MERCATUS CENTER
George Mason University

TESTIMONY

PROMOTING PUBLIC HEALTH THROUGH MEANINGFUL REGULATORY REVIEW

James Broughel
Senior Research Fellow, Mercatus Center at George Mason University

Montana Senate Committee on Public Health, Welfare and Safety

March 31, 2021

Chair Howard 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 regulatory institutions, economic analysis of regulations, and the impacts of regulations on economic growth.

My testimony today centers around House Bill 158 (HB 158), which is currently being considered by this committee. Specifically, I have three main points to convey:

1. Around the country, governors and regulatory agencies have suspended regulations standing in the way of an effective public health response to the COVID-19 pandemic; these regulations need to be reviewed to ensure that they are working for Americans, including the residents of Montana.
2. Though Montana is one of the more lightly regulated states on balance, some states are significantly less regulated than Montana by some measures, and all states need effective mechanisms for reviewing rules to ensure that the rules are meeting public needs.
3. If passed, HB 158 would constitute one of the most deliberate efforts in the country to enhance policymakers' understanding of why the current regulatory system has fallen so far short during the ongoing pandemic. Montana legislators should be commended for their efforts, but there remain ways in which HB 158 could nevertheless be improved.

SUSPENDING REGULATIONS TO PROMOTE PUBLIC HEALTH

During the past year, regulations in a wide variety of areas have been relaxed or suspended in order to facilitate the public health response to the COVID-19 pandemic. Examples of such waived or relaxed regulations include the following:

1. *Certificate-of-need (CON) laws.* CON laws require healthcare providers to seek permission from the government before they offer new services or expand or build new facilities. As of January

For more information or to meet with the scholar, contact
Mercatus Outreach, 703-993-4930, mercatusoutreach@mercatus.gmu.edu
Mercatus Center at George Mason University, 3434 Washington Blvd., 4th Floor, Arlington, Virginia 22201

2020, 35 states plus the District of Columbia required healthcare providers to obtain a CON before offering at least one service, and this number rises to as many as 39 states when other similar healthcare supply constraints are taken into account.[1] Yet according to one report, 24 states with CON laws have suspended portions of them during the pandemic or authorized emergency certificates to be issued, such as certificates allowing for increases in the number of available hospital beds.[2]

2. *Occupational licensing and scope-of-practice regulations*. These regulations restrict who can work in certain professions and what services professionals in various occupations can provide. During the pandemic, states have made it easier for out-of-state or retired healthcare professionals to provide services, and they have expanded the classes of healthcare professionals that can provide certain services, such as testing or vaccination.[3] For example, the US Department of Health and Human Services has issued nationwide guidance allowing pharmacists, qualified pharmacy technicians, and state-authorized pharmacy interns to administer COVID-19 vaccines and COVID-19 tests.[4]
3. *Regulations governing clinical laboratories*. The federal government botched its early response to the crisis,[5] as the first COVID-19 tests distributed around the country by the Centers for Disease Control and Prevention (CDC) produced unreliable results.[6] At the same time, commercial labs and public health officials in the states couldn't get initial approval to perform their own tests (though in some cases, they tested anyway).[7] These failures, largely a result of inflexible regulations,[8] led the FDA and CDC to relax regulations on clinical laboratories and transfer some regulatory authority over labs to the states.

Whether these suspended or relaxed regulations ever made sense at all is a critical public health issue. Thus, it is not surprising that governments are engaging in reviews of regulations waived or suspended during the pandemic. In Arizona, Governor Doug Ducey signed an executive order in early 2021 directing state agencies to conduct a comprehensive review of regulations suspended during the COVID-19 emergency to determine whether suspensions should be made permanent.[9] In Idaho, Governor Brad Little signed Executive Order 2020-13, titled "Regulatory Relief to Support Economic Recovery."[10] That order requires regulators to initiate rulemakings to remove regulations waived during COVID-19. Exceptions can be made for rules required by law or necessary to protect public health or safety, but the default position is that such regulations should be eliminated. The US

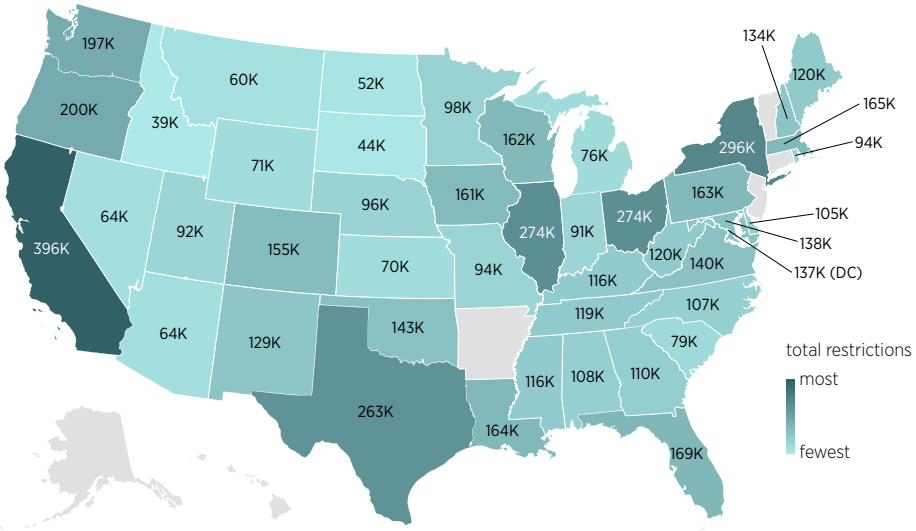
1. Matthew D. Mitchell, Anne Philpot, Jessica McBirney, "CON Laws in 2020: About the Update," Mercatus Center at George Mason University, February 19, 2021.
2. Angela C. Erickson, "States Are Suspending Certificate of Need laws in the Wake of COVID-19 but the Damage Might Already Be Done," Pacific Legal Foundation, January 11, 2021.
3. For examples of waived occupational licensing regulations during the early days of the pandemic, see Ethan Bayne, Conor Norris, and Edward Timmons, "A Primer on Emergency Occupational Licensing Reforms for Combating COVID-19" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, March 2021).
4. With regard to the role that pharmacists and pharmacy technicians could play in response to COVID-19, see James Broughel and Yuliya Yatsyshina, "In Coronavirus Fight, Your Pharmacist Could Be an Unexpected Hero," *Fox Business*, May 1, 2020; James Broughel and Yuliya Yatsyshina, "To Boost Vaccination Rates, Empower Pharmacy Technicians," *The Hill*, November 4, 2020.
5. Adam Thierer, "How the US Botched Coronavirus Testing," *Daily Economy*, American Institute for Economic Research, March 12, 2020.
6. Christopher Weaver, Betsy McKay, and Brianna Abbott, "America Needed Coronavirus Tests. The Government Failed," *Wall Street Journal*, March 19, 2020.
7. Sheri Fink and Mike Baker, "'It's Just Everywhere Already': How Delays in Testing Set Back the U.S. Coronavirus Response," *New York Times*, March 16, 2021.
8. Alec Stapp, "Timeline: The Regulations—and Regulators—That Delayed Coronavirus Testing," *The Dispatch*, March 20, 2020.
9. Arizona Exec. Order No. 2021-02 (February 12, 2021).
10. Idaho Exec. Order No. 2020-13 (June 22, 2020).

