



**Regulatory
Transparency
Project**
Unlocking Innovation & Opportunity

Managing the Regulatory Thicket: Cumulative Burdens of State and Local Regulation

State and Local

Anastasia P. Boden
Braden Boucek
Paul J. Larkin, Jr.
Clark Neily
Jonathan Riches
Lawrence VanDyke
Luke A. Wake

The views expressed are those of the authors in their personal capacities and not in their official/professional capacities.

To cite this paper: Luke Wake, et al. “Managing the Regulatory Thicket: Cumulative Burdens of State and Local Regulation”, released by the Regulatory Transparency Project of the Federalist Society, January 8 2019 ([file:///C:/Users/nathan.beacom/Documents/RTP%20State%20and%20Local%20Working%20Group%20Paper%20-%20Regulatory%20Thicket\(1\).pdf](file:///C:/Users/nathan.beacom/Documents/RTP%20State%20and%20Local%20Working%20Group%20Paper%20-%20Regulatory%20Thicket(1).pdf)).

14 January 2019

Table of Contents

Executive Summary	3-4
Introduction	5-22
Runaway Regulation Imposes Significant costs	22-27
Non-Economic Effects of the Regulatory Thicket	27-29
How to Begin Trimming Back the Regulatory Thicket	29-37
Conclusion	37

I. Executive Summary

New business owners imagine that they will succeed or fail based on the strength of their business model and their willingness to work. Indeed, this belief in earned success is integral to the classic American ideal of meritocracy—the idea that anyone with a good idea can make it if they are willing to work hard enough. But today’s entrepreneurs face an unpleasant reality. Success is not only about business acumen; it also depends on one’s ability to navigate a series of complex regulatory regimes at multiple levels of government. All that red tape frustrates many would-be entrepreneurs who lack the energy and or resources necessary to navigate the many regulatory regimes that they face in launching, growing, and maintaining a business.

It is not any specific regulatory imposition, or even one agency, that plagues small business. Instead, overlapping, confusing, overly broad, unnecessarily complicated and redundant regulations from different levels of government—federal, state and local—stifle innovation and crush the entrepreneurial spirit in America. Each regulation, though perhaps defensible on its own merit, adds yet another layer to what we refer to as the “**regulatory thicket.**” This thicket, calcified through the years, is especially daunting to small businesses with little to spend on the lawyers and accountants necessary to ensure compliance. Accordingly, when left unchecked, the regulatory thicket threatens economic dynamism, with societal consequences detrimental to the health of our national economy—and, importantly, to aspiring entrepreneurs who stake their livelihood on the success of their business.

In this report, we diagnose the regulatory thicket as an often-overlooked phenomenon. We describe it in depth from the perspective of an ordinary entrepreneur. Policymakers are used to considering the regulatory environment one regulation at a time from the perspective of the regulator and with a parochial view of their agency as the only relevant player in the field. This perspective too often ignores the viewpoint of a person starting a business, who must comply with regulations at multiple levels of government across overlapping issues. To these entrepreneurs, the regulatory thicket offers negligible benefits when compared to the added compliance burden.

The regulatory thicket imposes real costs on real people. There are economic costs that are hard to quantify, especially when politicized. There are also the institutional costs, including the toll extracted by a suffocating regulatory environment. As compliance becomes increasingly difficult, more and more entrepreneurs give up. Some continue forward as best they can, hoping that they are not stepping on regulatory landmines on the way, or that they will be lucky enough to avoid a lawsuit or enforcement action if they are making mistakes. Others will simply decide the effort is not worth the rewards and choose to close shop.

We offer a menu of possible reforms that policymakers should consider controlling the regulatory thicket. We do not rank or endorse any one of these considerations. But we urge that policymakers should keep an open mind about all possible solutions. We specifically suggest the following:

- **Illuminate the thicket**
 - **Provide assistance** with navigating the regulatory thicket by making guidance widely available and easily understood. For example, government can offer public assistance through hotlines or setting up “business navigators.”
 - **Create a regulatory scorecard** that compares the overall regulatory load, comparing and contrasting various jurisdictions in some objective fashion.
- **Trim the existing thicket**
 - **Freeze regulations**, either by requiring net-zero increases or by mandating that new regulations be subject to cost reviews, cost ceilings, or regulatory impact analysis. Review of regulations should run through a central authority empowered to conduct such analysis.
 - **Impose a sunset rule**, either on regulations and licenses or on regulatory and licensing boards. Curb the authority of agencies to enact regulations unless explicitly and unambiguously authorized by statute.
 - **Create a review commission** to scrutinize regulations from top to bottom, preferably one with some power to reform or eliminate regulations.
- **Curb the growth of the regulatory thicket**
 - **Build a regulatory budget.** Develop an approach that aggregates total economic costs across agencies and levels of government or mandates that regulation(s) must be eliminated as a condition of promulgating new regulation.
 - **Use the judicial system to tame local political influence.** Judicial reform options include cutting the level of judicial deference afforded to agencies, forcing agencies to examine the costs and benefits of a regulatory scheme more closely, and providing dedicated causes of actions with heightened standards for regulators to meet.
 - **Provide easy access to courts** with a dedicated cause of action and a heightened standard of review as a means to ensure that regulatory burdens are demonstrably necessary to protect the public interest.

The gradual growth of the regulatory thicket need not continue unabated. By putting some or all of these suggested policy recommendations in place, policymakers can ensure economic dynamism and restore vitality to the American Dream. The bottom line is that someone should be thinking about how to control and manage the regulatory thicket, because it will continue to expand if left unchecked.

II. Introduction

Imagine an elderly widow who lives alone in a rough part of town. She worries about her apartment being broken into while she sleeps, so she adds a deadbolt and a security chain to her front door. Next, she adds *another* deadbolt, and a rotating security latch, like they have in hotels. Unsatisfied, she adds a metal bar that slides across the entire door. Then, still paranoid, she installs *yet another* deadbolt, and another, and another. She continues installing more, and still heavier, locks to the point that it takes her nearly 5 minutes to open the door whenever she needs to go somewhere.

Of course, a strong case can be made for each device individually. But together this assortment of locks renders her door practically useless. In fact, these “security” features may present an even greater (unintended) hazard than the risk they were meant to address. Unfortunately, this is what government regulation looks like in 21st Century America. In this report, we express concern that America’s regulatory environment has become just like that door—an agglomeration of individually defensible security measures that, in the aggregate, pose a real risk of undermining their very reason for being.¹ We call this the “**regulatory thicket**,” and it may be the single greatest threat to innovation and entrepreneurship in America today.

We first provide a practical description and overview of the regulatory thicket by walking the reader through some of the most common types of regulations that entrepreneurs must navigate before they can create or expand a business, and showing why unchecked regulation inevitably benefits large, established businesses at the expense of small, innovative startups. We then put a human face on the problem by describing the experiences of entrepreneurs who have become entangled in the regulatory thicket and how they tried to fight their way through (Part I). Next, we summarize the economic literature regarding the costs of runaway regulation generally and then in the context of specific regulatory settings (Part II). We also consider the non-economic costs of runaway regulation and its effect on key institutional commitments like the rule of law (Part III). Finally, we offer some ideas for trimming back the thicket and helping to ensure that if it grows or changes, it does so by design and not by happenstance (Part IV).

A. Overview: A Closer Look at the Elements of the Thicket

Dan’s Hamburgers, Amy’s Ice Cream, and Wild Jimmy’s Sausage and Beef Jerky are three food-centric small businesses in the South with one remarkable fact in common. These budding entrepreneurs all agree about one thing: if they knew before what they’ve learned through hard experience, they never would have started or expanded their businesses. “If I would’ve known, I never would have done it at all,” [said Jimmy](#). “I will never build from the ground up again,” [said the owner of Amy’s Ice Cream](#). “Never, Never, Never” [echoed the owner of Dan’s Hamburgers](#). And

¹ Of course, not all regulations are “defensible” in the sense that they represent genuine attempts to protect consumers or otherwise advance legitimate government interests. The point of this paper is that even if we focus exclusively on regulations that are truly defensible on the merits, they can become so numerous that—just like the locks on the metaphorical door described in the first paragraph—in the aggregate they end up defeating their very purpose.

such complaints are hardly limited to the food industry. Whether it's Kathy Faia [trying to start a family-owned remodeling business](#) in Louisiana, or Adam Jackson trying to leverage his former military experience to [start a security company](#) in Tennessee—wherever they are and whatever they do, up-and-coming entrepreneurs in pursuit of the American dream often voice the same complaint.

So what is taming Wild Jimmy's and melting Amy's Ice Cream's small business enthusiasm? In a word: regulation. But it's not any one particular government regulation. Rather, small companies everywhere are complaining about the problem powerfully illustrated by Wild Jimmy's owner and founder when he produced a hefty binder full of paperwork required by myriad governmental entities. "We had to get so many licenses, certifications and inspections," complained Jimmy. "There are so many hoops to jump through."

Starting and growing a small business can be daunting for many reasons. In the hope of achieving a lifelong dream, entrepreneurs usually take a major financial risk. For many that means walking away from secure employment in exchange for the possibility of profits in the future, inevitably coupled with a real chance of calamity for themselves and their families. [Many small business owners invest their life savings](#) in launching a business, or they [take personal lines of credit](#)—charging business expenses on personal credit cards, taking out a second mortgage on their home, securing loans from friends and family, or working with a bank. Small business owners are willing to take such risks because they believe they have the skills, the vision, and the drive necessary to succeed. Not all will succeed, but they do so often enough that small businesses form the backbone of the American economy, even today.

Unfortunately, success in business increasingly has less to do with commercial acumen and more to do with the ability and willingness to cut through thick layers of bureaucratic red tape. Today, regardless of what industry they're in, small business owners must not only manage the day-to-day functions of their business, but also navigate the increasingly treacherous waters of federal, state, and local regulation.

When [asked](#), business owners consistently list "taxes" and "government regulations and red tape" [as their biggest problems](#). It is difficult for a company to build its reputation and customer base from scratch and to compete with established businesses, but entrepreneurs expect fierce competition. New business owners are far more surprised and frustrated to find the tangle of regulatory issues that they must continually work through when launching and growing their business. Together, federal, state, and local regulations impose an estimated [\\$8 trillion](#) in costs annually. Not surprisingly, [research shows](#) that new regulatory impositions result in a decrease in new business start-ups, a slowdown in hiring, and even business closures.

Regulatory burdens tend to hurt upstart and small businesses in particular because they cannot absorb the costs or adopt new expensive processes or technologies as easily as larger companies.²

² "In the case of small businesses, the relative costs of compliance with [] regulations can be disproportionately high, both in terms of dollars and manpower. This is the result of economies of scale, the idea that the average costs per dollar of proceeds decrease as the size of the company or transaction increases because fixed costs can

While larger corporations have in-house attorneys and ample budget for outside counsel when seeking expert guidance on complex regulatory issues, small businesses do not have that luxury.³ Small businesses rarely have the resources to hire a human resources or regulatory affairs manager.⁴ As a result, entrepreneurs are often drawn away from productive tasks that could be growing their business—instead spending inordinate time and energy trying to understand regulatory requirements affecting their day-to-day functions. Meanwhile bigger companies have a comparative advantage when trying to comply.⁵ In fact, larger companies are more likely to favor new regulatory impositions precisely because they impose disproportionate burdens on smaller competitors and present barriers to entry for new market entrants.⁶ Thus, regulation reduces the number of new business start-ups.

Federal regulatory requirements can be difficult enough for small business owners to navigate, but state and local regulations make matters even worse.⁷ State requirements are often more numerous and more demanding than at the federal level—imposing even more complicated or stringent requirements than analogous federal regimes or regulating matters not regulated by Congress. Local authorities often choose to go [even further](#)—even in those states notorious for imposing the most controversial and heavy-handed regulatory standards. Together these intertwined federal, state and local regulatory requirements present a formidable regulatory thicket. And every year the state and local regulatory thicket [grows thicker](#). This is a cause of great concern, not just for the small businesses directly affected, but [for everyone](#). To be sure, [nobody benefits](#) when potential start-ups are discouraged from taking the field.

be spread out.” Joseph A. Castelluccio III, *Sarbanes-Oxley and Small Business: Section 404 and the Case for a Small Business Exemption*, 71 *Brook. L. Rev.* 429, 444 (2005) (citations omitted).

