



THREE ESSENTIAL PILLARS OF REGULATORY REFORM

THE INDISPENSABLE SEPARATION OF POWERS

The proper separation of government powers is foundational to American liberty and democracy, representing the genius of the founding generation. To better protect individual liberty, our federal and state constitutions divide government's most coercive powers by granting limited authority to each branch, together with other checks aimed at keeping each type of power separated. Under this plan, the legislature has the sole power to make our laws, the executive has the sole power to enforce laws, and judges have the final power to interpret laws when they decide cases and controversies in their courts.

However, that constitutional separation—the greatest achievement of American government upon which our flourishing depends—has been significantly undermined and sometimes grossly violated. The worst examples include when the legislature delegates sweeping lawmaking authority to regulatory agencies and others to write regulations with the force of law, and when judges improperly defer to the executive branch's interpretation of law—including the executive's interpretation of its own powers.

Fully restoring the constitutional separation of powers is critical to promoting liberty and protecting individuals from governmental overreach. State legislators should focus on three key pillars of regulatory reform to return each branch to its proper lane and prevent any one branch from straying from its constitutionally assigned task or gaining too much unchecked power.

I. MEANINGFUL LEGISLATIVE OVERSIGHT OVER REGULATORY AGENCIES

Regulatory agencies staffed by unelected bureaucrats write many more binding rules than the laws enacted by the legislature; such regulations often impose crippling civil or even criminal penalties on businesses and individuals. Instead of just filling in minor gaps in laws, some grants of rulemaking authority are alarmingly broad and amount to lawmaking. Without focused legislative oversight, regulatory agencies seriously undermine the legislature's core function and upset the balance of power between the branches. Personal liberty always suffers when government power is so concentrated.

A. Legislative Joint Committee on Administrative Rules

To restore accountability for agency rules, legislators need more effective oversight tools to ensure agencies stay within the permissive bounds of authority, and that agencies don't issue abusive rules that would never pass the legislative process. A legislative Joint Committee on Administrative Rules (JCAR) exists in many states to conduct systematic review of administrative rules. Almost any JCAR is better than none, but some JCARs have more practical and powerful tools than others.

For oversight to be meaningful, legislators need actionable information and analysis throughout the year when agency rules are proposed and issued. A JCAR focused on regulatory review, and which meets year-round, can keep pace with the regulatory edicts imposed on citizens. Without a JCAR or similar committee, most rules will escape oversight entirely—or receive only cursory review long after they have gone into effect. Moreover, a JCAR ensures that legislators, who are more sensitive to the concerns and liberties of

their constituents, have meaningful input in the regulatory process and can evaluate matters that agency regulators may have discounted or not considered at all.

B. Targeted legislative review of major rules

A few state legislatures must approve all, or almost all, rules before they go into effect. That is an excellent way to satisfy the separation of powers ideal. Yet there is a concern that such a practice in other states could lead to mass rubberstamping of rules or other harms, if vital rules are not affirmed. Even so, there are ways to approximate the legislative ideal. Targeted legislative review requires or significantly aids the legislature to vote on every “major rule” (a threshold defined by the legislature) proposed by administrative agencies before they take effect. That’s especially effective when the legislature earmarks a small portion of the regulatory agency’s budget to fund an independent economic and regulatory analysis staff in the legislature. By focusing on major rules, the legislature’s professional staff and legislative members can ensure the people’s elected representatives have the final say over the most significant rules that impact the daily affairs of individuals and businesses. In short, targeted legislative review ensures the legislature retains its core lawmaking power while agencies are left to fill in smaller regulatory gaps.

C. Sunset review

Sunset review of rules (which is similar to sunset review of laws) requires the legislature to review agency rules on a periodic basis and determine if they should be retained, reformed, or repealed. Excessive rules clutter the regulatory code, imposing needless costs and uncertainty on personal and business activities. When too many rules build up over time without being repealed, economic growth slows down, fewer businesses open, and wealth inequality is increased as excessive rulemaking disproportionately burdens low-income households. Sunset review ensures that burdensome and ineffective rules are eliminated and not left to needlessly clutter the regulatory code.

II. EXECUTIVE ACCOUNTABILITY: ACCOUNTABILITY IN RULEMAKING ACT

Rules that have the force of law should be signed by the governor just like any other law. Far too often, however, state rules are signed by unelected bureaucrats who are not democratically accountable to anyone. American democracy requires lawmakers to be directly accountable to the people. When unelected bureaucrats make rules, they need not consider everyone’s best interests or concerns, because citizens have no way of removing them from office. Rulemaking by unaccountable bureaucrats also enables higher-level executives, including those who are democratically elected, to avoid accountability for these rules. Even when a governor appoints the agency heads, it’s much more difficult to claim he or she did not know a much-criticized rule was issued if the governor is required to approve the rule before it takes effect.

III. JUDICIAL INTEGRITY: JUDICIAL DEFERENCE REFORM ACT

Despite judges’ constitutionally assigned duty to interpret the law independently and without bias—many judges regularly violate that duty. In many states, the judiciary has abdicated its obligation of fairness by deferring instead to regulatory agencies’ interpretation of a statute, regulation, or guidance document. This happens even when an agency’s interpretation conflicts with a court precedent or with a prior interpretation by that same agency. As then-Judge (now Justice) Neil Gorsuch explained, deference allows an agency to “reverse its current view 180 degrees anytime based merely on the shift of political winds and still prevail [in court].” To ensure the judiciary understands and does not shirk its duty, the legislature should require judges to interpret statutes, regulations, and other documents without giving any deference to an agency’s legal interpretation. If the text is still unclear, even after the judge exhausts all customary interpretive tools, the judge should default to a reasonable interpretation which limits agency power and maximizes individual liberty. The tie should go to the citizen, not the government.