Department of Health and Human Services also ordered a review of the vast majority of its existing regulations in early 2021,[11] though that effort is being delayed by legal challenges.[12]

BACKGROUND ON THE REGULATORY ENVIRONMENT IN MONTANA

A recent Mercatus Center report highlights the reach of the regulatory state throughout the Rocky Mountain region of the United States.[13] Montana has 4.7 million words of regulation in its administrative code and about 60,000 regulatory restrictions (instances of the words and phrases "shall," "must," "may not," "prohibited," and "required"). Figure 1 shows a map of US states along with their corresponding regulatory restrictions.

FIGURE 1. STATE-LEVEL REGULATORY RESTRICTIONS



Note: State RegData 2.0 includes data on 44 states and the District of Columbia that were gathered between March and June of 2020. Uncolored states are those for which the number of regulatory restrictions has not been calculated. Source: Patrick A. McLaughlin, Jonathan Nelson, Stephen Strosko, Thurston Powers, Walter Stover, Ethan Greist, and Hayden Warlick, State RegData (dataset), QuantGov, Mercatus Center at George Mason University, Arlington, VA, accessed July 9, 2020, https://quantgov.org/state-regdata/; Bing Maps (data), © GeoNames, HERE, MSFT.

As is evident from figure 1, Montana has one of the lower levels of regulation in the country, as measured by counts of restrictions. It nonetheless has more regulations than a number of other states, including some of its neighbors. For example, Idaho has just 39,000 restrictions as of last count, and North Dakota and South Dakota both have fewer restrictions than Montana.

In addition, there are reasons to believe that the cost of the regulatory system sometimes declines on a per capita basis as the population increases.[14] Thus, a restriction in California might impose a lower cost on an individual than the same restriction in Montana. On a per capita basis, Montana is among the 10 most regulated states (including the District of Columbia, which is the most regulated state-level

11. James Broughel, "HHS's 'Sunset Rule' Will Save Money and Lives," *STAT*, February 2, 2021.
12. US Department of Health and Human Services, Securing Updated and Necessary Statutory Evaluations Timely; Administrative Delay of Effective Date; Correction, 86 Fed. Reg. 15404 (March 23, 2021).
13. James Broughel and Kofi Ampaabeng, "A Snapshot of Regulation in Rocky Mountain States" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, October 2020).
14. James Bailey, James Broughel, and Patrick A. McLaughlin, "Larger Polities Are More Regulated," *Journal of Public Finance and Public Choice* (forthcoming).

jurisdiction in the United States on a per capita basis). Montana industries are also about 30 percent more regulated by federal regulation than are industries across the nation as a whole, meaning businesses in Montana are disproportionately targeted by regulators in Washington, DC, relative to businesses nationally.

Even if on balance Montana is less regulated than most other states (which seems likely), this should not detract from the need for systematic review of existing regulations. Whether rules are advancing public health or diminishing it is a critical question, and without rigorous review, this question will remain unanswered.

REGULATIONS CAN SLOW GROWTH, INCREASE RISK AND HAVE REGRESSIVE EFFECTS

The overall volume of regulation in a jurisdiction can be problematic because of the process of regulatory accumulation, which slows growth and has other unintended consequences. The empirical connection between regulation and growth is well documented in the peer-reviewed academic literature:

- 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.[15] This estimate suggests that, had regulation remained at its 1949 level, 2011 GDP would have been about $39 trillion larger, or 3.5 times larger, than it actually was.
- A study published in the *Review of Economic Dynamics* estimates that economic growth has been slowed by 0.8 percentage points per year on average by federal regulations implemented since 1980.[16] 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.[17]
- A review of the peer-reviewed studies that rely on measures of regulation constructed by the World Bank and Organisation for Economic Co-operation and Development finds an apparent consensus that entry regulation and anticompetitive product and labor market regulations are generally harmful to productivity and growth.[18]

Well-designed regulations can protect the public, but regulations also have costs that can increase health and safety risks inadvertently. The mechanism driving this result is that compliance costs from regulations reduce business profitability, and these losses get passed on to workers in the form of lower wages and to customers in the form of higher prices. By extension, families have less income to spend on doctor's visits, safer vehicles, or living in more secure or less polluted neighborhoods. Across society, some risks inevitably rise as incomes fall owing to the burdens regulations impose.

15. John W. Dawson and John J. Seater, "Federal Regulation and Aggregate Economic Growth," *Journal of Economic Growth* 18, no. 2 (2013): 137–77.
16. Bentley Coffey, Patrick A. McLaughlin, and Pietro Peretto, "The Cumulative Cost of Regulations," *Review of Economic Dynamics* 38 (2020): 1–21.
17. Simeon Djankov, Caralee McLiesh, and Rita Maria Ramalho, "Regulation and Growth," *Economics Letters* 92, no. 3 (2006): 395–401.
18. James Broughel and Robert W. Hahn, "The Impact of Economic Regulation on Growth: Survey and Synthesis," *Regulation & Governance*, published ahead of print (December 28, 2020), https://doi.org/10.1111/rego.12376.

When regulatory costs rise enough, one can expect deaths to occur because the assortment of rules increases risks for some hardworking Americans who are on the margins. Recent research suggests that for each $110 million or so in regulatory costs, there will be one expected death owing to this impoverishment effect.[19] As a result, statistical analysis shows that higher levels of federal regulation go together with higher mortality, even after controlling for factors commonly thought to explain higher mortality.[20]

In addition to these unintended consequences related to risk, a recent report from the Mercatus Center finds that federal regulations from 1997 to 2015 are associated with an additional 17,755 Montanans living in poverty, 3.1 percent higher income inequality in the state, 51 fewer businesses annually, 508 lost jobs annually, and 7.4 percent higher prices.[21] Thus, regulations have many unintended consequences, and these side effects are often most pronounced for working families and households.

RECOMMENDATIONS FOR IMPROVING HB 158

HB 158 creates a COVID-19 response study commission whose responsibility is to review statutes and regulations suspended or revised during the pandemic and to prepare a report with recommendations. Such study could help to address problematic regulations like those described earlier in this testimony. Moreover, this legislation would go a step further than other states have gone, such as Arizona or Idaho, which have ordered reviews of suspended regulations via executive order, which is a less durable solution than legislation.

That said, there are ways to ensure that HB 158 is effective in achieving its stated goals.