³ “Whereas a Fortune 500 company will have a team of compliance officers and attorneys ready to tackle regulatory issues like a swarm of wasps, a typical small business has only ten employees and lacks the financial resources to address regulatory roadblocks in the same manner. Without a standing army of experts, small businesses cannot efficiently clear regulatory hurdles; therefore, the cost of compliance is necessarily higher for them.” Damien M. Schiff, Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 *Tex. Rev. L. & Pol.* 97, 98 (2012).

⁴ Only 12 percent of small businesses [report](#) having human resource specialists on staff.

⁵ See Johan Eklund & Björn Falkenhall, [The Costly Effects of Regulatory Burdens](#), RegBlog (Oct. 17, 2011), (“Beyond just the direct costs that businesses incur in coming into compliance with rules, the indirect costs of regulations include raising barriers to entry into markets, harming competition and entrepreneurship, affecting production dynamics, skewing resource allocations, and reducing yields on investments.”); see also James Bailey and Diana Thomas, [“Red Tape Kills Jobs: New Data Show that Decreasing Regulations Would be Great for Job Growth,”](#) U.S. News & World Report (Sept. 14, 2015).

⁶ Daniel E. Lazaroff, *Entry Barriers and Contemporary Antitrust Litigation*, 7 *U.C. Davis Bus. L.J.* 1 (2006) (noting two definitions for “barriers to entry” in economic literature: “The first ... defines a barrier to entry as any factor that permits firms already in a relevant market to earn higher than normal profits while simultaneously deterring others from entering and competing.” The second defines “barrier to entry” more narrowly as “costs that a prospective market entrant must incur at the time or after the time of entry that existing market participants did not have to incur...”).

⁷ In this paper, we focus on state and local regulation. But it is important to bear in mind that small businesses are already dealing with layers and layers of bureaucratic red tape, inspections, and paperwork at the federal level. The New York Times offers [an illuminating expose](#) in a recent article highlighting the various regulatory issues confronting a small apple farm in upstate New York.

By its very nature, “death by a thousand cuts” is a challenging concept to describe and diagnose with precision. Since no individual “cut”—or even some subset of “cuts”—is the specific and direct cause of death, explaining a complex problem like the regulatory thicket is not amenable to anything like mathematical certainty. It is especially difficult to demonstrate how the various individual parts of a problem like the regulatory thicket may interact in complex ways that make the phenomenon not so much additive as multiplicative. The problem of describing the thicket’s interaction and agglomeration is a significant one, and it is possible that we lack the tools to describe it with analytic precision.

Recognizing our inability to comprehensively describe every regulation affecting every small business in America, much less convey the myriad ways that individual regulations may interact to compound the problem, this paper provides a synopsis of the variety of regulations that small businesses encounters every day in every state. Even incomplete, and without any attempt to illustrate the interaction between regulations, the pile of regulations is daunting. It is no surprise that small business owners regularly exclaim: “[Never, Never, Never](#)” again.

i. Licensing Requirements

Red tape usually begins to descend on a business long before it ever opens. Even before opening day, many would-be entrepreneurs must first jump through extensive hoops—including years of training requirements, exams, costly fees and other requirements—to become licensed to work within their chosen occupation. As detailed in a [separate paper](#), these licensing requirements not only present barriers to entry for those seeking to launch a business, but also deter otherwise competent individuals who want to engage in the workforce.

Typically, a worker will gain experience, and greater expertise, working under the supervision of someone else before launching an independent business. But in most jurisdictions, the first step in launching a business is to seek permission from the state and/or local authorities. In addition to obtaining a general business license, a would-be entrepreneur must figure out whether the specific business model requires a special license.⁸ Municipal licensing requirements can be particularly burdensome, because a single business may have to seek license from multiple localities. And further licenses may be required in the future if a business intends to grow or offer new services.⁹ What is more, to remain compliant a business may have to reapply year after year. With each year, of course,

⁸ Even in the internet age, it is sometimes difficult to get a definitive answer as to whether and when a license is required. For example, California law requires a contractor’s license for any construction project of more than \$500 in value; however, the California Contracting Board provides [no clear guidance](#) as to whether installation of a movable structure on wheels requires a license. A business owner might endeavor to find the governing statutory language, only to find that the language is [ambiguous](#). At that point the owner must pursue a costly and time-intensive permitting process (that will not make sense for a single project), contact the Contracting Board for case specific guidance, or seek counsel from an attorney. In reality, it can be difficult or impossible to contact the right person (or, indeed, anyone) at a governing agency. Even when that can be achieved, government employees often are unwilling or prohibited from giving concrete, case-specific guidance.

⁹ For example, Texas requires auto dealerships to [obtain a license](#) for financing vehicles.

the amount of time and money invested in the business increases, as does the harm that would result from failing to obtain re-licensing.¹⁰

Setting aside the paperwork burden, licensing fees can be costly. In addition to initial licensing fees, some jurisdictions require ongoing annual “fees” or “special taxes” simply as a condition of allowing a business to operate. For example, in Nevada, all businesses [pay a business license fee](#) each year—\$500 for corporations and \$200 for pass-throughs. The Colorado Secretary of State imposes controversial business licensing “fees” designed to cover not only the cost of services provided to the business community but all functions of the Secretary of State’s Office, including administering statewide elections.¹¹ And the 10 percent “technology fee” paid by businesses in the District of Columbia goes to plug holes in the city’s budget, even though city law states that the funds are to be used to upgrade the licensing system.¹²

For some industries, states limit the availability of required licenses—charging heightened fees to obtain a coveted license. Sometimes already-established businesses lobby for the government to impose or maintain a cap on business licenses within their industry. For example, the Montana Legislature recently considered whether to expand the cap on available liquor licenses. But [existing license holders protested](#) vigorously and were ultimately successful in their opposition to reform. And to further discourage would-be entrepreneurs, Montana charges as much as [\\$340,000](#) for a liquor license to operate in a small town.

Worse, one might be required to purchase [multiple licenses](#) for a business, perhaps even with conflicting requirements.¹³ In 1995, [Rich Pelletier](#) looked at an old farmhouse for sale in Nashoba Valley, Massachusetts. He ended up buying the whole property, including an orchard and winery, even though he had never farmed or run an orchard before. His background was in culinary arts, so he decided to turn the farmhouse into a restaurant that would support the orchard and winery with the hope of turning a failing property into a successful business. He was required to get four licenses: one for pouring alcohol and three for running the orchard and winery. Even under this regime, Rich successfully built the business and ran it for years—even adding a brewery to the property, and inventing an apple-based vodka after noticing how many apples from his orchard went to waste. But that all changed when the Massachusetts ABC [told him](#) he would no longer be able to renew all four licenses due to an obscure state law that prohibits owning both a pouring license and a farmer’s manufacturing license. To continue operating, he’d have to shelve a major

¹⁰ One California small business owner described her anxiety and frustration in working with local bureaucrats: “They don’t tell you anything. They keep you scared and they keep you sleepless at night.” This owner feared that she might not get a license renewal for her 15-year-old business because of a technical violation—a result that would shut down her business and take away her livelihood.

¹¹ The Colorado Supreme Court will decide whether these “fees” are actually “taxes.” See *NFIB v. Williams*, Case No. 2017SC368 (Co. Sup. Ct.).

¹² David Bishop, [“Money for Nothing: DC Businesses Pay a Technology Fee but Get Very Little in Return.”](#) D.C. Pol’y Center (April 17, 2017).

¹³ Some states expressly prohibit a company working in one business from expanding into another business. For example, in Nevada anyone who owns an alcohol “manufacturing” business, such as a winery or brewery, is prohibited from owning or operating an alcohol distribution company—or even a restaurant that sells alcohol. See NRS 597.210.

portion of his operations. And Rich is not alone; there are [similar stories](#) of business licensing requirements smothering innovative business models.

ii. Regulatory Hurdles in Opening Your Doors

Beyond business licenses, entrepreneurs face the basic question of whether the law will allow them to carry out their desired business operations within a given locality or at a chosen worksite. Take zoning regulations: a new business owner must often consult legal counsel to get guidance on whether an elaborate and complex zoning code will even allow the entry of a new business. That prospective business owner may need to act quickly to take advantage of available property, but he risks finding out later that existing land-use restrictions forbid commercial activity or that the restrictions forbid the sort of enterprise he envisions. An entrepreneur may also learn that existing restrictions prohibit the owner from making changes that may improve the functionality of the property or that may be more appealing to customers. Such restrictions may force an entrepreneur to look elsewhere for a more workable business site, or to make changes to their business operations to ensure conformity with zoning restrictions.¹⁴

In many instances the entrepreneur must pursue a special permit to begin business operations, which may result in significant (or indefinite) delays.¹⁵ Local officials usually have [tremendous discretion](#) to allow or disallow a new business from starting or expanding. Further, zoning codes in many cities prohibit home-based businesses; zoning administrators are often unwilling to grant variances to allow for exceptions, thereby discouraging would-be entrepreneurs who cannot afford to take-out a commercial lease elsewhere.¹⁶ Complicating matters, businesses must often seek separate approvals from different state and local agencies, which may impose inconsistent requirements or that otherwise cause extended delays. And in many cases the permitting process can be costly. Not only must the applicant pay substantial fees to state and local authorities, but often he or she also must pay for professional assistance from consulting firms and or legal counsel to navigate complex regulatory regimes. Those costs are compounded if land use authorities require

¹⁴ Businesses must also ensure continued conformity with local zoning requirements that govern community aesthetics. These restrictions can prove cumbersome, as zoning codes increasingly seek to micromanage many aspects of a business that may be visible to the public. In some instances, these restrictions can present serious problems, such as restrictions prohibiting use of outdoor space for storage. Non-compliance also can result in serious fines.

¹⁵ In some cases, delay in the permitting process may be attributable to severe understaffing. In other cases, delay may be intentional, as bureaucrats “slow walk” permit applications that they oppose in the hope that the delay will kill-off the project by making it no longer profitable. *See, e.g.*, ROSEMARY O’LEARY, *THE ETHICS OF DISSENT: MANAGING GUERRILLA GOVERNMENT* (2d ed. 2013). Worse, while some states require permitting decisions to be made within a statutorily defined timeframe, there is no definitive requirement for action on a permit application in other jurisdictions. *But see* H.B. 2062, Arizona House of Representatives, 53rd Legislature (2018) (requiring approval of permit applications within 30 days of submission to the agency).

