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spotlight

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Take the REINS

How to return law-making authority to elected, accountable legislators

KEY FACTS: **• North Carolina has over 22,500 permanent administrative rules. The rule-making power of executive branch state agencies is delegated by the General Assembly.**

• Rules carry the full force of law but are not passed by a body of elected, accountable legislators. The delegated power should therefore be limited to allow agencies to deal with the nuts and bolts of their areas.

• State agencies headed by unelected bureaucrats not directly accountable to the people are not, however, the proper vehicles for deciding and dictating *major* matters of state policy.

• North Carolina's rulemaking system is heavily biased in favor of expanding regulations, including major regulations. A 2010 study found that only about one-tenth of one percent of proposed regulations are ultimately blocked.

• A bill before Congress would address this same problem at the federal level. The Regulations from the Executive In Need of Scrutiny (REINS) Act would require Congress to approve any proposed rule that would have significant economic impact. A joint resolution approving the rule would have to pass both chambers and be signed by the president for the rule to proceed; if no vote took place within 70 session days, the regulation would not take effect.

• The idea behind REINS originated from an October 1983 lecture by then federal appellate judge Stephen Breyer, later appointed to the Supreme Court by President Bill Clinton.

• The General Assembly should adopt the REINS principles for North Carolina, thereby properly returning major legislative authority to elected, accountable representatives of the people.

• Current N.C. law uses the deliberative power of the legislature to dissuade *blocking* new regulations. The REINS approach would use that process to allow deeply impactful regulations to proceed only if they can obtain majority support from elected and accountable representatives of the people.

Note: Portions of this report are from the chapter "The Next Steps on Regulatory Reform" in the book *First in Freedom: Transforming Ideas Into Consequences for North Carolina*, Raleigh: John Locke Foundation, 2013, pp. 143–171, *johnlockestore.com/First-In-Freedom-03.htm*.

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Right now North Carolina has over 22,500 permanent administrative rules.[1] Over the past 20 years state officials have been adding an average 2,360 new pages to the *North Carolina Register* every year, indicating an aggressive regulatory climate. Overregulation is imposing significant costs on the economy, making it more expensive to do business (especially for small businesses), harming the state's competitiveness, and stifling innovation and job creation. In recent years, the General Assembly has taken action against the regulatory beast, passing the Regulatory Reform Acts of 2011 and 2012.[2]

Legislative power in the hands of the executive

These rules come not from the legislative branch, but from the executive branch. The rule-making power of state agencies is, however, a legislative power delegated by the General Assembly to the executive branch to carry out enacted legislation, court rulings, and federal laws. Unlike the legislature, agencies are run by appointed (not elected) bureaucrats who are not directly accountable to the people. Minor rules that help the agencies function within their intended scope are no cause for alarm, but what about major ones? They are essentially acts of legislation, and they carry the full force of law, but they are not passed by a body of elected, accountable legislators.

This is a significant concern for a representative democracy. As John Locke put it in his *Second Treatise of Civil Government*:

> The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others.[3]

It was one of the chief concerns behind the founding of the American republic. One of the grievances listed in the Declaration of Independence was that King George III "has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to *their Acts of pretended Legislation*" (emphasis added).[4]

Enter the REINS Act

How could the North Carolina General Assembly address this problem? They could draw inspiration from federal legislation addressing the same problem at the national level. In 2011 the United States Congress debated H.R. 10, the Regulations from the Executive In Need of Scrutiny Act of 2011 (REINS), which would require Congress to approve any proposed rule that would have a major impact on the economy, cause significant cost or price increases on consumers, or bring about significant harm against competition, employment, productivity, and other healthy economic activities. A joint resolution approving the regulation would have to pass both chambers and be signed by the president for the rule to proceed. Also, if no vote on the regulation took place within 70 session days, the regulation would not take effect. The REINS Act passed the House, 241-184, but languished in the Senate.[5]

A REINS Act of 2013 is currently before Congress.[6] The General Assembly could use it as the basis of a regulatory reform bill here, making appropriate changes to apply to North Carolina's regulatory environment.