1. *Populate the commission in a bipartisan manner*. The benefit of a bipartisan approach is that it lends credibility to a review effort by making recommendations reflect a consensus. A potential model is the bipartisan government efficiency and regulatory review commission that is set to be created by Assembly Bill 4810 in New Jersey, a bill that, as of this writing, has passed both chambers in New Jersey's legislature and awaits the governor's signature.[22] Modeled after a similar commission that existed during the Chris Christie administration, Assembly Bill 4810 would allow both the majority and the minority party in the state legislature to appoint members to the review commission.[23] (Note that a recent amendment to HB 158 would allow the minority leader in each chamber to appoint a member to the commission.)
2. *Make the commission permanent*. Assembly Bill 4810 in New Jersey is again a model in this respect, because it creates a commission that will be a permanent standing body to review regulations and makes recommendations for improvements. Although reviewing regulations suspended during the pandemic is and must be a top priority, regulatory review more generally is needed on an ongoing basis, not just temporarily.
3. *Invest in economists to produce independent, objective analysis.* Under HB 158, the Legislative Services Division (LSD) will provide support staff to assist the COVID-19 response study commission. Additionally, regulatory agencies will be required to furnish an economic impact

19. James Broughel and W. Kip Viscusi, "The Mortality Cost of Expenditures," *Contemporary Economic Policy* 39, no. 1 (2021): 156–67.
20. James Broughel and Dustin Chambers, "Regulation and Mortality in the 50 States" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, January 2020).
21. Dustin Chambers and Colin O'Reilly, "The Regressive Effects of Regulations in Montana" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, February 2021).
22. Assemb. B. 4810, 219th Leg., 2nd Ann. Sess. (N.J. 2021).
23. For more information on Governor Chris Christie's regulatory reforms, see James Broughel, "Cutting Red Tape in the Garden State: New Jersey's Regulatory Reform Program under Chris Christie" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, May 2018).

statement upon request by the commission. However, to ensure objectivity and independence of analysis, legislators should consider staffing the LSD with an economist whose job is to analyze regulations upon request. Doing so would keep analytical responsibilities separate from program management.[24]

4. *Give the commission authority to order agencies to regulate or deregulate in specific areas.* In Mississippi, the Occupational Licensing Review Commission was set up in recent years to review occupational licensing regulations. The commission has the authority to direct agencies to remove regulations in particular areas.[25] Montana may want to empower the commission created under HB 158 with similar authority.

CONCLUSION

The COVID-19 pandemic has revealed deep shortcomings in the regulatory system at multiple levels of American government. As such, it is not surprising that states and federal agencies are considering ways to review regulations that were hampering the pandemic public health response. Montana is taking important steps by looking at ways to make temporary regulatory suspensions permanent. The process now being considered has the potential to make Montana a leader in public-health-centered regulatory reform and a model that other states will likely wish to emulate.

Thank you for the opportunity to submit this testimony. I am happy to answer any questions you may have.

ATTACHMENTS (3)

Kendall Cotton and James Broughel, "To Promote Economic Recovery, Montana Needs Regulatory Relief," *Independent Record*, November 4, 2020.

James Broughel and Kofi Ampaabeng, "A Snapshot of Regulation in Rocky Mountain States" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, October 2020).

Dustin Chambers and Colin O'Reilly, "The Regressive Effects of Regulations in Montana" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, February 2021).

24. On the importance of independent regulatory analysis, see James Broughel and Patrick A. McLaughlin, "Principles for Constructing a State Economic Analysis Unit" (Mercatus Policy Primer, Mercatus Center at George Mason University, Arlington, VA, 2018).
25. James Broughel and Patricia Patnode, "Taming the Occupational Licensing Boards and Creating Jobs," *Discourse*, February 10, 2021.

https://helenair.com/opinion/columnists/to-promote-economic-recovery-montana-needs-regulatory-relief/article_6968de5f-63b2-58bd-8986-2fbeccc7b443.html

GUEST VIEW

To promote economic recovery, Montana needs regulatory relief

KENDALL COTTON and JAMES BROUGHEL

Nov 4, 2020

Montana is often referred to as the "last best place," but by one measure it's the second-worst place in the Mountain West in terms of harmful regulations and red tape. That's according to new research from the Mercatus Center at George Mason University, which shows that, on a population-adjusted basis, Montana has the second-most regulatory restrictions among its regional neighbors, trailing only Wyoming and well ahead of Colorado, Idaho and Utah.

Cotton

As of this year, Montana's regulatory code has grown to over 4.7 million words and includes just under 60,000 regulatory restrictions, as measured by words like "shall," "must" and "required" in the state's rulebook. It would take a typical person about six-and-a-half weeks to read every rule in Montana's administrative code, assuming 40 hours per week at a normal pace of reading.

Federal rules also burden Montana's economy, with industries in Montana subject to about 30% more federal regulation than industries across the nation as a whole are.

Together, these restrictions and red tape impose real costs on Montana's economic health. Some of the industries most heavily regulated in Montana are also among the most important to the state's economy, like animal production and mining. It's surprising, for example, that the home of the country's "golden triangle" of wheat farming regulates crop production more than any other neighbor in the Mountain West.

Provided photo

While regulation is necessary in some cases to protect health, safety and the environment, the accumulation of thousands of regulations together has been shown to stifle economic growth and substantially increase the cost of doing business. That's the last thing Montanans need at a time when the state's economic recovery is still fragile from the coronavirus.

To revive strong economic growth, policymakers should focus on reducing Montana's overall burden of regulation. Idaho Gov. Brad Little recently undertook an effort to cut his state's regulatory burden, implementing a policy whereby state agencies must propose two regulations to simplify or eliminate for each new regulation they want to add. Last year, the Idaho legislature went so far as to repeal the entire state regulatory code, allowing Gov. Little's administration to start fresh with a more streamlined set of rules.

As a result, Idaho is now the least-regulated state in the nation, and Governor Little has looked to institutionalize his reforms by mandating that rule chapters be periodically repealed and replaced to keep them modern and up-to-date.

By enacting similar regulatory relief measures in 2021, Montana could set the stage for an economic rebound. Moreover, there's room for Montana to go even further than a state like Idaho, by legislating a permanent cap on the size of the state's code. That would make Montana a regulatory reform leader not just in the Rocky Mountain region, but all across the world.

Kendall Cotton is president and CEO of the Frontier Institute, a think tank based in Helena. James Broughel is a senior research fellow with the Mercatus Center at George Mason University and a coauthor (with Kofi Ampaabeng) of the new study, "A Snapshot of Regulation in the Rocky Mountain States."

MERCATUS CENTER
George Mason University

POLICY BRIEF

A Snapshot of Regulation in Rocky Mountain States

James Broughel and Kofi Ampaabeng

October 2020

This policy brief uses RegData, an innovative tool from the Mercatus Center at George Mason University, to summarize and contextualize the volume of regulatory restrictions in five western states constituting the Rocky Mountain region as classified by the Bureau of Economic Analysis (BEA). In 2012, the Mercatus Center launched RegData to quantify regulation at the federal level in the United States. RegData uses text analysis and machine learning algorithms to convert legal text into quantitative data. Using these data, researchers can quantify the number of regulatory restrictions in a jurisdiction. Regulatory restrictions are the primary unit of measurement of regulation used by RegData and are instances of the terms *shall*, *must*, *may not*, *prohibited*, and *required* appearing in laws. Regulations by nature impose restrictions on regulated individuals and businesses, by either requiring or prohibiting certain activities. These terms approximate the number of restrictions that regulators impose on a jurisdiction.[1]

In 2019, the Mercatus Center launched State RegData, which extended the technology underlying RegData to state administrative codes. This allowed for aggregate levels of regulation across the various states to be compared with one another. This brief takes a deeper dive into the data generated by the various RegData projects to better understand the regulatory landscape in the Rocky Mountain region of the United States. Specifically, this report summarizes data for five states: Colorado, Idaho, Montana, Utah, and Wyoming. Using data from State RegData, version 2.0, as well as other sources, the brief compares these states' regulatory environments along a variety of dimensions, including overall word counts in state administrative codes, restrictiveness of regulations in state administrative codes, restrictions across industries, federal regulation of the various states' economies, and population-adjusted restrictions.