¹⁶ If an agency denies a permit, it can take even longer for an applicant to obtain relief in the courts. Aside from the normal delay of litigation, agencies often seek to avoid any judicial review of their permitting decisions. The result is that an applicant might be forced to spend years litigating whether he can obtain judicial review—even before a court examines the merits of an agency’s permit denial. *See* William Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After Palazzolo v. Rhode Island*, 46 St. Louis U. L.J. 833 (2002).

redesign after redesign, as is common when bureaucrats enjoy significant discretion to withhold approval.¹⁷

In some jurisdictions, entrepreneurs face special challenges because the local zoning code requires a business to secure the premises on which it intends to operate before it can submit a permit application. While such a requirement may not prove especially cumbersome for a major corporation, it can be cost-prohibitive for small businesses with limited capital. Such a requirement forces a business either to invest heavily in a property or to commit to a lease (usually long-term) without knowing definitively that it can carry out business as planned. In the best-case scenario, a business in this position will be forced to make mortgage or rent payments without earning income from the property until it obtains permit approval. Any delay in processing the application will cost the business money in terms of lost potential revenue, which may very well topple a business before it ever gets off the ground.¹⁸

The City of Sacramento, California, imposed so much administrative red tape of this kind that one entrepreneurial couple gave up their dream of opening a West Coast microbrewery. The couple was told that they would need to get approval for the brewery from the city's zoning committee, but that the committee would not even consider their plans until after the two bought or leased the property, submitted architectural designs, and paid a \$15,000 fee. Even after they met these conditions, the budding entrepreneurs would have to wait indefinitely for a decision. They were told the typical waiting time was 8-12 months, but that they could pay more money for an expedited assessment, wherein planning department staff would give a preliminary (unofficial) judgment as to whether their plans were likely to be approved or not. They decided instead to uproot and start the Fort Myers Brewing Company in Lee County, Florida, where local officials were far more open to "new and innovative business."¹⁹

Specific building code requirements may also complicate necessary remodeling projects for a business looking to open its doors or expand an existing facility.²⁰ In many cases, alterations are required by law under the [Americans with Disabilities Act](#), which requires modifications to older buildings to remove "barriers to access" to the disabled community. While the ADA may be well intentioned, it has proven costly for businesses. In addition to ensuring compliance with U.S. Department of Justice guidance on what changes are required under federal law, small business

¹⁷ [Amicus Br. of National Federation of Independent Business Small Business Legal Center](#), *Koontz v. St. Johns River Water Mgmt. Dist.*, Sup. Ct. No. 11-1447 (2012) (observing that land use authorities "often threaten denial in order to coerce the landowner into repeatedly proposing less ambitious building plans[,] and referencing a case in which a permit applicant was required to redesign its project at least three times, with costs over \$100,000).

¹⁸ Jonathan N. Millar, Stephen D. Oliner, and Daniel E. Sichel, [Time-to-Plan Lags for Commercial Construction Projects](#), Finance and Economics Discussion Series Division of Research & Statistics and Monetary Affairs, Federal Reserve Board, Washington D.C. (2012) (observing that planning time for development projects has risen substantially in recent years and that zoning restrictions are likely the reason).

¹⁹ This is one of many stories of state and local regulation that has gone unreported. We spoke directly with, and quote from, the owner of Fort Myers Brewing Company.

²⁰ "Unfortunately, even with building department oversight, it is common to find construction shortcomings that constitute violations of the ADA regulations or the California Building Code." [Accessibility Compliance for Businesses: "Myths and Misconceptions"](#), 3, California Commission on Disability Access (CCDA Guidance).

owners must also ensure compliance with [state regulations](#) that may require more exacting standards.²¹ The [federal guidance](#) alone is over 80 pages, often requiring changes as minute as the precise placement of toilet paper rolls in bathrooms.²² If placed a quarter-inch too low or too high, the business may be in violation. Because state-imposed standards are piled on top of the federal requirements, ADA compliance is so difficult in California that a cottage industry has developed to help business owners spot and make necessary changes.²³

What is more, California has incentivized plaintiffs to sue small businesses by authorizing automatic damages of \$4,000 for each violation found on-site, and by [stacking damages](#) for every time the plaintiff visits the business in question.²⁴ This has made ADA litigation in California a veritable [goldmine for enterprising plaintiffs](#). Small businesses operating in older buildings make for easy targets because, unless a business has paid for a thorough inspection from a [certified access specialist](#), it is difficult to know whether they are 100 percent compliant. Moreover, the law provides no right for a business to [pursue corrective action](#) once the violation is brought to light. For this reason, some businesses have simply closed shop once hit with a state ADA lawsuit because they cannot afford to pay both penalties and attorney's fees. For example, a popular billiards hall that had been open for 50 years was [forced to close](#) when the owner was sued by a serial state ADA filer.

Disability access laws not only affect business ventures, but also discourage charities seeking to provide needed public services. For example, Mother Teresa's Missionaries of Charity ran into problems in New York City when they sought to convert two vacant buildings into a homeless shelter, because the City demanded that they install an elevator, which would have cost up to \$150,000. In their view an elevator was a luxury that they could not afford. "The sisters felt they could use the money much more usefully for soup and sandwiches," said Msgr. Henry Mansell, then-chancellor of the Archdiocese of New York. The nuns had already purchased the buildings for use as transitional housing for 64 men when they learned about the requirement to install an elevator. By that time they had spent approximately \$100,000 to repair fire damage. "Confronted with the unanticipated expenses and delays, the nuns decided to abandon the Bronx project," the *New York Times* [reported](#).

iii. Regulation of Sales

Once up and running, businesses must navigate all sorts of rules at the state and local level to ensure compliance with various consumer protection statutes, ordinances, and other mandates. Consumer protection laws serve a valid public function insofar as they may deter fraudulent or misleading conduct; however, in creating open-ended causes of action—even in the absence of any real

²¹ See [CCDA Guidance](#) at 2 ("It is the sole responsibility of the business owner and/or the landlord to make sure that the facility is in compliance with the most restrictive requirements of both the California accessibility requirements AND the federal requirements under the ADA.") (emphasis in the original).

²² See also [ADA Update: A Primer for Small Business](#), U.S. Department of Justice, Civil Rights Division, Disability Rights Section; [ADA Checklist for Existing Facilities](#), Institute for Human Centered Design.

²³ Local building code authorities rarely ensure compliance with ADA standards. Instead, businesses are encouraged to pay for inspections from experts, such a [certified access specialist in California](#).

²⁴ In 2012 [California passed legislation in an effort at reform](#), which allows businesses to qualify for reduced damages "from \$4,000 to \$2,000" if a business "corrects the violation within 30 days."

injury—state and local consumer protection laws often [invite lawsuits](#) over ostensibly reasonable conduct. For example, a small business in New Jersey was recently [threatened with a lawsuit](#) because it was selling products to consumers in the District of Columbia and (truthfully) comparing its listed prices with the manufacturers’ recommended sales price. The owner had no idea that this practice might violate consumer protection laws²⁵ until hit with a letter from an attorney, which threatened a lawsuit and demanded money to make the problem go away.

Likewise, product labeling laws can provide consumers with potentially helpful information, but they inevitably create regulatory burdens and potentially open companies up to lawsuits for inadvertent mistakes. California’s [Proposition 65](#) is a prime example. Proposition 65 requires businesses to warn consumers if they are using chemicals that are “known to the State of California” to cause cancer or reproductive harm. Since 1986, California’s list has [grown](#) from fewer than 100 to [over 900](#) chemicals, and it continues to grow each year. The list includes many naturally occurring chemicals, and requires warnings for products (including food) deemed entirely safe by the U.S. Environmental Protection Agency or the U.S. Food and Drug Administration.²⁶ These labels often appear on products sold throughout the country. Theoretically, a company manufacturing products that may be sold in California can create special warnings for California consumers; however, in practice it is often more [costly](#) to produce separate labels for California and the rest of the country.

Proposition 65 also invites lawsuits because it provides successful plaintiffs with [attorneys’ fees](#). Even where there is little evidence that a product causes any harm, plaintiffs can bring a class action suit that often results in a large settlement, because these suits are so costly to defend. And while Starbucks may have the resources to defend against a Proposition 65 lawsuit for failing to provide warnings on coffee, a [smaller coffee shop](#) will likely go bankrupt fighting this sort of lawsuit. For this reason, most businesses post Proposition 65 warnings in an abundance of caution even where it is unclear whether a warning is necessary. As a result, Proposition 65 warnings are [ubiquitous](#)—appearing on products as innocuous as potato chips, Christmas lights, and even grilled chicken.

California is not alone. There has been a [proliferation of disclosure requirements](#) across industries and throughout the United States—from mandated disclosures related to mortgages, pharmaceutical drugs, and [genetically modified foods](#) to requirements to list calorie counts at fast food establishments. These requirements often have the effect of driving up the cost of doing business, while unnecessarily stigmatizing products. In one [example](#), the state of Florida nearly forced a small dairy out of business by enforcing a rule that prohibited it from labeling its product as skim milk. Florida law prohibited the company from labeling its milk as “skim” because it was not including supplemental vitamins. It was told that it needed to label its product as “Imitation Skim Milk.”

State and local law complicate business transactions in many other ways. For example, New York [prohibits](#) merchants from imposing surcharges on credit card transactions. Wisconsin [prohibits](#)

²⁵ See D.C. Code Sec. 28-3904 (j).

²⁶ There is a potential defense for food products if it can be proven that the chemical is entirely naturally occurring; in practice, however, that defense is extraordinarily difficult to prove, and has only been successfully invoked [once](#).

businesses from including automatic renewal provisions within commercial contracts. Meanwhile, businesses in California have been hit with lawsuits for alleged discrimination in pricing between men and women. For example, [night clubs have been sued](#) for letting women in for free on “[girls nights](#).” Opportunistic lawyers have begun suing [minority-owned hair salons and dry cleaners](#) for charging different prices—notwithstanding the fact that a man’s haircut or shirt is generally less complicated to cut or clean than a woman’s. There are innumerable other examples.²⁷

The latest trend in state and local regulation is a move to require out-of-state merchants to collect and remit [sales tax for products sold online](#). This is [especially problematic](#) for businesses based in states like New Hampshire, Delaware, Montana, or Oregon that are not currently required to collect sales tax for in-state sales. Different jurisdictions may impose [different rules](#) for collection and remission of sales taxes. Compliance becomes exponentially [more complicated](#) for small businesses where municipalities impose their own requirements on top of (or in lieu of) state requirements. Though software is available to ensure compliance with inconsistent requirements across the country, it is expensive; this leaves smaller vendors in a bind.

iv. Navigating Labor and Employment Issues

Some of the most vexing regulatory issues come up as a business seeks to grow by expanding its workforce. Labor and employment standards are difficult enough for small employers to navigate. While federal standards are the default in many jurisdictions, some states impose more burdensome and nuanced rules. As companies add employees, new and often more complex regulations kick in, which can be especially problematic for companies still too small to bring on a full-time human resource specialist. Small employers must therefore devote inordinate time and energy in resolving HR questions that arise every day.

Compliance is especially difficult for small businesses when the legal landscape is perpetually changing. Consider [California](#), where the state legislature and agencies are constantly changing regulatory standards. To make matters worse, California authorizes private lawsuits for virtually every regulatory infraction, even innocuous mistakes like inadvertently failing to include one of nine required items on an [employee’s paystub](#). Lawsuits over even minor infractions are easy to initiate and can [sink a business](#). The employer often bears a difficult burden of proving innocence when accused of wrongdoing.

Employment law is complicated further by a growing trend toward municipal regulation. For example, numerous cities and counties have enacted ordinances raising minimum wage, mandating paid sick leave requirements, and imposing other rules. Balkanization of labor and employment standards is especially cumbersome for a business with a mobile workforce. A plumbing company may send out employees to service homes throughout the region and may have to deal with conflicting and inconsistent requirements from one locality to the next. Because it is impractical for a company to pay different minimum wages for the time a technician spends on projects in one city

²⁷ For example, Seattle landlords are prohibited from selecting between prospective tenants. Landlords understandably may prefer the security of renting to a tenant with better credit history or without a criminal record, but Seattle law [requires](#) the owner to rent to whichever person comes first.

next to another, dominant cities tend to dictate employment standards for the entire region—often to the consternation of bedroom communities and state lawmakers.²⁸

One of the first issues that comes up when engaging the services of another is whether the laborer is properly classified as an employee or an [independent contractor](#). In many cases this is a [difficult question](#). That is especially true where state agencies utilize different tests for distinguishing between contractors and employees. As a result, it is easy to misclassify an independent contractor as an employee. But these mistakes can [bankrupt a business](#) quickly. For this reason, many companies err on the side of treating contractors as employees to avoid the risk of lawsuits. Meanwhile, some jurisdictions impose [demanding tests](#) that effectively eliminate innovative business models that rely on independent contractors. For example, the California Supreme Court’s recent decision in *Dynamex v. Superior Court*²⁹ [came as a shock](#) to many businesses—especially in the gig economy. The *Dynamex* court [ruled](#) that businesses cannot use independent contractors if those contractors are providing the same sort of services that the company offers to the public. Not only does this mean that many companies must reclassify workers as employees, but it affirmatively discourages larger companies from outsourcing work to start-ups who are building their business.

