—Arizona,” QuantGov, <http://www.quantgov.org/data/>.

6. Bentley Coffey, Patrick A. McLaughlin, and Pietro Peretto, “The Cumulative Cost of Regulations” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2016).

ABOUT THE AUTHORS

James Broughel is a research fellow for the State and Local Policy Project at the Mercatus Center at George Mason University. Broughel has a PhD in economics from George Mason University. He is also an adjunct professor of law at the Antonin Scalia Law School.

Oliver Sherouse is a research analyst for the Program for Economic Research on Regulation at the Mercatus Center. He studied history and computer science at Duke University and received his MPP from Georgetown University.

Daniel Francis is a research programmer at the Mercatus Center. He received his BS in economics and mathematics from Florida State University.

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Regulator Discretion at the State Level: The Case of Arizona

James Broughel and Catherine Konieczny

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Periodic review of administrative rules is important to ensure that public policy is achieving desired outcomes. Such review can also improve the design of new regulations, as lessons from past experience are used in the creation and implementation of new rules and programs. A 2010 report showed that, as a result of either a governor's executive order or a state statute, 40 states had processes for the periodic review of rules.¹ In many cases, however, these reviews are quite limited in scope, focusing narrowly on impacts on small businesses; in some cases, the review requirements are not seriously enforced and meaningful review does not occur. In recent years many governors have taken further steps to guarantee that rules are reviewed on at least a one-time basis.²

In order to be successful when reviewing existing regulations, regulatory agencies must competently identify the rules under their purview, determine which ones need updating or eliminating, and, critically, take action to modify or repeal those rules. In some cases, however, regulators lack the legal authority to take this last step, i.e., to make substantive changes to regulations, because rules can be required by federal or state law.

THE CASE OF ARIZONA

An example of a state that requires periodic review of regulations is Arizona. State law provides that every five years state agencies review their own rules to determine if any should be amended or repealed.³ At the end of their reviews, agencies submit a report to the Governor's Regulatory Review Council summarizing their findings and describing any proposed course of action. The statute governing the review process requires, among other things, that agencies

provide the “authorization of the rule by existing statutes” in their reports.⁴ Thus, these reports offer important insights into the extent to which state regulations are authorized or required by state or federal law.

The most recent review of Arizona regulations took place in 2017. In late 2017, the Arizona Governor’s Regulatory Review Council produced a report summarizing information gathered from state agencies.⁵ The report shows that, as of March 31, 2017, Arizona has 10,917 rules.

With respect to the authorization for these rules, the report organizes the rules into four categories: *agency discretion*, *state statute*, *federal statute or regulation*, and *definitions or applicability*.

While all regulations must have some statutory basis, the *agency discretion* classification means that the decision of whether to adopt a given regulation is left up to the regulator by the legislature, or that a statute delegates general lawmaking powers to an agency without mandating that a specific regulation be promulgated.

By contrast, the *state statute* classification means that a governing state statute requires a specific rule in an agency’s chapter of the state code, and therefore state law must be changed before an agency can significantly alter or eliminate a rule.

Similarly, the *federal statute or regulation* classification means that a rule is required by federal law, is in place because of a condition for the state to receive federal grants or other incentives, or exists as part of an agreement between the federal government and Arizona. These rules also have authority stemming from state statute, but their original authority begins with a federal mandate.

Finally, rules whose authority traces to definitions or applicability are typically issued at the discretion of the regulating agencies, but rather than add additional regulatory burdens on the public, these rules serve to add clarity to the language of other regulations or to more clearly identify who is impacted or what activities fall under the scope of regulations.

RESULTS OF ARIZONA’S REVIEW

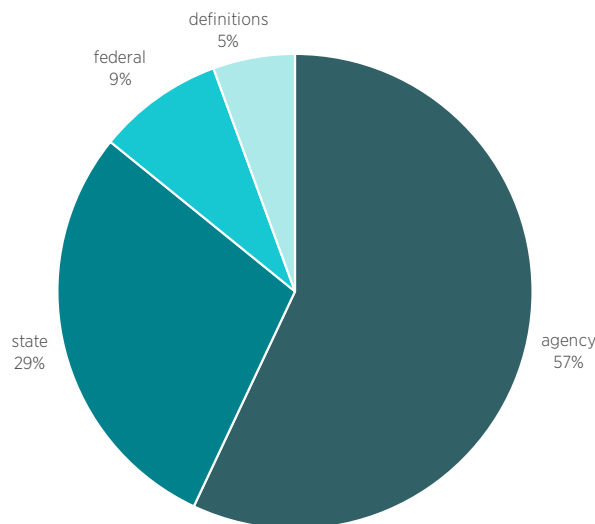
Arizona’s review determined that 57 percent of regulations on the books existed at the discretion of the state regulating agency, 29 percent were mandated by state statute, and 9 percent of rules cited federal laws or agreements as authorizing the regulation. Just 5 percent of rules were classified as relating to definitions or applicability.