The analysis presented here provides new insights into the extent and scope of regulation across the Rocky Mountain region, which should prove useful to academics, policymakers, and even

the regulators themselves as they seek to understand the consequences of the regulatory state in America.

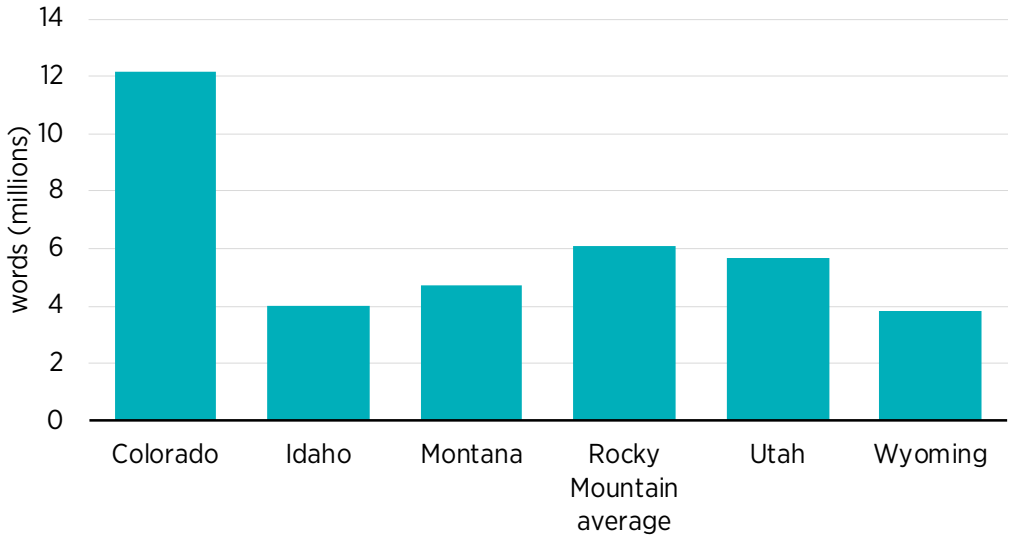
WORD AND RESTRICTION COUNTS IN STATE REGULATIONS

Almost every state in the country has a regulatory code where its administrative laws are housed.[2] Regulations are distinct from traditional laws written by legislators in that they are written mostly by unelected officials working at executive branch agencies. Elected representatives in a legislature delegate specific lawmaking powers to these agencies. Executive branch agencies are typically run by political appointees (although sometimes they are run by elected officials), and the staff who work at agencies are career civil servants. Thus, the administrative laws (i.e., regulations) written by these officials are different from statutes written by legislators in that there is generally no direct line of accountability from voters to the writers of these laws.

Perhaps the simplest way to quantify how much state regulation exists is to count the words in states' administrative codes (figure 1). For example, the Colorado administrative code contains 12.2 million words, while Wyoming's administrative code contains just 3.8 million words. Except for Colorado, the number of words in each Rocky Mountain state's administrative code is below the Rocky Mountain average of 6.1 million and the national average of 9.2 million.

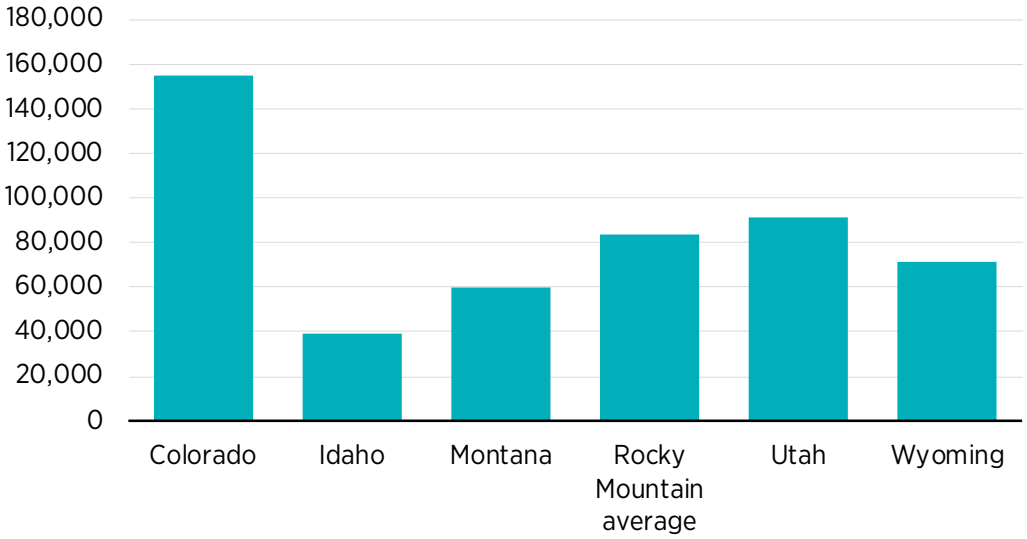
If one instead counts the restrictive terms in administrative codes, then Colorado remains the most regulated mountain state, with 154,964 restrictions (figure 2). Idaho is the least regulated state by this metric, as it has just 38,961 restrictions as of 2020.

Figure 1. Word Counts in Rocky Mountain State Administrative Codes



Source: Patrick A. McLaughlin et al., "State RegData 2.0" (dataset), QuantGov, Mercatus Center at George Mason University, Arlington, VA, 2020, https://quantgov.org/state-regdata/.

Figure 2. State Regulatory Restrictions in the Rocky Mountain Region



Source: McLaughlin et al., "State RegData 2.0."

REGULATION OF INDUSTRY AT THE STATE AND FEDERAL LEVELS

Another way to analyze the regulatory systems in these states is to look at industries that are targeted by state and federal regulation. RegData utilizes machine learning algorithms that are trained to identify text relevant to particular industries. When the probability that a certain piece of legal text applies to a particular industry is combined with regulatory restriction data, one can produce an estimate of the regulatory restrictions targeting particular sectors of the economy.[3] Figure 3a provides state regulatory restriction information for select industries. Figure 3a shows clearly that the number of regulatory restrictions varies widely both within and across states. In other words, for particular industries, some states impose far more regulation than others. And within particular states, some industries are far more regulated than others.

Several interesting observations can be made about the data in figure 3a. One obvious pattern is that Colorado tends to impose more regulation on these industries than the other states, which is consistent with its larger overall volume of regulations. Ambulatory healthcare services is the most regulated industry in Colorado (12,737 restrictions). Montana imposes the fewest regulatory restrictions on this industry, but also regulates crop production more than any other Rocky Mountain state (2,816 restrictions). Petroleum and coal products manufacturing is the most regulated industry in Utah and the third most regulated in Colorado.