Critically, classifying a worker as an employee comes with a big ball of red tape. Employers must pay unemployment insurance, provide workers’ compensation coverage, and offer many other benefits that state and local law require. Employers must also determine whether they can pay a salary, or whether they need to pay based on the hours worked. And if the worker is hourly (and sometimes even if salaried), they must make sure they pay the required minimum wage for all hours worked.³⁰ While often well-meaning, these requirements can dramatically increase the administrative cost of doing business.³¹

Many jurisdictions (state and local) are moving to raise minimum wage.³² California is especially complicated because there is currently an escalating two-tiered wage rate for businesses of different

²⁸ These local ordinances have larger implications for the state. Balkanized local regulation may adversely affect the general business climate in the state and hamper economic growth, with resulting budgetary implications.

²⁹ 416 P.3d 1 (Cal. 2018); John Breslin, [“Business Surprised, Alarmed, Over New Narrower Test for Classifying Independent Contractors.”](#) Northern Cal. Rec. (June 14, 2018).

³⁰ Laws favoring union workers are also common at the state and local level. California, for example, requires bidders on public projects to abide by the “prevailing wage”—*i.e.*, a higher wage that correlates to union demanded wages. Cities also often engage in Project Labor Agreements (PLAs), which are negotiated between the city and unions prior to any bidding on the project, and require all bidders to abide by the terms of the agreement. Such agreements often require usage of union labor at union rates, and [have been shown](#) to drive up the costs of public projects. What is more, a growing trend is for state and local authorities to impose generally applicable regulatory requirements, while exempting union shops with collective bargaining agreements from these more burdensome standards.

³¹ Wage and hour compliance is especially complicated when dealing with on-call employees or traveling employees. The requirements vary by jurisdiction.

³² Several businesses have cited minimum wage laws as forcing their closure. For example, bibliophile and bookstore owner Kelley Ulmer closed her Almost Perfect Book Store after 25 years, [saying that](#) the added expense from California’s minimum-wage increases had made continuing her business impossible. Ulmer operated a profit-share plan with her employees. At the end of each week, Ulmer would share whatever money didn’t go toward bills with her employees. “They actually made more money at \$7 an hour than they make at

sizes at the [state level](#)—with even more demanding [municipal requirements](#). These requirements in turn trigger heightened salary mandates for exempt employees.³³ Meanwhile, California and other states impose more stringent overtime requirements. For example, Pennsylvania has proposed regulations to [dramatically change overtime rules](#) so as to require companies to pay an hourly rate and overtime unless an employee is paid an annual salary of at least \$47,892—more than double what is required by federal law. Pennsylvania’s proposed regulations also change the rules for determining whether an employee performs the right “duties” to be paid as an exempt salaried employee.³⁴

Paid sick leave requirements impose further complications for employers, who must effectively pay a defined wage for time an employee is out and unavailable to work.³⁵ This is just another well-intentioned policy at the state level that imposes serious difficulties for employers. For example, some jurisdictions have moved to impose “[predictive scheduling](#)” requirements that are intended to benefit workers, but which make it all the more difficult for managers to provide flexibility for employees who may request changes in their schedules.

The so-called “ban the box” movement is another example of burdensome, if well-meaning, regulations. To help individuals with a criminal background reenter the workforce, these rules [prohibit employers](#) from inquiring about criminal history until after extending an offer. While employers are allowed to rescind an offer upon learning about a past conviction that may call into question an applicant’s capacity to do the job in question, these jurisdictions often make it procedurally difficult to withdraw an offer—even where there is good reason. For example, [California requires](#) employers to (1) provide a copy of the criminal background report; (2) inform the applicant of his or her right to provide supplemental information or explanation; (3) wait up to 10 days before finalizing the decision; (4) give written notice of the final decision, along with information about how the applicant may request reconsideration; and (5) provide a notice that the applicant has a right to file a discrimination complaint with the California Department of Fair Employment & Housing.

Employers face multiple regulatory regimes simply in managing the workplace on a day-to-day basis. For example, employers must provide numerous “notices” to employees on their rights. They must also comply with document retention rules that may differ from federal law. It is easy for employers to make mistakes with [meal and rest break requirements](#), and even easier for aggrieved employees to make wrongful accusations that they were denied breaks. In some jurisdictions, employers must

\$10.” “I could either pay my employees or pay my rent. I paid my employees,” Ulmer said. “Now I can’t do either. It’s just too much.” Ulmer is not the only one to have made this choice; there are [other stories](#) like this.

³³ In California, exempt employees must be [paid twice](#) what an employee would be making at minimum wage working a 40-hour week. Other complications in California include the option to pay a “[piece rate](#)” for every project completed; however, piece-rate employees must also be paid a minimum hourly wage for “waiting time” between projects, even if they are making a six-figure income.

³⁴ In [California](#), overtime requirements apply after an employee works 8 hours in a single day, while most states require overtime only after an employee has worked 40 hours in a week.

³⁵ Paid sick leave requirements vary greatly from one jurisdiction to the next, meaning that employers may have to contend with conflicting or otherwise [inconsistent requirements](#) from [one jurisdiction](#) to the next.

provide mandatory training to supervisors on harassment issues. Likewise, employers must make difficult decisions every day in managing employees, not only to avoid the risk of harassment claims, but also in dealing with more mundane matters like scheduling. For that matter, dealing with leave issues and [requests for accommodations](#) is one of the [most complicated areas of the law](#) involving layers of regulation at the federal, state, and local level. Expanded medical leave laws and state disability laws can be [especially vexing](#) for an employer to sort out without assistance from an HR professional or an employment law attorney.

Disciplinary and performance issues also come up frequently. But employers are [often afraid](#) to terminate insubordinate or underperforming employees, even where they are costing the company money, creating work for others, and hurting morale. Small employers fear wrongful termination lawsuits because it is easy to make an allegation of discrimination or retaliation, but often cost-prohibitive to mount a serious defense. Further, there is always a risk, even when terminating an employee for legitimate reasons, that the employee may file a complaint about other technical violations.³⁶

v. Industry Specific Regulation

Every industry has its own—sometimes very technical—regulatory issues. While regulation is often justified as a necessary exercise of state power to protect public health and safety, the reality is that these regulations are sometimes hyper-technical and counter-productive, especially in aggregate. Worse, in some cases regulation is co-opted by established industry insiders to [stifle competitors](#) or to otherwise benefit incumbent businesses. The following are a few examples:

a. Ranching, Farming, and Silviculture Regulation

Businesses in the agricultural industry often feel [the pain of environmental regulation](#) first-hand. In California, for example, farmers are currently struggling with [requirements](#) to keep their trucks and vital machinery compliant with [ever more stringent](#) emission standards from the California Air Resources Board. Increasingly, they are told how and under what conditions they may plant and harvest crops, and/or what conditions they must abide by in raising livestock.³⁷

³⁶ Often a complaint will spur an audit from state authorities for wage and hour mistakes. And [other regulatory violations may come to light](#) if a [company is scrutinized](#). For example, 22 states impose more demanding health and safety standards than required by federal law under the Occupational Safety and Health Act. Therefore, a company in a [state like Alaska, Michigan or Washington](#) might be hit with serious OSHA fines (even in the absence of an injury) though it is in full compliance with the federal rules.

³⁷ “In [Ventura \[California\]](#), a farmer attempting to permit a cogeneration facility to produce energy from waste in his operation found that: ‘regulatory costs were in excess of 30% of the total project cost, making it virtually impossible to complete. It was impossible to identify all the rules, regulations, and people involved in the process, making it very challenging to budget a project like this or develop a real timeline.’” Another [California farmer lamented](#): “‘We’ve gotten over 40 permits since 2005. We didn’t know all the requirements upfront, and new ones frequently arose, which set us back significantly. None of the permitting agencies could help us navigate the process because they didn’t know what the other agencies required or which permits were needed.’” *Id.* Still [another farmer voiced frustration](#), explaining that: “‘[T]here can be short windows in which you have the time and money available for a project. As soon as you enter the realm of seeking approval for that project, you lose momentum.’”

One of the most frustrating issues for businesses in these industries are restrictions on how they may use their own lands.³⁸ State law often imposes more stringent environmental regulatory standards on private property than are imposed under federal law.³⁹ For example, an area that is otherwise exempt or excluded from regulation under the federal Clean Water Act or the Endangered Species Act may very well be subject to state level restrictions if it is deemed to be “ecologically sensitive.”⁴⁰ And as federal regulators seek to deregulate in areas, state regulators are often eager to [double down](#) by imposing their own, [more restrictive](#), rules.

b. Food Industry Regulation

Food production is already heavily regulated at the federal level. But while U.S. Food and Drug Administration regulation is supposed to guarantee uniform standards for health and safety, state laws often impose further regulatory burdens throughout the chain of commerce—from “farm to fork.” Added state regulation can effectively snuff out [cottage-industry food companies](#), or companies with unique business models. For example, [Wisconsin law](#) requires official taste testers to assign a letter grade to butter before it may be sold in-state. The grade is essentially a government mandated taste test that assesses whether the state considers the butter “pleasing.”⁴¹ But this regulatory requirement has proven a [major problem](#) for small out-of-state producers that cannot afford to have each batch independently graded and separately labeled.

[Matthew Secich’s story](#) is illustrative. As a former sous chef at an upscale Chicago restaurant, Secich wanted to strike out on his own. He opened Charcuterie, an Amish-cured meat, smoked cheese, and baked goods store, which makes its products in the Amish style—*i.e.*, without electricity or other modern conveniences. Though Charcuterie is popular, it’s struggling to stay afloat because of the compliance burdens that exist within Maine’s 160-page food safety code. Secich came under fire for his method of cooling meat (in ice boxes) and for his failure to have a HAACP (hazard analysis and critical control points plan). This treatment of Secich’s business is even more disturbing because other chefs may serve the very same meats that Secich sells without these regulatory burdens; in Maine, restaurants are subject to different rules than baked-goods stores like Charcuterie. “We’re thinking about closing because it’s just too much,” Secich [said](#). “We want to stay open. But we’re so overwhelmed at the vast amount of paperwork...it’s so immense, I can’t keep up with it.”

³⁸ One organization has created a [dizzying flow-chart](#) (see page 5 of their report) detailing the regulatory steps (and the 24 entities) involved in a 34-month process for a farmer to obtain authorization to build a wine and seed processing facility on his land.

³⁹ See Shannon M. Roesler, *Federalism and Local Environmental Regulation*, 48 U.C. Davis L. Rev. 1111 (2015).

⁴⁰ See *e.g.*, *Barnum Timber Co. v. U.S. E.P.A.*, 633 F.3d 894 (9th Cir. 2011) (holding that a timber company suffered an injury in devaluation of property as a result of the interplay between a federal designation of impaired waters under the Clean Water Act and corresponding state regulation that was triggered by that designation).

⁴¹ “[N]o Wisconsin consumer knows what a butter grade is supposed to mean—even the government’s designated experts couldn’t explain the state’s butter grading criteria.... The government might just as well place a Sesame Street sticker on the butter packaging—it would reveal just as much information.” Joshua Thompson, [Minerva Dairy Asks Court to Declare Wisconsin’s Butter Grading Law Unconstitutional](#), Pacific Legal Foundation (Dec. 1, 2017).

Similar codes [hamper food producers](#) elsewhere. Ali Fratesi and Dustin Pinion created a unique business model raising chickens and pigs at Beaverdam Fresh Farms in Mississippi. They've established "buying clubs" with other small farmers to provide an easy way of getting fresh, local food to the community. But the Mississippi Department of Agriculture and Commerce shut that down, citing a regulation that prohibits them from selling their poultry in markets. This cut their sales almost by half. Under federal U.S. Department of Agriculture poultry standards, farmers can raise and slaughter up to 1,000 birds on their land and sell them in their state without mandatory inspections as long as they follow applicable safety guidelines. Farmers can also raise and slaughter up to 20,000 birds on their land and sell them in their state without mandatory inspections, if they have a state-certified on-site processing facility. But the Mississippi Department of Agriculture and Commerce has an additional regulation: it requires farmers to pay for an inspector to be present during the slaughter of meat before the meat can be sold outside the farm. That requirement makes the business model at Beaverdam Fresh Farms cost-prohibitive.