The idea behind REINS is not new. It was proposed in October 1983 in a lecture at Georgetown University Law Center by Stephen Breyer, then a federal appellate judge, later appointed to the Supreme Court by President Bill Clinton. Breyer offered a qualified analysis "suggesting that Congress condition the exercise of a delegated legislative power on the enactment of a confirmatory statute, passed by both houses and signed by the President. It would be perfectly in keeping with the Constitution's language, Mr. Breyer noted, while simulating the function of the traditional legislative veto."[7]

REINS' distinction between major and nonmajor rules is important. It would unnecessarily hamstring efficient government to require legislative approval of small matters that are properly within the scope of the executive branch.

The North Carolina Supreme Court has recognized the propriety of the General Assembly delegating "a limited portion of its legislative powers" to agencies tasked to deal with intricacies the legislature could not effectively handle directly.[8]

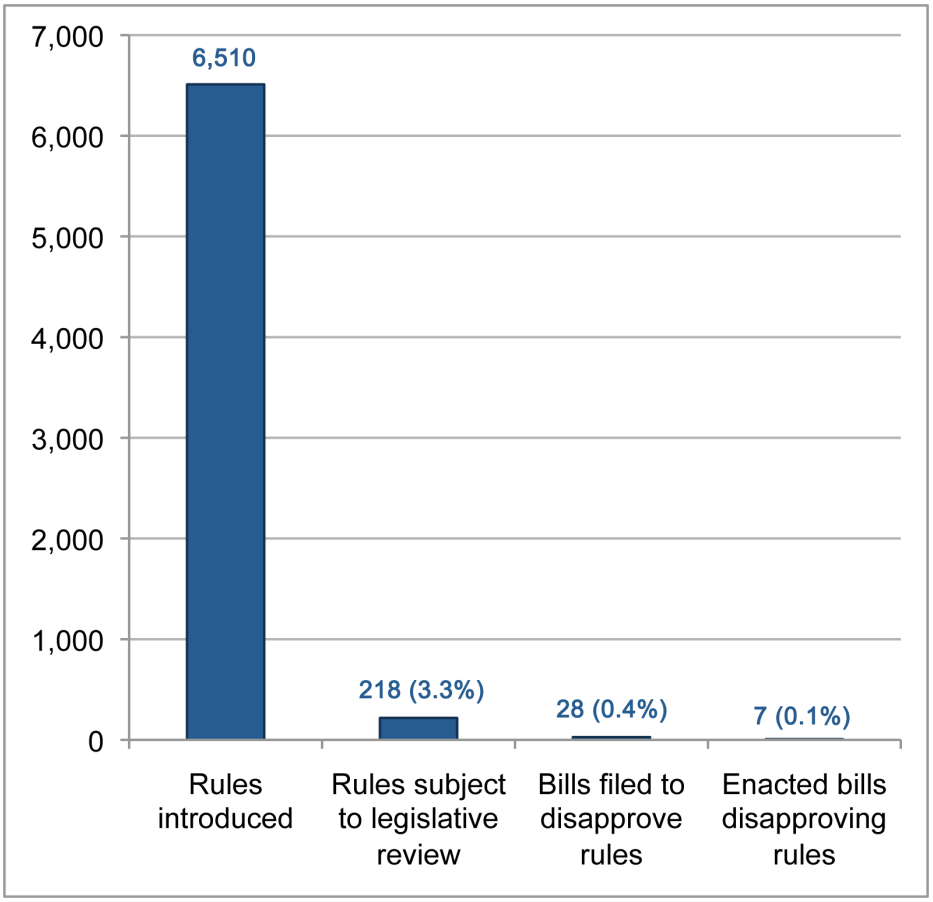
State agencies are not, however, the proper vehicles for deciding and dictating major matters of policy. That same N.C. Supreme Court decision noted that "such transfers of power [delegation] should be closely monitored to insure that the decision-making by the agency is not arbitrary and unreasoned and that *the agency is not asked to make important policy choices which might just as easily be made by elected representatives in the legislature*" (emphasis added).[9]

A heavy bias in favor of expanding regulations

At present, the regulatory system in North Carolina is heavily biased in favor of expanding regulations, including major regulations (e.g., the Regulatory Reform Act of 2011[10] defined a rule as having "substantial economic impact" if it had "an aggregate financial impact on all persons affected" of at least $500,000). In a nutshell, if the proposed rule passes muster with the Rules Review Commission (RRC),[11] then it takes 10 public objections to delay the rule, during which time the General Assembly can — but is not obligated to — produce a bill blocking it. Should a bill come forth, it still has to pass both houses and be signed by the governor in order for the rule ultimately to be blocked.