The variation in the number of restrictions on various industries across this region could be explained by the relative importance of each sector to each state's economy. Without assuming any direct causal relationship between the volume of regulations that falls on an industry and that industry's contribution to GDP, in figure 3b we present the percentage of state GDP associated

Figure 3a. State Regulatory Restrictions for Select Industries in the Rocky Mountain States

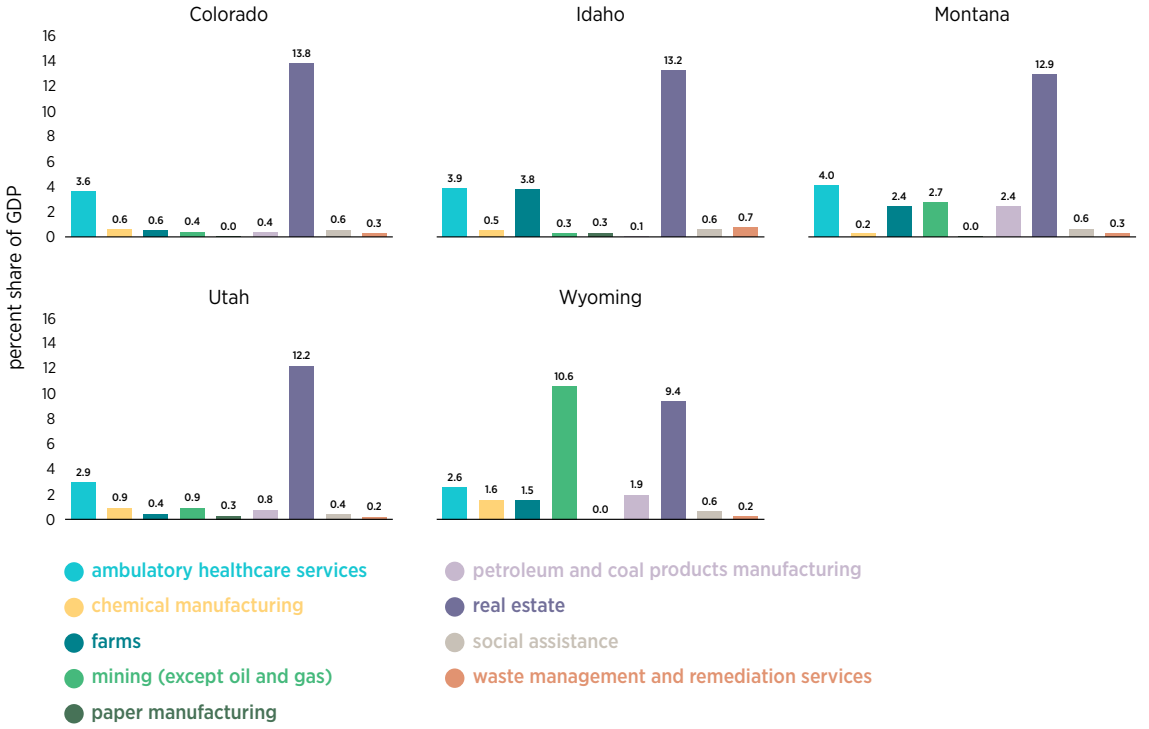
Note: We use the three-digit North America Industry Classification System to delineate industries. Not all industries are shown here. For more details on the algorithm that classifies regulations into industries and the methodology for assigning probabilities to industries, see Patrick A. McLaughlin and Oliver Sherouse, "RegData 2.2: A Panel Dataset on US Federal Regulations," Public Choice 180 (2019): 43–55.
Source: McLaughlin et al., "State RegData 2.0."

with each of these industries for the five states. The mining industry is much more important to Wyoming's economy than to the economies of the other states; this industry is also more heavily regulated than the other industries in Wyoming. Meanwhile, real estate is important in all the states' economies, and is lightly regulated in all the states.

States also vary in terms of the degree to which their economies are targeted by federal regulation. For example, the average number of regulatory restrictions imposed by the five states reviewed here is 83,305. By comparison, there are approximately 1.08 million regulatory restrictions in the US *Code of Federal Regulations*.[4] Therefore, it is quite possible that federal regulations have a larger impact on these state economies than do the states' own regulatory restrictions.

The Mercatus Center has also produced data to better understand the degree to which federal regulation targets states' economies. By weighting estimates of industry-relevant federal restrictions according to how important various industries are to states' gross state product, the Federal Regulation and State Enterprise (FRASE) index is able to rank the states in terms of how regulated they are by the federal government (figure 4). Wyoming receives a score of 1.50. This score

Figure 3b. Contribution to State GDP of Select Industries



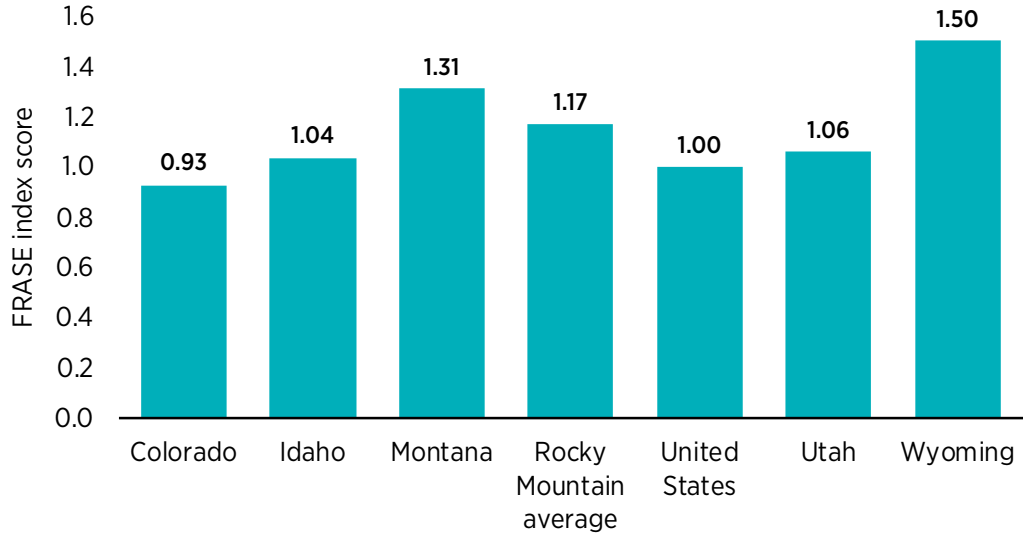
Source: "GDP by State," Bureau of Economic Analysis, accessed May 26, 2020, https://www.bea.gov/data/gdp/gdp-state.

is scaled relative to the nation as a whole, which receives a score of 1.00, so a score of 1.50 means that Wyoming industries are targeted by federal regulation 50 percent more than industries across the nation as a whole are. Notably, four of the five states in the Rocky Mountain region are more regulated than is the whole nation, by this measure.