Meanwhile, like food producers, restaurants are heavily regulated to ensure compliance with stringent health and safety standards. But they must also keep abreast of unique regulatory mandates and restrictions.⁴² For example, the City of Seattle, Washington made headlines recently with enactment of an [ordinance prohibiting straws](#). In a similar vein, California law punishes restaurants that gratuitously provide [water to guests who don't ask](#). California restaurant owners are also required by state law to pay [assessments](#) to a public corporation to fund advertisements promoting California tourism.

c. Regulation of Manufacturers

Manufacturers must also comply with a wide array of regulatory requirements that have nothing to do with protecting consumer health and safety, but only promote the policy goals of some environmentalists. For example, California's AB-32 [regulates greenhouse gas emissions](#) through a cap-and-trade system. Though advocates believe it is important for California to be a leader in combating climate change, the economic reality is that [these regulations stifle](#) productivity and raise the cost of consumer goods. Cap-and-trade is particularly problematic for smaller companies that cannot afford to retrofit their facilities with the latest technologies. These companies are forced either to cut back on production or to compete at auction for a limited supply of emission allowances—where larger corporations (with greater access to capital) have a tremendous competitive advantage.

Meanwhile, in an effort to force reduction in greenhouse gas emissions through the entire life-cycle of consumer products (from resource extraction to production, packaging, and retail), manufacturers are increasingly subject to [green chemistry](#) mandates dictating how products should be designed.⁴³ Any manufacturer producing consumer products that are ultimately sold in California is required to

⁴² For example, "the state of Washington [requires companies](#) to indicate on menus and receipts what portion of a mandatory service charge goes to the employee who served the customer."

⁴³ See *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1080 (9th Cir. 2013) (concerning regulation predicated on a "lifecycle analysis" of greenhouse gas emissions for fuel sold in California).

periodically submit reports to the State on the chemicals and processes used in production. “Other state green chemistry laws [require submission](#) of an ‘alternatives assessment’ [describing other options available for the manufacturer in producing a specific product]... Still others give states authority to compel companies to completely eliminate chemicals in their products...”⁴⁴

d. Caught in a Bind: Real Life Stories of Crushing Regulation

These stories of budding entrepreneurs and their encounters with the regulatory thicket illustrate how individual regulations, even if individually justifiable, can combine to create a thicket that is prohibitively expensive to comply with and extraordinarily difficult to navigate.

Wild Jimmy’s Sausage & Beef Jerky – Marco Island, Florida

Jimmy Downey got his start making sausage in his backyard—slowly perfecting his mix of parsley, parmesan cheese, and pork sausage. After hearing the refrain, “you should sell this stuff” enough times, he decided to try it. He took the first step towards entrepreneurship by selling beef jerky at a local farmer’s market. After he continually sold out of his stock, he decided to open a full-fledged business.

Little did he know the regulatory thicket that awaited him. Said Jimmy, “There are so many hoops to jump through. We had the FSIS (Food Safety and Inspection Service of the federal Department of Agriculture), the state department of agriculture, DBPR (Dept. of Business and Prof. Regulation), Hotels and Restaurants, the county, the city—every agency you can think of. It cost us \$1,360 just for a hotdog cart inspection.” In total, Jimmy estimates that in addition to the thousands of dollars of regulatory fees he had to bear, he spent over 600 hours getting the necessary approval to operate his business.

Wild Jimmy’s is now a thriving company. His broad range of sausages include sweet or hot Italian, parsley and parmesan pork, mozzarella and broccoli rabe, Polish, bratwurst, Mexican chorizo, summer sausage, jalapeño and cheddar, Swedish potato, English bangers, and chicken and pancetta. He sells beef jerkies in almost the same number of flavors. Yet Jimmy swears that if, before he began, he had known about the sheer number of regulations he had to comply with, he “never would have done it at all.”

Food shop owners vow to never open new locations in Austin

Katie Congdon, owner of Dan’s Hamburgers, has said that she will “Never[,] Never[,] Never[.]” build another restaurant in Austin so long as she lives. Dan’s Hamburgers was started by her parents in 1973, but Katie set out to rebuild the beloved store in 2014. In an open letter to Austin citizens

⁴⁴ “State laws vary, which makes the landscape confusing.... Typical green chemistry laws cover a variety of specific chemicals and require covered companies to report to the state the identity of listed chemicals present in covered products. Reports must include not just listed chemicals that are intentionally added at any level, but also those inadvertently present as a contaminant above a threshold.” Sheila A. Millar and Anushka N. Rahman, [Green Chemistry in 2017: The State of the States](#), Keller and Heckman (Mar. 16, 2017).

and city officials, [Katie described](#) the process of renovating the building—and the bureaucratic nightmare that ensued.

Before she could even begin, it took the City nine months to grant her a site plan and the requisite building permits. Initially, Katie pursued the rebuild as a “remodel,” which makes the process easier but requires the business to keep more than half of its existing walls during construction. After she began demolition, Katie discovered that the remaining walls were unsound and would have to be rebuilt. But this also meant that her project would be considered “new construction,” with many attendant consequences. For example, Katie was now required to give up several parking spaces and replace them with “cars2go” spots. She had to add awnings above all of the windows to shade the sidewalk. She was forced to add in windows to the bathrooms, even if nonfunctional. She forfeited her drought-resistant trees in favor of new landscaping and irrigation—even though Katie believes she’ll never be able to use the irrigation given that the area is in a perpetual drought and subject to watering restrictions. New regulations also forced her to undergo inspections of her soda machines for potential CO₂ issues. Together, these regulations added months of extra construction time and an additional \$100,000 in costs—not to mention the costs of keeping employees on the payroll during the delay.

After all was said and done, Katie said that “[n]ever again as a small business could we afford to remodel in the City of Austin.... There should be a better pathway for an existing small business in good standing to update a building.”

[***Affordable housing projects strangled by regulation in San Francisco***](#)

San Francisco has some of the most expensive housing in the nation. Though entrepreneurs and builders stand ready, willing, and able to provide housing solutions that would shore up the housing deficit and bring down prices, regulators stand in their way. Patrick Kennedy, for example, has been trying to get pre-fabricated “tiny homes” approved in San Francisco—not only to address high prices, but also to aid the homeless.

But Patrick is up against a coalition of powerful unions that drive up labor and construction costs, entrenched developers who seek to remain the only builders in town, NIMBY (“Not-in-my-backyard”) residents, and the politicians funded by these various interests. After months of petitioning elected officials, Patrick was unable to make his dream of easy-to-build, easy-to-finance, easy-to-stack homes come to fruition. “San Francisco’s housing crisis is largely self-inflicted,” he said. “The regulatory thicket—lawsuits, hurdles, unions—makes it very difficult to produce here. You end up with very expensive projects, and you can then only justify them by selling high-end condos.”

[***Former soldiers can’t provide security in Tennessee***](#)

Adam Jackson is a former Special Forces soldier who provided electronic security to U.S. embassies and military bases. Together with his former brother in arms, he founded a company that utilizes facial recognition technology to provide cutting-edge private security. Because his software can instantly identify people who appear on security cameras and match it with known offenders, his

system could help defend some of the most vulnerable locales—including schools and domestic violence shelters. Yet he’s finding it impossible to operate in Tennessee, given regulations promulgated by the state’s Alarm Systems Contractors Board.

Under Tennessee law, Adam is required to obtain a license to install alarm systems. And in order to get a license, an alarm company must have a board-approved manager with a Bachelor’s degree in engineering and two years of experience in the alarm industry, or five years’ experience in the industry. Because he does not have a degree in engineering, Adam would have to apprentice for five years installing burglar alarms to qualify for a license.

But Adam’s business does not even install alarms. Instead, his software heightens the ability of other systems to identify threats. Nevertheless, because the Board determined that his innovative business operated in a “grey area,” it told him he had to get a license—and it refused to tell him whether his extensive military service meant he qualified for the license until he paid the fees.

Rather than complying, Adam moved his business out of state. “The Tennessee market is otherwise a dream market for us, but we had to leave,” said Adam. “Right now we’ve been forced to put our best products on hold.”

* * *

These anecdotes serve as cautionary tales of regulation run amok. But it is important to keep in mind that there are many more stories that we will never hear, because too many would-be entrepreneurs simply give up in the face of onerous regulation rather than making the effort to build a business in the first place.

III. Runaway Regulation Imposes Significant Costs

All regulations have costs. Some costs are worth paying because they deliver important benefits like fewer accidents or illnesses, a cleaner environment, more information for consumers, or a better quality of life. But a thicket of onerous regulations operating in unforgiving regulatory regimes can cause significant harms such as stifling innovation, overwhelming small businesses, taking away work opportunities, reducing prosperity, and restricting economic growth. While commonly accepted, this cautionary observation has not stopped governments from imposing cumulatively excessive regulations. This is likely due in large measure to the fact that it is very difficult to measure the cost of the regulatory thicket.

A. Why is it Hard to Measure the Cost of the Regulatory Thicket?

Such measurement is difficult for at least three (intersecting) reasons. First, a substantial amount of business activity is determined by economic factors beyond the reach of any single regulator: labor and material costs, cost of financing, or consumers’ willingness to spend, amplify, or dampen the impacts of regulation. Importantly, no single sector in the economy operates separate and in isolation from other sectors, so regulatory changes in one sector (say, the labor market) often have

effects in others (goods and services, households), making it extremely hard to pin down all costs associated with regulation.

For example, the vast literature on the impact of minimum wage increases on employment—a narrow question focusing on just *one type of regulation* and *one type of impact*—have failed to produce a definitive conclusion, precisely because of complex interactions between economic conditions, market structures, and regulatory impositions. While many [studies show adverse impacts](#), minimum wage increases might not appear to have negative impacts if the demand for labor is high and already exerting positive pressure on wages. If the proposed minimum wage is too low to matter for a large group of workers, there will similarly be no discernible impact.⁴⁵ Productivity could remain high or even increase after a minimum-wage hike if firms can automate jobs or if employers can easily find higher-paid workers to take minimum-wage jobs.⁴⁶ Even when employment does not change much, firms with thin margins might not survive the cost increases, often taking down the most vulnerable of all workers with them—a small economic impact across the country, perhaps, but a destructive impact for these workers.⁴⁷ And minimum wage workers who take home higher paychecks might end up surrendering much of this new income to the higher prices or rents that follow.⁴⁸ We use the minimum-wage example because it is among the most-often studied areas of economic regulation, but there is no consensus in sight about whether the costs are worth the benefits that flow from higher wages.

Second, it is very difficult to quantify the entirety of regulatory burdens systematically. Besides the federal government and the 50 states, there are over 89,000 local government entities including counties, cities, townships, municipalities, special districts, and school districts. Many of these entities impose regulations. While the costs of these regulations are cumulative, there is simply no way to quantify just how much regulation there is systematically. Some have tried at the international level: the World Bank's Doing Business Index, for example, tries to quantify the regulatory environment and its burdens through firm-level surveys, but its work focuses on a small set of issues (such as starting a business, hiring employees, and paying taxes) as well as the complexity of regulations and ease or difficulty of complying with them. Not surprisingly, researchers who use this

⁴⁵ See, e.g., David Neumark, *The Employment Effects of Minimum Wages: Some Questions We Need to Answer*, NBER Working Paper 23584 (2017).

⁴⁶ See Daniel Aaronson, Eric French, Isaac Sorkin and Ted To, [Industry Dynamics and the Minimum Wage: A Putty-Clay Approach](#), *Indus. Econ. Rev.*, Volume 59, Issue 1 (February 2018).