All those hurdles, which include the deliberative process of the legislative branch, make it extraordinarily difficult to block a proposed rule. A 2010 study of this process by the John Locke Foundation showed just how rare it is for a regulation to be blocked (see the graph). Of the 6,510 permanent rules introduced between fiscal years 2004-05 and 2008-09, only 218 (about 3 percent) were subject to legislative review, and only 28 bills were introduced in the legislature to disapprove them (i.e., about seven out of every eight rules subject to legislative review have their objections ignored and are allowed to go into effect). Just seven of those bills passed. In other words, *only about one-tenth of one percent of regulations was ultimately blocked*.[13]

Rules subject to legislative review and rules disapproved, 2004–09[12]



That study also showed how the RRC's authority to review a regulation to determine if it is "within the authority delegated to the agency by the General Assembly" is practically limited. Agencies have challenged unfavorable rulings by the RRC over statutory authority and won. Courts have favored expansionist readings of statutes, and conversely, the legislature has often produced broad statutory language open to interpretation. Agencies will naturally seek the broadest expansions of their own power.[14]

In other words, current N.C. law uses the deliberative process of legislature to

dissuade *blocking* new regulations. The REINS approach would use that process to *allow* only those deeply impactful regulations that can obtain majority support from elected and accountable representatives of the people.

REINS in NC: What it would do and why

The purpose of the federal REINS Act is instructive for North Carolina's leaders:

> The purpose of this Act is to increase accountability for and transparency in the federal regulatory process. Section 1 of article I of the United States Constitution grants all legislative powers to Congress. Over time, Congress has excessively delegated its constitutional charge while failing to conduct appropriate oversight and retain accountability for the content of the laws it passes. By requiring a vote in Congress, the REINS Act will result in more carefully drafted and detailed legislation, an improved regulatory process, and a legislative branch that is truly accountable to the American people for the laws imposed upon them.[15]

Taking the REINS Act and making its principles applicable to North Carolina would yield legislation that would do the following (see Table 1 for a breakdown of several features of REINS and why they are important):[16]

- Define a "major rule" according to its projected (by the Office of State Management and Budget directly, or indirectly upon approving the agency's fiscal note for the rule) negative annual economic impact, imposition of significant cost and price increases on consumers, or other nontrivial negative economic impacts, such as those on market competition, employment, productivity, investment, and technological or other innovations (RRA 2011 defined a rule as having "substantial economic impact" if it had "an aggregate financial impact on all persons affected" of at least $500,000; the REINS Act, surveying a national economic impact, counted as "major" any rule with an adverse economic impact of $100 million or more)
- Require the General Assembly to consider a vote to approve any major rule proposed by a state agency
- Mandate that without a vote of approval from both chambers of the legislature and the governor's signature within a set period of time (e.g., 70 days), the proposed major rule would die
- Stipulate that the vote in the General Assembly is not a vote to enact the major rule as state law but instead is a grant of legislative authority to the agency to proceed with the proposed major rule under the regulatory process

Conclusion

A REINS approach to regulation in North Carolina would restore ultimate authority over state regulations back to the people of North Carolina by returning to the General Assembly major law-making power that legislators either should not have or unintentionally handed over to state agencies. It would put an end to "acts of pretend legislation" and the lax regulatory climate that invites them.

It would furthermore offer two other improvements in future state regulations. Legislators, knowing they would face votes over proposed regulations and could no longer rely on unelected bureaucrats to make major policy decisions, would have new incentives to write clearer, more narrowly focused bills. The bureaucrats, knowing they would face defeat by legislative action or inaction if they overstepped their bounds, would have new incentives to write better, more circumspect rules clearly within their statutory authority.