REGULATION AND POPULATION

There is also evidence that more-populous states tend to have more regulation than less-populous states.[5] One can speculate about several reasons why this could be the case. For example, more-populous states might tend to have more industries, so some forms of regulation may not be necessary in less-populous states. It is possible that more-populous states have denser populations than less-populous states, and when more people are congregated in smaller areas, certain externalities or other market failures could be more prevalent, thereby necessitating more regulation. It may be that larger populations demand more regulation. Finally, some scholars have posited that there are fixed costs associated with regulating and that larger populations will be able to absorb these fixed costs more easily by spreading them across a greater number of people.[6] Therefore, more populous states could be expected to have more regulation because regulating becomes cheaper as population increases.

Figure 4. Relative Federal Regulatory Burden by State in the Rocky Mountain Region



Note: The score for the United States is 1.00.
Source: QuantGov, "2017 FRASE Index" (dataset), accessed March 17, 2020, https://www.quantgov.org/download-interactively.

For these reasons, it could make sense to adjust for population when reporting regulatory restrictions.[7] Figure 5a shows the number of state regulatory restrictions for every 1,000 residents in each of the Rocky Mountain states. Wyoming (123.2 restrictions) is the most regulated state in the region, adjusting for population. Idaho (21.8 restrictions) is the least regulated state in the region. Figure 5a also shows the regional average number of restrictions per 1,000 residents for the Rocky Mountain region. Utah, Colorado, and Idaho have fewer state restrictions per 1,000 residents than the regional average.

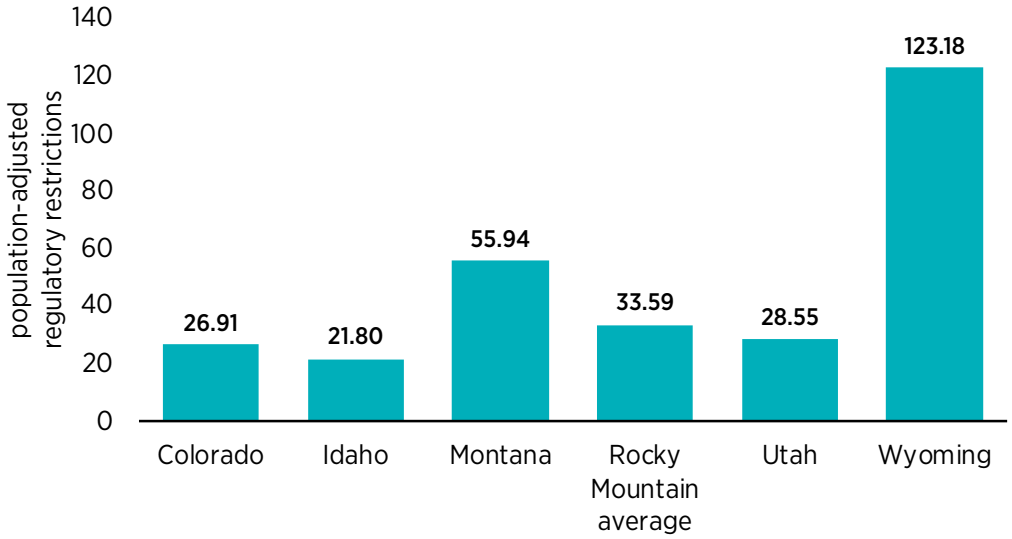
Figure 5b shows the 2018 GDP per capita for each of the Rocky Mountain states. While Idaho has the fewest regulations per capita, it also has the smallest GDP per capita. Wyoming has the highest GDP per capita and also the most restrictions per capita. Again, we stress that we are not attempting to establish a causal relationship between regulation and GDP, but merely putting the volume of regulatory restrictions in the context of the local economies.

CONCLUSION

There are a variety of ways one can compare the regulatory environments across states, as this policy brief has done for states in the Rocky Mountain region of the United States. We have looked at word counts in state administrative codes, regulatory restriction counts, restrictions targeting industries in these states, the extent to which federal regulation targets each state's industries, and the population-adjusted quantity of state regulation.

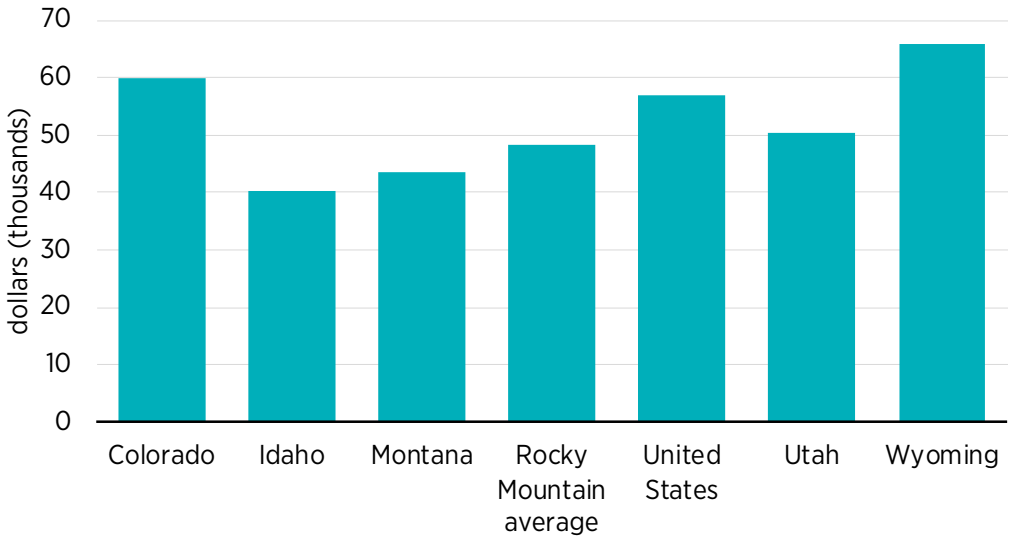
Each of these metrics has its own advantages and disadvantages. All told, the amount of regulation in the states is considerable. Further research will help gauge how levels of regulation are evolving in these states over time and what implications follow from this evolution. This snapshot of state regulations, however, provides a glimpse into the reach of various kinds of regulation in the Rocky Mountain region.

Figure 5a. Population-Adjusted Regulatory Restrictions for Rocky Mountain States



Source: McLaughlin et al., "State RegData 2.0"; Census Bureau, "2018 ACS 1-Year Estimates" (dataset), Summary File Data, American Community Survey, https://www.census.gov/programs-surveys/acs/data/summary-file.html.

Figure 5b. 2018 Per Capita GDP for Rocky Mountain States



Source: "GDP & Personal Income," Bureau of Economic Analysis, accessed March 19, 2020, https://apps.bea.gov/iTable/index_regional.cfm.

ABOUT THE AUTHORS

James Broughel is a senior research fellow at the Mercatus Center at George Mason University. Broughel has a PhD in economics from George Mason University. He is also an adjunct professor at the Antonin Scalia Law School at George Mason University.

Kofi Ampaabeng is a research fellow and data scientist at the Mercatus Center at George Mason University. He specializes in curating data and generating policy-relevant insights from data. Before joining the Mercatus Center, he worked for IMPAQ International, LLC, where he evaluated the efficacy of government programs.