Judging by these numbers, it appears that state regulators have considerable discretion in Arizona, though some exceptions exist at specific agencies. For example, 83 percent of the state Water Infrastructure Finance Authority’s rules are required by the federal government, as are 80 percent of the

Emergency Response Commission’s rules, 58 percent of the state Radiation Regulatory Agency’s rules, and 52 percent of Department of Environmental Quality’s rules.

Relating to state law, 87 percent of the Private Investigator and Security Guard Hearing Board’s regulations are required by state statute, as are 63 percent of the State Boxing and Mixed Martial Arts Commission’s rules and 53 percent of the Department of Emergency and Military Affairs’s rules.

Figure 1. Composition of Arizona Regulations in 2017, by Original Authority



Source: Office of Economic Opportunity, Governor’s Regulatory Review Council, *Arizona Administrative Code Rule Inventory 17-1, 2017*.

LESSONS FROM OTHER STATES

While the findings from Arizona’s review are informative, Arizona may not be representative of all states. For example, West Virginia is a state that generally requires legislative approval before new regulations can be adopted.⁶ Thus, agencies have far less discretion to change or modify old regulations in West Virginia compared to Arizona because so many of the regulations in the *West Virginia Code of State Rules* are required by state statute.

Similarly, since 2017 Wisconsin has been a state that prohibits promulgation of regulations estimated to cost \$10 million or more unless the legislature passes a bill that allows the regulation to proceed.⁷ While this requirement may make it harder for some large regulations to be promulgated, those regulations that are adopted through this process (which will also be some of the most consequential regulations) will also be harder for regulators to change in the future because the rules will have an explicit legislative endorsement.

While there may be benefits to processes—such as those found in West Virginia and Wisconsin—

that significantly reduce state regulator discretion, such policies may also have the unintended consequence of tying the executive branch's hands in future efforts to amend regulations as needed by changing circumstances.

By contrast, the governor in Arizona has considerable authority when it comes to rule changes. For example, after the Governor's Regulatory Review Council reviews agency rule reports, the council has the authority to order an agency to amend or repeal a rule that is deemed materially flawed. If the agency fails to do so by a specified date, the rule automatically expires.⁸

CONCLUSION

The point of having periodic reviews is to improve regulations according to changing circumstances as new technologies, products, and business models emerge. Improvements could take the form of rolling back obsolete rules, reducing regulatory burden without diluting necessary protections, replacing cumbersome requirements with nimbler and smarter ones, or even strengthening regulations.

Even when a rule is required by law, the agency may still have discretion over certain aspects of the rule. On the other hand, even when the agency has broad discretion over how and whether to regulate, the agency must still adhere to administrative procedures in the state, which are set up to ensure checks and balances, public participation, and government accountability.

State legislatures should provide instructions to the executive branch regarding how to prioritize and conduct rule reviews; at the same time, state agencies should maintain a degree of discretion to modify rules as needed to fulfill their mandates, and they should routinely make recommendations to the legislature regarding regulatory improvements that require statutory changes.

It is not easy to strike the balance between statutory authority and administrative discretion. The first step toward finding that balance is to account for who has authority over each rule in the state administrative code; herein we offer such a picture for Arizona.

ABOUT THE AUTHORS

James Broughel is a research fellow for the State and Local Policy Project at the Mercatus Center at George Mason University. Broughel has a PhD in economics from George Mason University. He is also an adjunct professor of law at the Antonin Scalia Law School.

Catherine Konieczny is an MA fellow alumna at the Mercatus Center at George Mason University.

NOTES

1. Jason A. Schwartz, “52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemaking” (Report No. 6, Institute for Policy Integrity, New York University School of Law, New York, November 2010), 116–24.
2. Some examples of recent executive orders related to regulatory review include Arizona Exec. Order No. 2016-03; Arizona Exec. Order No. 2017-02; Maryland Exec. Order No. 01.01.2015.20; Colorado Exec. Order No. D2012-002; Massachusetts Exec. Order No. 562; Illinois Exec. Order No. 2016-13; Nebraska Exec. Order No. 17-04; Missouri Exec. Order No. 17-03; Missouri Exec. Order No. 17-11.
3. Ariz. Rev. Stat. § 41-1056.
4. Ariz. Rev. Stat. § 41-1056(A)(3).
5. Office of Economic Opportunity, Governor’s Regulatory Review Council, *Arizona Administrative Code Rule Inventory 17-1*, 2017.
6. W. Va. Code § 29A-3-9.
7. Technically, the requirement applies to regulations estimated to cost \$10 million for implementation or compliance over any two-year period. Some regulations, such as emergency regulations or some rules from the Department of Natural Resources related to air quality, are exempt from this requirement. See Wis. Stat. § 227.139 (2018).
8. Ariz. Rev. Stat. §§ 41-1056 (E)–(G).