⁴⁷ For example, a recent hike of minimum wage in San Francisco disproportionately affected lower-rated restaurants, pushing them out of existence, and their relatively low-skilled, low income workers out of jobs. See Dara Lee Luca and Michael Luca, [Survival of the Fittest: The Impact of the Minimum Wage on Firm Exit](#), Harvard Business School NOM Unit Working Paper No. 17-088 (August 1, 2018).

⁴⁸ For example, an examination of supermarket check-out data in the aftermath of local minimum wage increases show that each one percent increase in minimum wages is followed by a 2-cent price increase for all shoppers, suggesting that consumers rather than firms bear the cost of minimum-wage increases. Moreover, poor households are most negatively affected by the price response, surrendering up to 10 percent of the increase in their wage incomes. See Tobias Renkin, Claire Montialoux, and Michael Siegenthaler, *The Pass-through of Minimum Wages into US Retail Prices: Evidence from Supermarket Scanner Data* (unpublished paper) (2017). For similar findings on impact of minimum wage increases on restaurant prices, see James M. MacDonald and Daniel Aaronson, [How Firms Construct Price Changes: Evidence from Restaurant Responses to Increased Minimum Wages](#), *Am. J. of Agric. Econ.*, Vol. 88, No. 2 (May, 2006) at 292-307.

index as a measure of regulatory burdens generally find that lower-quality regulatory regimes can considerably slow down macroeconomic growth.⁴⁹

Third, much of the regulatory activity takes place at the state and local levels where governments have no obligation to identify the costs or benefits associated with regulations they impose. At the federal level, executive agencies are not supposed to impose regulations unless they can show that the benefits justify the costs (a rule that admittedly seems often to be honored more in the breach than in reality). But there is no similar discipline at the state and local level, even when these governments could impose regulations with "...[r]eal, far-reaching consequences that have not been foreseen because state and local regulators are usually not required to undergo any kind of review process, or coordinate with any other entity, before issuing a new rule."⁵⁰ National advocacy organizations, quite aware of the low barriers to passing laws at the local level (*e.g.*, no cost-benefit analysis and a smaller and more easily manipulated legislative body) are increasingly lobbying local governments to push their regulatory agendas. Paid family leave, energy efficiency, and carbon tax are three examples that come to mind. This practice has turned local governments into petri dishes of ideology, with potentially disastrous effects on the economy.

B. Declining Dynamism as a Measure of the Consequences of the Regulatory

Thicket

Growth in productivity has been disturbingly weak since at least the mid-2000s. In turn, overall economic growth and improvement in living standards have been anemic. Economists who have attempted to understand these developments have been studying a broad set of economic trends grouped together under the heading of "dynamism." For example, they look at what is happening to labor mobility by examining the [rates of interstate migration and job-to-job movement](#). On the business side, they look at [the birth and death rates of business establishments](#), as well as the pace of employment growth for young firms, to discern how welcoming the economic environment is to new firms.

Researchers have consistently found that dynamism for both workers and businesses is in decline by every possible measure. Why does this matter in the context of economic growth? Labor mobility is an indicator of how willing and able workers are to take advantage of better opportunities. Higher mobility signals a higher ability of the labor market to match workers with employers, putting both on the highest productive path possible. Similarly, firm dynamism is an indicator that the economic environment is open to new, potentially game-changing ideas. Lower levels of establishment births suggest that barriers to starting a business have become too high, and many good ideas are being left on the table.

⁴⁹ *E.g.*, Juan C. Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Schleifer, *The Regulation of Labor*, Q. J. Econ. 119 (4) (2004), at 1339–82.

⁵⁰ Edward Glaeser and Cass R. Sunstein, *Regulatory Review for the States*, National Affairs (Summer 2014).

The burgeoning research that links economic dynamism to regulatory impositions has helped expand our knowledge. One study found little relationship between federal regulations (again measured by the same metric of *shalls* and *musts*) and dynamism (measured as start-up activity).⁵¹ The possibility that federal regulations exert little influence on startup decisions comports with this paper's earlier observations regarding how little entrepreneurs know about the regulatory impositions they must meet before starting a business. It also suggests that regulatory barriers, particularly at the state and local level, have been an important part of these changing discussions.⁵²

International evidence is consistent with the view that regulatory policy matters for market entry. A 2002 study analyzed cross-country data on regulation of business entry and found that tighter regulation is associated with higher corruption and a larger informal sector.⁵³ Others, like Bruhn (2011) and Kaplan et al. (2006), find that a Mexican simplification of business entry regulation was associated with a significant increase in business formation.⁵⁴

Research on whether labor regulations impede labor mobility also shows important results. For example, research on the interstate migration effects of licensing strongly suggests that licensed workers are inhibited from moving across state lines. Workers in occupations that require state licensing are much less likely to move to different states compared to workers who don't have to obtain state licenses. Quite apart from the other economic costs of licensing, its limits on worker mobility have compounding, intergenerational effects when one considers the opportunities for a more prosperous life that workers must miss because they cannot afford to obtain a license in a different state

C. The Increasing Role of State and Local Governments in Imposing Regulatory

Costs

So what do we know about various types of regulatory costs, particularly those that occur as a consequence of state and local policy? Just as at the federal level, researchers struggle to measure the size of the regulatory thicket at the state and local levels. The panel dataset, [RegData](#), which mines the Code of Federal Regulations to measure cumulative regulatory burdens at the federal level, is already changing how we think of burdens. RegData is becoming available at the state level, providing a growing, but still incomplete, coverage of states. A recent and accessible source for thinking about economic costs of poorly designed regulations is University of Chicago Professor Steven Davis's 2017 paper, "[Regulatory Complexity and Policy Uncertainty: Headwinds of Our](#)

⁵¹ Nathan Goldschlag and Alex Tabarrok, [Is Regulation To Blame for the Decline in American Entrepreneurship?](#) Econ. Pol'y (January 2018), at 5–44.

⁵² Steven J. Davis and John Haltiwanger, [Labor Market Fluidity and Economic Performance](#), NBER Working Paper (2014).

⁵³ Simeon Djankov, et al., [The Regulation of Entry](#), Q. J. Econ. (February 2002).

⁵⁴ See Miriam Bruhn, [License to Sell: the Effect of Business Registration Reform on Entrepreneurial Activity in Mexico](#), Rev. of Econ. & Stat. (February 2011). See also David Kaplan, et al., [Are Burdensome Registration Procedures an Important Barrier on Firm Creation? Evidence from Mexico](#), Stanford Institute for Economic Policy Research Discussion Paper (2006).

[Own Making](#),” which emphasizes the need for institutions that restrain “excessively burdensome and capricious regulations.”

A large body of literature examines the economic costs of particular regulations in state and local contexts and for specific issues. Below is a non-exhaustive summary of research in particular areas of state and local regulation.

- *Occupational licensing* raises wages for licensed workers and depresses wages for unlicensed workers, costing consumers about \$200 billion annually.⁵⁵
- *Land-use restrictions* may have lowered cumulative economic growth by 50 percent from 1964-2009,⁵⁶ and a 2017 paper finds land-use restrictions to be a cause of slowing convergence in incomes across regions.⁵⁷ To the extent that it is difficult to build new residential and non-residential structures in booming areas, it is more difficult for economic activity to be reallocated in ways that promote regional convergence. Focusing specifically on the effects of commercial land-use restrictions, another paper finds that greater commercial zoning flexibility (i.e., reduced restrictiveness) is associated with lower interest rates and generally better outcomes for commercial property loans.⁵⁸ Finally, another study finds that planning-time for commercial projects has risen substantially, and land-use restrictions likely play a role in this development.⁵⁹
- *Auto franchise regulation* raises the price of vehicles, raising prices for consumers and profits for dealerships.⁶⁰ Notably, Tesla has encountered considerable difficulty in selling vehicles directly to consumers as a result of this type of regulation.⁶¹

While it will probably never be possible to estimate the net effect of regulation on economic dynamism precisely, the economic literature abundantly confirms the common intuition that unchecked regulation discourages innovation, retards growth, and exerts a significant drag on economic productivity.

⁵⁵ Morris Kleiner, et al. [Occupational Licensing: Protecting the Public Interest or Protectionism?](#), Upjohn Institute Policy Paper No. 2011-009 (2011).

⁵⁶ Chang-Tai Hsieh and Enrico Moretti, [Housing Constraints and Spatial Misallocation](#), NBER Working Paper No. 21154 (2015).

⁵⁷ Peter Ganong and Daniel Shoag, [Why Has Regional Income Convergence in the U.S. Declined?](#), NBER Working Paper No. 23609 (2017).

⁵⁸ Efraim Benmelech, et al., [Do Liquidation Values Affect Financial Contracts? Evidence from Commercial Loan Contracts and Zoning Regulation](#), Q. J. Econ. (August 2005).

⁵⁹ Jonathan N. Millar et al., [Time-to-Plan Lags for Commercial Construction Projects](#), Regional Sci. & Urb. Econ. (2016).

⁶⁰ Richard L. Smith II, *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution*, 25 J. L. & Econ. 125 (1982).

⁶¹ Daniel A. Crane, [Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism](#), Iowa L. Rev. (2016).

IV. Non-Economic Effects of the Regulatory Thicket

Although economic analysis is important, it doesn't tell us everything we need to know about runaway regulation. Besides economic costs, the regulatory thicket has institutional costs, including undermining our commitment to the rule of law.⁶² The threat is that business owners who are faced with an impossible regulatory environment will make the entirely rational decision to aim for just partial compliance—picking and choosing which requirements to obey and which to ignore—while hoping for the best.⁶³ A related concern is the government's ability to selectively choose not to enforce regulations in certain instances, which invites firms to curry favor with regulators in the hopes of obtaining exemptions. Richard Epstein has called this practice "[government by waiver](#)" and deemed it "among the most serious challenges to the rule of law in our time."

The principal hazard of "government by waiver" is the opportunity it presents to government actors to extract concessions from private parties—or, to put it less delicately, to extort them. Businesses face immense up-front costs when, for instance, pursuing a major construction project—including acquiring a binder full of permits and undergoing numerous hearings in front of various regulatory bodies. The danger of "government by waiver" is that the process allows the bargaining away of many such costs, if the price (e.g. funding a public project, like improving a nearby park, road, or school) is right. Perversely, this dynamic increases the complexity of such projects, because more parties emerge in the bargaining process who may frustrate project success with their corresponding demands. It also ensures that only those entities with substantial resources—usually established businesses, not entrepreneurial start-ups—can afford to pay to play.

Another danger of "government by waiver" is that regulatory agencies often enjoy broad discretionary authority to apply these waivers, which itself can create free-standing agency power. For instance, the Food and Drug Administration must conduct clinical trials before the drugs it regulates go on the market. What are the rules for such trials? They are not always laid out in law, or even agency rules. Sometimes they are established ad hoc by regulators who are charged with approval or rejection, and sometimes they are waived ad hoc as well. In a dynamic similar to the construction process described immediately above, an agency will sometimes insist that drug submissions meet conditions that are nowhere in the authorizing legislation—conditions that might limit the distribution or advertising of a drug or govern its recall in the event that problems arise—in exchange for agency waiver or early approval.⁶⁴

⁶² There are other concerns beyond those emphasized here. For example, Ilya Somin warns that complex regulatory regimes threaten democratic values because—as regulation becomes more complex and far-reaching—it becomes exponentially more difficult for citizens to make informed and rational judgements when voting. Somin argues that concerns over "[political ignorance](#)" counsel for smaller government.

⁶³ Cf. CHARLES A. MURRAY, *BY THE PEOPLE: REBUILDING LIBERTY WITHOUT PERMISSION* (2015) (encouraging business owners to form mutual protection associations in order to facilitate willful, broad-ranging noncompliance with excessive regulations).

⁶⁴ The FDA is a federal agency, and this paper is mostly focused on state and local regulations. But this example nicely illustrates the concern, which is not necessarily isolated to the federal government. Indeed, regulation by fiat is typically easier (and perhaps more pervasive) at the state and local level than the federal level, since federal regulations receive broader scrutiny than most state and federal regulations.