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Table 1 -- Features of a REINS Act for NC: What They Are and Why They Matter

Feature	Why it's needed
Increase accountability in the regulatory process	• Regulations are rules established by state agencies and commissions to implement or interpret enacted legislation. They carry the full force of law. People can face fines and even jail for violating them. They are made by bureaucrats who are not directly accountable to voters. Their authority is delegated to them by the legislature. • Under current state law, it is very difficult to block a regulation once it's proposed. The risk is very high of bureaucrats exceeding their authority and crafting state law without the consent of the governed. Returning legislative oversight is paramount.
Increase transparency in the regulatory process	• The rulemaking process is overly closed to those affected by regulations. Members of the public could delay a pending regulation by filing at least 10 objections to a rule with the Rules Review Commission, during which time the General Assembly *could* (as opposed to *must*) produce legislation disapproving it, that must pass both houses and be signed or allowed by the governor. Only about one-tenth of one percent of rules is blocked in this way. • The current system uses the deliberative process of the legislature against itself, preventing the legislature from blocking new rules by the executive branch.
Require the General Assembly to approve or reject every proposed major rule (i.e., every rule with substantial economic impact)	• This would return law-making authority to the proper branch of government. A rule carrying the full force of law that would have a major effect should be deliberated upon by elected representatives accountable to the people. (RRA 2011 defined a rule having "substantial economic impact" if it had "an aggregate financial impact on all persons affected" of at least $500,000.)[17]
Limit the delegated authority of executive branch agencies	• The legislature delegates some of its authority to an executive branch agency for efficient governing. Agency officials presumably have subject-area expertise that legislators lack and should therefore be able to devise good rules that faithfully interpret the ratified legislation. The delegated power should be narrowly constricted, not effectively handing over legislating power to unaccountable bureaucrats. • Current constraints on agencies' rulemaking are insufficient. The Rules Review Commission (RRC), which is tasked with approving regulations before they become finalized, cannot evaluate the merits of a regulation; its general duties include ensuring the regulating agency properly followed procedures, had statutory authority, and produced a clear rule. Meanwhile, agencies have successfully challenged unfavorable rulings by the RRC, as courts have tended to allow broad interpretations of statutory authority. Legislation granting authority can be vague and inviting of agency overreach.
Uphold properly delegated authority by affecting only major rules (i.e., rules with substantial economic impact)	• Efficient governance would leave the nuts and bolts of interpreting and applying enacted legislation to the relevant agencies. Major policy changes are the province of elected legislators, however. • The state Supreme Court thought it proper for the General Assembly to delegate "a *limited* portion of its legislative powers" to agencies tasked to deal with intricacies the legislature could not effectively handle directly. The court noted, however, that "such transfers of power [delegation] should be closely monitored to insure that the decision-making by the agency is not arbitrary and unreasoned and that *the agency is not asked to make important policy choices which might just as easily be made by elected representatives in the legislature*" (emphasis added).[18]
Clarify that a General Assembly vote to approve a proposed major rule would be a grant of authority to the agency to complete the rulemaking process, not an enactment of that rule	• An approval resolution would properly be a grant of authority to the agency to proceed with the rule. It would not be interpreted as an act of law. The resolution granting authority would therefore not prevent public hearing and comment, RRC review of the procedures followed and the rule's clarity, nor judicial oversight should challenges be raised.
Require a joint resolution to approve a proposed major new rule to be held within a set time (e.g., 70 legislative days) or else the rule is automatically rejected	• A proposed major rule should be compelling enough to merit a majority vote of both state houses within a reasonable time frame allowing legislators to consider drafting such a resolution and deliberating over it. A major change that cannot even get a hearing, let alone find majority support among elected representatives, within a reasonable amount of time could not be something worth subjecting the state's citizens to. • This feature would also offer two welcome side effects. Legislators would have the added incentive to write clearer, more narrowly focused bills, knowing they would face votes over proposed regulations and could no longer rely on unelected bureaucrats to make major policy decisions. The bureaucrats would have greater incentives to write better, clearer, more circumspect rules clearly within their statutory authority, since they would face defeat by legislative action or inaction if they overstepped their bounds.[19]
Require the governor's active or passive approval of the joint resolution to approve a proposed major new rule, or else the rule is automatically rejected	• The rule would also have to be compellingly justified to another elected representative of the people, the chief executive — or barring that, to veto-proof majorities in both legislative chambers. No longer would a major policy change by unelected, unaccountable state officials be a near fait accompli. Instead, it would require positive action by elected, accountable representatives of the people in the legislative and executive branches to proceed.