NOTES

1. 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 to the private sector.
2. Arkansas does not yet have an administrative code, but the state is actively working on compiling one. See H.B. 1429, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019), which establishes the *Code of Arkansas Rules*.
3. Omar Al-Ubaydli and Patrick A. McLaughlin, "RegData: A Numerical Database on Industry-Specific Regulations for All United States Industries and Federal Regulations, 1997–2012," *Regulation and Governance* 11, no. 1 (2017): 109–23.
4. "Visualize QuantGov Data," QuantGov, accessed July 18, 2020, https://www.quantgov.org/visualize-data.
5. James Bailey, James Broughel, and Patrick A. McLaughlin, "Larger Polities Are More Regulated" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, September 2020).
6. Casey Mulligan and Andrei Schleifer, "The Extent of the Market and the Supply of Regulation," *Quarterly Journal of Economics* 120, no. 4 (2005): 1445–73.
7. That said, a regulatory restriction in a larger state may also carry a larger impact than the same restriction in a smaller state, simply because it affects more people.

MERCATUS CENTER
George Mason University

POLICY BRIEF

The Regressive Effects of Regulations in Montana

Dustin Chambers and Colin O'Reilly

February 2021

Published in partnership with the Institute for Economic Inquiry (IEI)

KEY FINDINGS

The impact of federal regulations from 1997 to 2015 on the Montana economy is associated with the following regressive effects:

- 17,755 people living in poverty
- 3.1 percent higher income inequality
- 51 fewer businesses annually
- 508 lost jobs annually
- 7.35 percent higher prices

With regard to the volume of state-level regulations, Montana ranks 41 of 44 states for which data are available (where a rank of "1" is most burdensome).

Regulations have unintended consequences. Recent research shows that a greater regulatory burden (as measured by the number of regulatory restrictions—instances of the words and phrases *shall*, *must*, *may not*, *prohibited,* and *required*—included in rules and regulations) is associated with increased poverty rates, higher levels of income inequality, reduced entrepreneurship, and increased consumer prices (especially for the products consumed by individuals living in poverty). Focusing specifically on Montana, this snapshot describes each of these regressive effects.

POVERTY

The increase in Montana's regulatory burden from 1997 to 2015 is associated with an increase in the number of people living in poverty by 17,755 (134,185 after vs. 116,430 before) and an increase in the poverty rate of 1.71 percentage points (12.9 percent after vs. 11.19 percent before).[1]

Using the federal regulation and state enterprise (FRASE) index, which "represents the degree of impact federal regulations have on a state's economy relative to federal regulations' impact on the national economy,"[2] researchers have found that states with a higher incidence of federal regulations also tend to exhibit higher poverty rates.[3] Specifically, a 10 percent increase in the effective federal regulatory burden upon a state is associated with about a 2.5 percent increase in the poverty rate.

From 1997 to 2015 (the period for which FRASE estimates are available), the effective federal regulatory burden upon Montana increased by 61 percent and is associated with an increase in Montana's poverty rate of 15.25 percent.[4] As of 2018, the overall poverty rate in Montana stood at 12.9 percent.[5] If the increase in the regulatory burden had not occurred, our research suggests that the poverty rate could have been as low as 11.19 percent in 2018.[6] Though this may not seem like a large difference in relative terms, it amounts to *17,755 fewer people living in poverty in Montana in 2018*.

INCOME INEQUALITY

The increase in Montana's regulatory burden from 1997 to 2015 is associated with an increase in the state's income inequality by 3.1 percent.

Given the association between rising poverty and federal regulations, it is no surprise that income inequality has also increased. Using the FRASE index, researchers have found that states with a higher incidence of federal regulations also have higher levels of income inequality. Specifically, a 10 percent increase in the effective federal regulatory burden upon a state is associated with an approximate 0.5 percent increase in the state's Gini coefficient (the most commonly used measure of income inequality).[7]

From 1997 to 2015, the effective federal regulatory burden upon Montana increased by 61 percent,[8] *and that increase is associated with a 3.1 percent increase in Montana's level of income inequality*.[9] As of 2015, Montana was the 19th most unequal state in terms of income inequality.

ENTREPRENEURSHIP

The average annual growth rate of industry-specific federal regulations (measured from 1999 to 2015) is associated with an annual loss of 51 small firms and 508 jobs in Montana.

One reason a greater regulatory burden may increase poverty and inequality is that regulation can reduce entrepreneurship. Researchers matched data from the Mercatus Center at George Mason University on industry-level federal regulation (from the RegData dataset) with Census Bureau data on the number of small and large firms and the number of employees per industry.[10] They estimate that a 10 percent increase in the number of regulatory restrictions pertaining to a particular industry is associated with a 0.42 percent reduction in the total number of small firms (that is, with fewer than 500 employees)[11] within that industry and a corresponding 0.55 percent

reduction in small firm employment.[12] Moreover, the researchers find that consecutive years of rising regulatory burden on an industry have a compounding effect, whereby the negative effects of regulation are amplified if preceded by above-average regulation growth.

In 2017, Montana had 31,899 small firms, collectively employing 245,758 workers.[13] Between 1999 and 2015, industry-level federal regulatory restrictions increased, on average, by 3.78 percent per year.[14] The results of the research mentioned earlier suggest that in an average year, if industry-level federal regulations uniformly increase by 3.78 percent, Montana loses about 51 small firms (0.16 percent of total small firms) and 508 jobs (0.21 percent of small firm employment).[15]

CONSUMER PRICES

The increase in industry-specific federal regulations (measured from 1999 to 2015) is associated with a 7.35 percent increase in consumer prices in Montana and the rest of the nation.[16]

A 2018 study combines consumer expenditure and pricing data from the Bureau of Labor Statistics with regulation data from RegData to determine the impact of industry-level regulation on the prices of consumer goods.[17] Given that regulations drive up compliance costs, it is not surprising that the researchers find that a 10 percent increase in federal regulations is associated with a 0.9 percent increase in consumer prices. The study also finds that the poorest households spend an outsized share of their income on the goods that are most regulated. Consequently, between 1999 and 2015, the average annual increase in prices for the households in the lowest income group was 2.46 percent, significantly more than the 2.08 percent increase in average prices experienced by households in the top income group.

Over the same period, industry-level federal regulations increased by an average of 3.78 percent per year, which, based on the research mentioned earlier, is associated with 0.34 percent higher prices nationally.[18] To put this into perspective, the annual rate of inflation from 1999 to 2015 in the United States averaged 2.19 percent,[19] but it could have been as little as 1.85 percent per annum if there had been no growth in regulation. Whereas this may seem like a small difference in the inflation rate, the effects compound over time.

MONTANA'S STATE-LEVEL REGULATIONS

In terms of the number of state-level regulatory restrictions, Montana ranks 41 of 44 states, with 59,788 regulatory restrictions (where a rank of "1" is most regulated). Montana also ranks 49 in the nation in terms of occupational licensure burden (where a rank of "1" is most burdensome).