Agencies may engage in non-enforcement for many reasons, but not all non-enforcement is equal. There are sound arguments against mechanical, universal application of rules (agencies have finite resources, sometimes there are edge cases, etc.), but refusing to enforce the rules as written raises troubling questions when used for purposes other than caseload management. It is worst, from a rule-of-law perspective, when enforcement decisions are not guided by principled standards, notice-and-comment constraints, or oversight. In those instances, an agency might decline to enforce burdensome regulations not for benevolent reasons but instead to allow a favored party to engage in an activity that others can only engage in at great expense or not at all—in other words, outright cronyism.⁶⁵

Federal agencies vary notably in their authorization to engage in non-enforcement, in the processes they use to evaluate potential non-enforcement, in what situations they choose to use non-enforcement, in their volume of non-enforcement, in the transparency of non-enforcement, and in the checks and balances that constrain their non-enforcement. Non-enforcement is, as Nielson says, “valuable but dangerous,” and the lack of rules and varying practices between agencies indicate a high likelihood of widespread abuse of discretion.

Some studies contain anecdotal accounts of more localized regulation that underscore concerns about the regulatory thicket’s impact on the rule of law. Fred McChesney, for instance, has analyzed state legislators who support various “milker” bills (bills intended to milk benefitted parties for campaign contributions).⁶⁶ The threat to the rule of law in such schemes is not just corruption, but institutional acceptance of inconsistent enforcement protocols. Alexander Cartwright has studied selective enforcement in New Orleans related to laws that prohibit activities like t-shirt sales, live music, and posting signs on public property.⁶⁷ The study suggests that “resource constraints” cannot explain such enforcement choices. While more research is needed, it seems likely that the laws are disproportionately enforced against some combination of racial minorities, campaign non-contributors, those who do not resort to under-the-table bribery of local law enforcement, and those without political clout. When regulations are so broad that it is easy for enforcers to discover violations in some instances and overlook them in others, opportunistic or even unscrupulous government conduct should be no surprise.

Like so many other parts of the regulatory thicket, non-enforcement may be a small problem *in itself*. In combination with all of the other burdens and considerations discussed in this paper, however, it may significantly add to the regulatory onslaught experienced by small businesses. This is especially so if their larger competitors have received the benefit of non-enforcement, but they have not been able to procure similar treatment. By the same token, we do not suggest that regulators should inflexibly impose penalties for good faith mistakes, which are all too easily made by those who get caught in the regulatory thicket. To the extent regulators are afforded discretion when imposing

⁶⁵ Aaron Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 Notre Dame L. Rev. 1517 (2018)

⁶⁶ Fred S. McChesney, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 29-34 (1997).

⁶⁷ Alexander Cartwright, *Selective Enforcement and Rent Extraction*, J. Pub. Fin. & Mgmt., vol. 16, no. 1 (2016).

penalties, it is essential that they bear in mind the difficulty of the issues presented and operate with an eye to educate rather than to punish where possible.

V. How to Begin Trimming the Regulatory Thicket

A. Why Regulatory Thickets Grow

Within any particular type of regulation, there can be overlapping requirements that were each designed for a specific, separate purpose. For example, commercial land-use rules in a particular area might specify the types of business permitted, minimum parking allotments, various aesthetic requirements, environmental standards, and permitting processes for agencies at multiple levels of government. These impacts on entrepreneurs may interact, in the sense that the overall portfolio of regulations can affect entrepreneurship more than the sum of the individual effects of each regulation.

There are a number of reasons why these regulations—whether individually or in the aggregate—may not be optimally designed. Two possibilities are particularly important to consider. First, state and local policymakers tend to have limited resources for assessing and evaluating regulations. Particularly when evaluating the combined impact of policies in a given domain, the necessary data, research, and expertise may not always be available to support optimal decision-making. Relatedly, there are often policymakers with overlapping authorities, and each implements new regulations in a vacuum. Failure to consider the existing web of regulations, as well as the actions of other policymakers with overlapping authority in an area, can lead a given policymaker to create rules with lower benefits and higher costs than they may realize.

Second, public choice dynamics can produce regulations that benefit concentrated interests at the expense of the general public. That is, policymakers may be responsive to lobbying by organized interest groups that benefit in some direct way from a given regulation and give diminished weight to the diffuse costs that the regulation produces for citizens and entrepreneurs.⁶⁸ With these causes of runaway regulation in mind, we turn to some possibilities for managing and even trimming back the regulatory thicket.

B. Apply That Understanding to Concrete Solutions

One of the unique challenges presented by the regulatory thicket is the limited potential for self-correction. There are some limited self-corrective measures for both government and private actors that naturally limit abuse. As governments increase taxes, for example, the ordinary aversion of voters to paying higher taxes, plus competition from other jurisdictions that have a lower tax rate,

⁶⁸ For example, some occupational licensing rules reflect the influence of professional organizations and licensing training providers, which benefit from the introduction and intensification of licensing requirements.

can provide a natural corrective. Similarly, if private businesses stray from their mission, consumer desires and market forces will often push back.

Unfortunately, the regulatory thicket, by its very nature, lacks much in the way of an automatic corrective. Indeed, one of the fundamental reasons the thicket exists, and grows, is that there are so many disparate contributors to the thicket and, while nearly everyone might agree in the abstract that it is a serious problem, often no one has either the incentive or the means to adequately address it. With that in mind, this paper closes by talking about three different directions from which the regulatory thicket can be tackled, and one practical suggestion as to how governments might be better incentivized to address their own regulatory thickets through better information.

i. Navigating the Regulatory Thicket

Probably the easiest approaches to initiate are those aimed at helping to navigate the regulatory thicket. Such efforts do not reduce burdensome regulations, but they are easier to implement and more politically feasible because they do not require any changes to statutes or regulations, resort to litigation, or perhaps even require any taxpayer money. Help navigating can come from anywhere: government, non-profits, or the free market.

The government, which is responsible both for promulgating regulations and enforcing them, could take any number of steps to make regulatory compliance easier. That assistance could be as simple as a plain-English explanation of one or more regulations, made available in hard copy or on an agency's website. For instance, the U.S. Environmental Protection Agency has published "[A Plain English Guide to the EPA Part 503 Biosolids Rule](#)." Agencies willing to invest more resources could create a hotline or a live chat service, making individuals available to regulated parties for live, real-time assistance. The Washington Department of Fish and Wildlife has several such [hotlines](#). In Canada, Nova Scotia has "[business navigators](#)" who provide "personalized and timely help with regulation and requirements." The executive could direct more [efficient or expedited licensing and permitting processes](#). Even more ambitious (and probably more helpful) would be efforts aimed more broadly at helping the public understand not only the meaning of a single regulation in isolation, but the wider picture of, and the interconnections between, regulations at one or more agencies. The U.S. Small Business Administration is aimed in part at [this goal](#). Many states also have created "one-stop" websites for businesses seeking to get started. [Kentucky](#), [Virginia](#), [South Carolina](#), [Delaware](#), and [Utah](#) are a few examples. (When the government provides assistance of this sort, one interesting question is the degree to which reliance on that assistance is a defense to improper or incomplete compliance.)

These solutions could be initiated either by the executive or the legislative branches. Individual agencies could take the initiative to provide help to the public, or they could be directed from the top down by a gubernatorial or presidential order. Presidents [Carter](#), [Clinton](#), and [Obama](#) all issued executive orders requiring regulations to be written in language that is clear and easy to understand. The legislature could likewise enact laws that mandate measures to help the public. For example, the [Plain Writing Act of 2010](#) requires federal agencies to use clear language in materials intended for

the public. The legislature could also appropriate money specifically to help the public navigate the regulatory thicket.

Non-profit organizations have long sought to provide regulatory compliance assistance to their members and in their relevant sectors. The American Dental Association has a webpage called “[Managing the Regulatory Environment](#),” intended to help its members navigate the “numerous regulations from multiple agencies at the federal, state and local levels.” The National Federation of Independent Business has a page on [legal compliance](#). The International Federation of Accountants has published a book called “[Making Regulation Work](#),” designed to help professional accountancy organizations “adapt to recent regulatory evolution.”

Finally, the private sector is also a source of help for those lost in the regulatory maze. That help can come at a steep price from [law firms](#), [accounting companies](#), and other similar outfits. Or it can be more do-it-yourself. The internet is littered with [books](#) and [blog posts](#) that offer help with navigating the regulatory thicket. Companies like LegalZoom provide streamlined, self-help processes for [creating businesses](#). There may be a market for similar self-help products to address regulatory compliance.

ii. Managing the Growth of the Thicket

In terms of effort and political motivation required, the next category of solutions is that aimed at managing the growth of the thicket. These solutions mostly require government involvement, but they do not require the effort needed to review and eliminate existing regulations.

The executive branch has all manner of creative options for controlling the growth of the thicket, some of which have been implemented by the [current presidential administration](#). The governor or President could issue an executive order or memorandum [freezing regulations](#) (temporarily), requiring a net-zero increase in regulations or mandating that new regulations be subject to rigorous reviews or [cost ceilings](#). At the federal level, all economically significant rules must be accompanied by a [regulatory impact analysis](#). The executive could require that all new regulations be reviewed by a centralized body, as Governor Baker has done in [Massachusetts](#). At the federal level, the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) arguably serves this role. It could limit the use of agency guidance that does not go through formal rulemaking processes, as the U.S. Department of Justice has [recently done](#). Or it could require a [cost-benefit analysis](#) for every new regulation. The Federal Communications Commission recently voted to create an [office specifically devoted to introducing rigorous cost-benefit analysis](#) into its rulemaking.

Though legislation is harder to pass, the legislature could mandate the same or similar measures. Since 1980, the [Paperwork Reduction Act](#) has imposed procedural requirements aimed at reducing the paperwork burden imposed on the public by federal rules and regulations. That Act also created OIRA.

State legislatures could also take more aggressive steps. The legislature could impose a [sunset on some or all regulations](#). A few years ago, in Wisconsin, the state legislature enacted [Act 21](#), which

created a provision of state law requiring “that an agency may not implement or enforce a standard, threshold or requirement, including as a term or condition of a permit, unless that requirement is either explicitly required or explicitly authorized by statute or properly promulgated administrative rule.” The idea was to limit attempts by agencies to act under implied authority or to push the boundaries of their statutory authority. The Little Hoover Commission, a bipartisan board appointed by California’s governor and legislature, [recently suggested](#) that California devote more resources to “sunrise and sunset review” procedures for state occupational licensing laws in order to address “more than 165 years of accumulated regulations creating a nearly impenetrable thicket of bureaucracy for Californians.” The existing [Congressional Review Act](#), which has been used a fair amount recently, creates a filibuster-proof process for Congress to pass resolutions striking down new regulations. States could adopt their own version of the CRA. Before a permanent rule can be adopted by a state agency, Nevada has long required [approval by a commission or subcommittee of the Legislature](#). Maybe the most aggressive way to stem regulatory growth would be to follow what some states, like West Virginia, have done, and [require all substantive rules to be approved by the legislature](#) and signed into law by the executive. The [REINS Act](#), which failed to become law, was a step in that direction by Congress.

Solutions could come from the judiciary, as well. The U.S. Supreme Court’s recent decision in [Michigan v. EPA](#) is viewed by many as an opportunity to force courts to take a closer look at the costs and benefits of regulations, at a minimum giving more bite to an agency’s regulatory impact analysis. As the Court said, “One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.” States could adopt the same requirements.