End notes

1. Jon Sanders, "Good 'red tape' vs. regulatory rigmarole," Rights & Regulation Update, John Locke Foundation, February 14, 2013, *johnlocke.org/newsletters/research/2013-02-14-pvtuollc36nro70kgkabkhof80-regulation-update.html*.
2. See the discussion in "Part III: Lifting the Regulatory Burden" in Jon Sanders, "Carolina Cronyism: Introduction, Overview, and Reform," John Locke Foundation *Policy Report*, July 2012, pp.18–21, *johnlocke.org/research/show/policy%20reports/246*.
3. John Locke, "Of the Extent of the Legislative Power," *Second Treatise of Civil Government*, 1690, *constitution.org/jl/2ndtr11.htm*.
4. Declaration of Independence, July 4, 1776, *ushistory.org/declaration/document/index.htm*.
5. H.R. 10, "Regulations From the Executive in Need of Scrutiny Act of 2011," The Library of Congress, *thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.10:*.
6. S.R. 15, "Regulations From the Executive in Need of Scrutiny Act of 2013," U.S. Government Printing Office, *gpo.gov/fdsys/pkg/BILLS-113s15is/pdf/BILLS-113s15is.pdf*.
7. "The Congressional Accountability Act," *The Wall Street Journal*, January 14, 2011, *online.wsj.com/article/SB10001424052970203525404576049703586223080.htm*; also see Paul M. Barrett, "REINS Act: Hogtie the Executive Branch!", *Bloomberg Businessweek*, March 24, 2011, *businessweek.com/magazine/content/11_14/b4222010097754.htm*.
8. *Adams v. North Carolina Department of Natural and Economic Resources (N.C. DENR)*, 295 N.C.683 (1978).
9. *Adams v. NC DENR*.
10. S.L. 2011-398, (S.B. 781), *ncga.state.nc.us/Sessions/2011/Bills/Senate/HTML/S781v6.html*.
11. The RRC cannot judge the merits of the proposed rule. Its concerns are whether the rule is drafted properly, reasonably necessary, clear, and within the agency's statutory authority.
12. Daren Bakst, "Regulating the Regulators: Seven Reforms for Sensible Regulatory Policy in North Carolina," Figure 1, John Locke Foundation *Policy Report*, February 2010, *johnlocke.org/research/show/policy%20reports/207*. The figure charted permanent rules only and also noted that "Even when disapproving a rule, the legislature could make simple changes to it while keeping a significant part of it."
13. Bakst, "Regulating the Regulators."
14. Bakst, "Regulating the Regulators"; the quoted matter is from N.C. Gen. Stat. § 150B-21.9(a).
15. H.R. 10, Section 2.
16. Ron Arnold, "Reining in Regulation by Delegation: A Guide to the REINS Act," *National Policy Analysis* No. 623, National Center for Public Policy Research, May 2011, *nationalcenter.org/NPA623.html*.
17. S.L. 2011-398, (S.B. 781), *ncga.state.nc.us/Sessions/2011/Bills/Senate/HTML/S781v6.html*.
18. *Adams v. NC DENR*.
19. See, e.g., the discussion of REINS in Phil Kerpen, "The REINS Act ends unchecked bureaucratic power," The Hill's Congress Blog, December 2, 2011, *thehill.com/blogs/congress-blog/politics/196821-the-reins-act-ends-unchecked-bureaucratic-power*.