Although Montana cannot unilaterally reduce federal regulatory burdens impacting the state, it can reduce homegrown red tape. An example of state-level red tape is occupational licensure, which can impose a costly barrier to entering a profession. Montana requires a license to work in

32 low-income occupations and requires an average of 312 days of education, training, or apprenticeships to obtain a license.[20] Montana is the 49th most regulated state in terms of the breadth and burden of occupational licensing, according to the Institute for Justice. Using a more comprehensive measure of regulation, Montana's administrative law code measured 4,742,174 words in total length in 2020 and contained 59,788 distinct regulatory restrictions.[21] *Compared with 43 other states for which data are available, Montana ranks 41 (California ranks 1, as the state with the most regulatory restrictions, and Idaho ranks 44, as the state with the fewest regulatory restrictions)*.

ABOUT THE AUTHORS

Dustin Chambers is a professor of economics in the Perdue School of Business at Salisbury University, a senior affiliated scholar for the Mercatus Center at George Mason University, and a policy adviser at the Heartland Institute. Chambers is an applied econometrician who has published widely on the topics of income inequality, poverty, and economic growth. His most recent research focuses on the regressive effects of government regulations, including their unintended impact on consumer prices, entrepreneurship, and social mobility vis-à-vis income inequality and poverty. He earned his MA in economics from UCLA and his PhD in economics from the University of California at Riverside.

Colin O'Reilly is an associate professor of economics in the Heider College of Business at Creighton University and a scholar at Creighton's Institute for Economic Inquiry. Since receiving his PhD in economics from Suffolk University in 2014, he has published more than a dozen articles studying institutions and economic development in such peer-reviewed journals as *World Development*, *Economics of Transition and Institutional Change*, *Empirical Economics*, and *Public Choice*. His current research studies the relationship between regulation, rent-seeking, and income inequality. More recently, he has been invited by Fortune 500 companies and local business groups to give presentations on current economic issues.

The Institute for Economic Inquiry (IEI) seeks to generate robust discussions on Creighton University's campus about markets and how economic freedom affects human flourishing. The Institute supports programs that analyze economic and social outcomes from various academic perspectives, including economics, ethics, and entrepreneurship.

NOTES

1. Our estimates, based on data from 1997 to 2015, are applied to the poverty rate in 2018, the most recent year with available data.

2. For more information on the FRASE index, see Patrick A. McLaughlin and Oliver Sherouse, *The Impact of Federal Regulation on the 50 States*, 2016 ed. (Arlington, VA: Mercatus Center at George Mason University, 2016); "FRASE Technical Documentation," QuantGov, December 1, 2017, https://www.quantgov.org/frase-documentation.

3. Dustin Chambers, Patrick A. McLaughlin, and Laura Stanley, "Regulation and Poverty: An Empirical Examination of the Relationship between the Incidence of Federal Regulation and the Occurrence of Poverty across the US States," *Public Choice* 180, no. 1–2 (2019): 131–44.

4. Multiplying the poverty elasticity measure (0.25 percent increase in poverty per 1.00 percent increase in regulation) by the increase in regulations in Montana as measured by the FRASE index (61 percent) yields the percentage increase in the poverty rate owing to regulation (15.25 percent).

5. For overall poverty rates and numbers of people living in poverty by state, see Census Bureau, "SAIPE State and County Estimates for 2018" (dataset), December 12, 2019, https://www.census.gov/data/datasets/2018/demo/saipe/2018-state-and-county.html.

6. The potential poverty rate of 11.19 percent (12.9/1.1525) ignores any additional growth in regulation since 2015.

7. Dustin Chambers and Colin O'Reilly, "Regulation and Income Inequality in the United States" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, June 2020).

8. McLaughlin and Sherouse, *The Impact of Federal Regulation on the 50 States*; "FRASE Technical Documentation," QuantGov.

9. Multiplying the inequality elasticity measure (0.05 percent increase in the Gini coefficient per 1.00 percent increase in regulation) by the increase in regulations in Montana as measured by the FRASE index (61 percent) yields the percentage increase in the Gini coefficient owing to regulation (3.1 percent).

10. For more information about RegData, see Patrick A. McLaughlin, "RegData US 3.2 Annual" (dataset), QuantGov, Mercatus Center at George Mason University, Arlington, VA, 2020, https://www.quantgov.org/regdata-us-documentation.

11. Dustin Chambers, Patrick A. McLaughlin, and Tyler Richards, "Regulation, Entrepreneurship, and Firm Size" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, April 2018). Following Small Business Administration classifications, Chambers, McLaughlin, and Richards define small firms as businesses with fewer than 500 employees.

12. Chambers, McLaughlin, and Richards, "Regulation, Entrepreneurship, and Firm Size."

13. For data on employment and firms, see "SUSB Tables," Census Bureau, accessed October 14, 2020, https://www.census.gov/programs-surveys/susb/data/tables.All.html.

14. Chambers, McLaughlin, and Richards, "Regulation, Entrepreneurship, and Firm Size," 35.

15. Multiplying the small firm elasticity measure (0.0423 percent reduction in small firms within an industry per 1 percent increase in industry regulation) by the average increase in national industry-level regulation as measured in RegData (3.78 percent) yields the annual percent reduction in small firms owing to regulation (0.159894 percent). Multiplying this value by the number of firms with fewer than 500 employees (31,899 firms) yields the number of lost small businesses annually, 51 firms (0.159894 percent × 31,899). To determine lost jobs, multiplying the employment elasticity measure (0.0547 percent reduction in small business employment within an industry per 1 percent increase in industry regulation) by the average increase in national industry-level regulation as measured in RegData (3.78 percent) yields the annual percentage reduction in small business employment owing to regulation (0.206766 percent). Multiplying this value by the number of small business employees (245,758) yields the number of small business jobs lost annually, 508 (0.206766 percent × 245,758).

16. If the annual inflation rate equals 2.19 percent, the price level grows by approximately 41.43 percent over a 16-year period (that is, 1999 to 2015). At the lower rate of inflation (1.85 percent), the price level grows by 34.08 percent. The difference in gross price appreciation over the period equals 7.35 percent.

17. Dustin Chambers, Courtney A. Collins, and Alan Krause, "How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation," *Public Choice* 180, no. 1–2 (2019): 57–90.

18. Multiplying the price elasticity measure (0.09 percent increase in consumer prices per 1.00 percent increase in regulation) by the average increase in national industry-level regulation as measured by RegData (3.78 percent) yields the annual percentage increase in consumer prices owing to regulation (0.3402 percent).

19. The inflation rate (2.19 percent) is the average annualized rate of change in the seasonally adjusted consumer price index for all urban consumers (CPI-U), Series ID CUSR0000SA0, from January 1999 to December 2015 as reported by the Bureau of Labor Statistics.

20. Dick M. Carpenter II et al., *License to Work: A National Study of the Burdens from Occupational Licensing*, 2nd ed. (Arlington, VA: Institute for Justice, 2017).

21. Patrick A. McLaughlin and Oliver Sherouse, "State RegData 2.0" (dataset), QuantGov, July 8, 2020, https://www.quantgov.org/state-regdata-documentation?rq=state%20regdata.