Courts could also cut back on the level of deference afforded to agencies, which might result in more regulations failing judicial review or less aggressive assertions of statutory authority by administrative agencies. Many state courts [do not](#) afford the equivalent of *Chevron* or *Seminole Rock/Auer* deference to state administrative agencies. In recent years, some state courts, notably the Wisconsin and Mississippi Supreme Courts, have expressly abrogated previously-applied deference doctrines entirely.⁶⁹ And Arizona was the first state in the country to eliminate the state equivalents of *Chevron* and *Auer* deference statutorily.⁷⁰ What’s more, a majority of the U.S. Supreme Court has slowly whittled away at the margins of *Chevron* deference, refusing to apply it where an agency [lacks expertise](#) or is [greatly expanding its regulatory power](#).⁷¹

Finally, there are additional opportunities for the legislative and judicial branches to work in tandem, as exemplified by Arizona’s Right to Earn a Living Act, a 2017 law that directs courts to apply a heightened standard of review to laws that restrict people’s ability to work in a given vocation. This

⁶⁹ *Tetra Tech EC, Inc. v. Wisconsin Dep’t of Revenue*, 2018 WI 75, ¶ 16, 382 Wis. 2d 496, 914 N.W.2d 21 (Wis. 2018); *King v. Mississippi Military Dep’t*, 245 So. 3d 404 (Miss. 2018).

⁷⁰ Ariz. Rev. Stat. Ann. § 12-910(E).

⁷¹ The Supreme Court’s decisions in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and *Auer v. Robbins*, 519 U.S. 452 (1997), require judicial deference to an agency’s reasonable interpretation of a federal statute and regulation.

enactment provides that the agency defending the law must demonstrate that the law is “necessary to specifically fulfill a public health, safety or welfare concern.”⁷²

iii. Reducing the Thicket

Probably the most difficult category of solutions to initiate is that aimed at reducing the regulatory thicket. These solutions not only require the political willingness to repeal, limit, or modify existing regulations, but also the resources and dedication to comb carefully through the stack of existing regulations. Repealing or modifying regulations must be done correctly. In the federal system and similar state systems, that means notice-and-comment rulemaking and a reasoned explanation for the repeal.

The executive obviously has the power to order a top-to-bottom review of existing regulations, a power it has exercised recently. President Trump has generally [directed his agencies](#) to designate Regulatory Reform Officers, create Regulatory Reform Task Forces, and to identify existing regulations that eliminate jobs, inhibit job creation, are outdated, are unnecessary, are ineffective, or that impose costs that exceed benefits. In one executive order, he specifically directed Treasury to [review and identify tax regulations for repeal](#). In response, Treasury has proposed to eliminate [nearly 300 regulations](#). President Trump has also issued an executive order that requires the elimination of two existing regulations for the creation of every one—the so-called [1-in-2-out order](#). The United States is not unique in taking this approach: Canada has considerable [experience](#) with regulatory budgeting at both the provincial and national levels. The Canadian federal government recently established a one-for-one rule for regulations that works on a principle similar to the 1-in-2-out order.

In Kentucky, the governor has initiated his “[Red Tape Reduction](#)” project. This project is an effort to “review every regulation currently on the books.” The governor instructed each of his cabinet secretaries to undertake a review of the regulations under their agencies, but he also called on state employees and the public to help identify unnecessary or burdensome regulations. The website allows anyone to [report a regulation for review](#). Monthly legislative meetings of the Administrative Regulations Review Subcommittee are held to review regulations. The website claims that 372 regulations have been repealed so far, and 327 have been amended.

Other state governors have similar initiatives. In Missouri, it’s called “[No More Red Tape](#).” In Arizona, it’s “[Regulation Rollback](#).” In Nebraska, it’s “[Rolling Back Harmful Red Tape](#).” And in Illinois, it’s “[Cutting the Red Tape](#).”

The legislature also has the power to review existing regulations. For example, it could create a commission to perform this function. That commission could make recommendations to the executive, or the legislature could pass laws to repeal or modify identified regulations. Such laws would have to be signed by the executive. This proposal was made a few years ago on a bipartisan basis in Congress. The lawmakers proposed the creation of the [Regulatory Improvement](#)

⁷² Arizona SB 1437 § 41-1093.03 (B) (2017).

[Commission](#), which would have included nine members appointed by the President and Congress, tasked with submitting to Congress a list of regulatory changes for an up-or-down vote.

A less ambitious proposal would be to create a similar commission focused only on certain regulatory sectors. California’s Little Hoover Commission has [specifically recommended](#) that the state’s legislative committees be provided additional resources to review proposed and existing regulations.

In terms of reducing the regulatory thicket, the judiciary may not be the most immediate place to look for solutions. It is difficult to imagine court decisions that could reduce the regulatory thicket more than one regulation at a time. Anything more would require a fundamental change in how the courts view the administrative state—something along the lines of Justice Thomas’s opinion in [Department of Transportation v. Association of American Railroads](#), in which he questioned whether executive agencies should even be promulgating binding rules governing private conduct. Courts could also re-examine deference doctrines and standards of judicial review, which could have the indirect effect of curbing future regulations that would not be implemented if regulatory decision-making is subject to heightened scrutiny.

Though the actual culling of regulations must be done by the government, non-profit and for-profit organizations can make independent contributions to that effort. Even if the government does not have formal procedures or initiatives in place to review and reduce the regulatory thicket, private organizations could undertake that review and affirmatively put out for public debate proposed lists of regulations for repeal or modification.

iv. Creating a Regulatory Budget

In the standard approach to assessing the costs and benefits of proposed regulation, policymakers evaluate each proposal separately, implementing only those that have benefits exceeding their costs (Gayer, Litan, and Wallach [2017](#)). From this perspective, the only challenge at the state and local levels is to ensure that policymakers have adequate information at their disposal. However, that is not to say that this is a simple challenge to meet: many state and local governments do not currently have the personnel and resources to conduct cost-benefit analysis.⁷³

There are a few considerations that suggest adding a complementary component to this cost-benefit analysis: a regulatory budget. First, it may be helpful for accounting and research purposes to attempt to quantify the aggregate costs of regulation. Even if a budget is non-binding, this can focus regulatory discussions in a useful way. That is, even if a state or local government is not constrained to keep its aggregate regulatory costs below any particular limit, the necessity of quantifying and publishing the costs may guide the public discussion. Second, there may be interactions between regulations, such that their combined cost is different (and likely larger) than the sum of each taken separately. Third, policymakers and the public may care about the total burden of regulation as an

⁷³ Colorado’s Department of Regulatory Agencies is a useful model. It [reviews](#) existing regulations, as well as new proposals, subjecting them to cost-benefit analysis and providing recommendations to the Colorado state legislature.

objective in and of itself. For example, the public may prefer not to implement a regulation with benefits slightly exceeding costs if total regulatory costs are already very high.

Of course, the practical difficulties in putting together a regulatory budget are considerable. In some cases, little or no research exists to provide guidance about the costs of a particular regulation or component of a regulation. This is likely to be especially characteristic of state and local regulations that may not be high-profile enough to have received research attention, or that are idiosyncratic and therefore difficult to study. In addition, both benefits and costs of regulation are sometimes non-monetary (e.g., the burden of time and uncertainty incurred by an entrepreneur seeking a zoning variance), which compounds the difficulty of making comparisons with monetary factors. Finally, in summing up costs across regulations, the difficulties in estimation for any specific regulation could increase the error associated with estimation of aggregate costs.

Some policymakers have responded to these difficulties by taking a simpler approach. For example, some have elected to simply count pages in the regulatory code, or to count individual regulations. While certainly more straightforward, this approach would be much less useful than assessing the total *costs* of regulation. The length of a regulation's text is likely not a good proxy for the regulation's economic costs. Moreover, any given regulation could be consolidated with another to reduce the total count of regulations. Once a regulatory budget of this kind is put in place, agencies would have strong incentives to manipulate the structure of their regulatory code without making substantive improvements.

For this reason, we suggest formulating true regulatory budgets that assess economic costs. However, given the difficulty of doing so, we recommend approaching the exercise of creating a regulatory budget with due humility. Before state and local governments constrain themselves to act within such a budget, they should start by developing the expertise to formulate the budget and gauge its accuracy and usefulness. In doing so, it would be important to specify what sorts of criteria would be used for cost-benefit analysis, where the necessary data would be obtained, and how aggregate regulatory costs would be calculated. In addition, it would be important to consider what regulatory actions would be within-scope for this budget. A larger conceptual question is whether regulatory benefits would be systematically incorporated in the budget itself (as opposed to the cost-benefit analysis for each regulation separately). If the answer is “no”, would benefits be permitted to offset regulatory costs to which they are closely associated (Gayer, Litan, and Wallach [2017](#))?

In some states, departments of regulatory analysis already exist and would be natural homes for this work. In other states, legislators should consider creating standing committees that would have responsibility for this analysis.

An important part of a regulatory budgeting process is making optimal use of resources from outside the state, whether they be technical assistance or research support. To this end, state policymakers should direct staff to issue-specific regulatory clearinghouses like the U.S. Housing and Urban Development's resource for [regulatory barriers](#) affecting affordable housing and the Federal Trade Commission's for [occupational licensing barriers](#).

v. Creating a Regulatory Scorecard

Another way that private organizations might stimulate governments to review and address their regulatory thickets is to shine more light on the *combined* regulatory burden—in a way that specifically allows the regulators and the regulated to directly compare the overall regulatory load in various jurisdictions. As noted above, one of the reasons the regulatory thicket typically grows unchecked is that there are usually many independent contributors to the thicket, but no entity is wholly responsible for the entire thicket. That, combined with the inability to quantify the density of the thicket, leaves well-intentioned reformers at a loss.

While more and better information might not address these systemic problems, it could highlight the best and worst offenders in a way that would encourage reform. This might be done by creating something like a “regulatory scorecard,” where the regulatory burden in various jurisdictions could be compared in a more objective fashion (starting, perhaps, at the state level, or by comparing major cities). Similar scorecards have been used to compare states on any number of factors: [state fiscal conditions](#), [access to medical records](#), [healthcare certificate-of-need laws](#), and even [energy efficiency](#). One way to create a reasonably objective scorecard would be to pick a representative handful of occupations and businesses, and then compare the number and cost of licenses and regulations that would need to be obtained or complied with in order to start and run those businesses in each jurisdiction. A more sophisticated scorecard could also take into account efforts that states or local jurisdictions have made to assist the regulated in navigating their regulatory thicket.

Collecting and providing such information would benefit everyone involved with the regulatory thicket. It would obviously help the regulated community to be able to compare the relative advantage of operating in various jurisdictions. This would assist businesses in deciding where to locate or move; it would also assist them in petitioning their governments for regulatory relief by giving the regulated community something more concrete to show to government actors when complaining about the combined regulatory impact they face. It would also help regulators. Many of the piecemeal contributors to the regulatory thicket are understandably focused only on their particular regulatory requirements, which may not seem too onerous in isolation. Yet, when combined with all the other regulatory drag on businesses, one additional regulation may be the proverbial straw that breaks the camel’s back. A regulatory scorecard highlighting those locations with an especially heavy regulatory burden could encourage those regulators to be mindful, not only of the burden caused directly by their own specific regulation(s), but of the entire regulatory thicket.

VI. Conclusion

The regulatory thicket presents major challenges for small businesses—all too often discouraging entrepreneurs, stifling innovation, and causing other secondary consequences. When viewed on a granular level, there is usually a plausible public policy justification for most regulatory impositions; however, in totality, the regulatory thicket takes on a life of its own, such that the perceived societal benefits no longer justify the aggregate burdens.

Accordingly, we suggest that policymakers should try to think about regulation from the perspective of those who will bear responsibility for compliance—*i.e.*, someone trying to sort out various regulatory requirements while managing a small business. Policymakers should consider the cumulative impact of other regulatory impositions when contemplating the addition of new burdens. And with awareness of the totality of the regulatory thicket, legislators and regulators should operate with an eye to lighten regulatory burdens, to more carefully craft regulatory requirements, to make regulatory standards straightforward, and to operate with a presumption that new regulatory impositions must be justified by *compelling* public concerns.

Ultimately someone must tend to the regulatory garden, or else it will grow all the more unmanageable. For that matter, the thicket is already unwieldy. Accordingly, policymakers should approach this as a systemic problem in need of a systemic solution. We have outlined a handful of possible reforms. One way or another, policymakers should understand that the American Dream, the dream of going into business for oneself, is imperiled so long as the regulatory thicket continues to grow unabated.