

Rationale and Features of a REINS ACT in North Carolina

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Red tape, regulation, and overregulation

“Almost all these studies conclude that **regulation has deleterious effects on economic activity.**”

— Economists John W. Dawson of Appalachian State University and John J. Seater of North Carolina State University survey of many new studies of the macroeconomic effects of regulation

“as the total level of regulation is marginally increased, **economic growth, prosperity, and the level of entrepreneurial activity marginally decrease.**”

—Economists Russell S. Sobel and John A. Dove survey of economic research literature

Red tape, regulation & overregulation cont.

- ❖ From 1997 to 2010, the least regulated industries had nearly twice the rate of growth in output per person (63 percent vs. 33 percent) and output per hour (64 percent vs. 34 percent) than the most regulated industries.
- ❖ The least regulated industries had a slight decline in unit labor costs, whereas the most regulated industries experienced a 20 percent increase in unit labor costs.

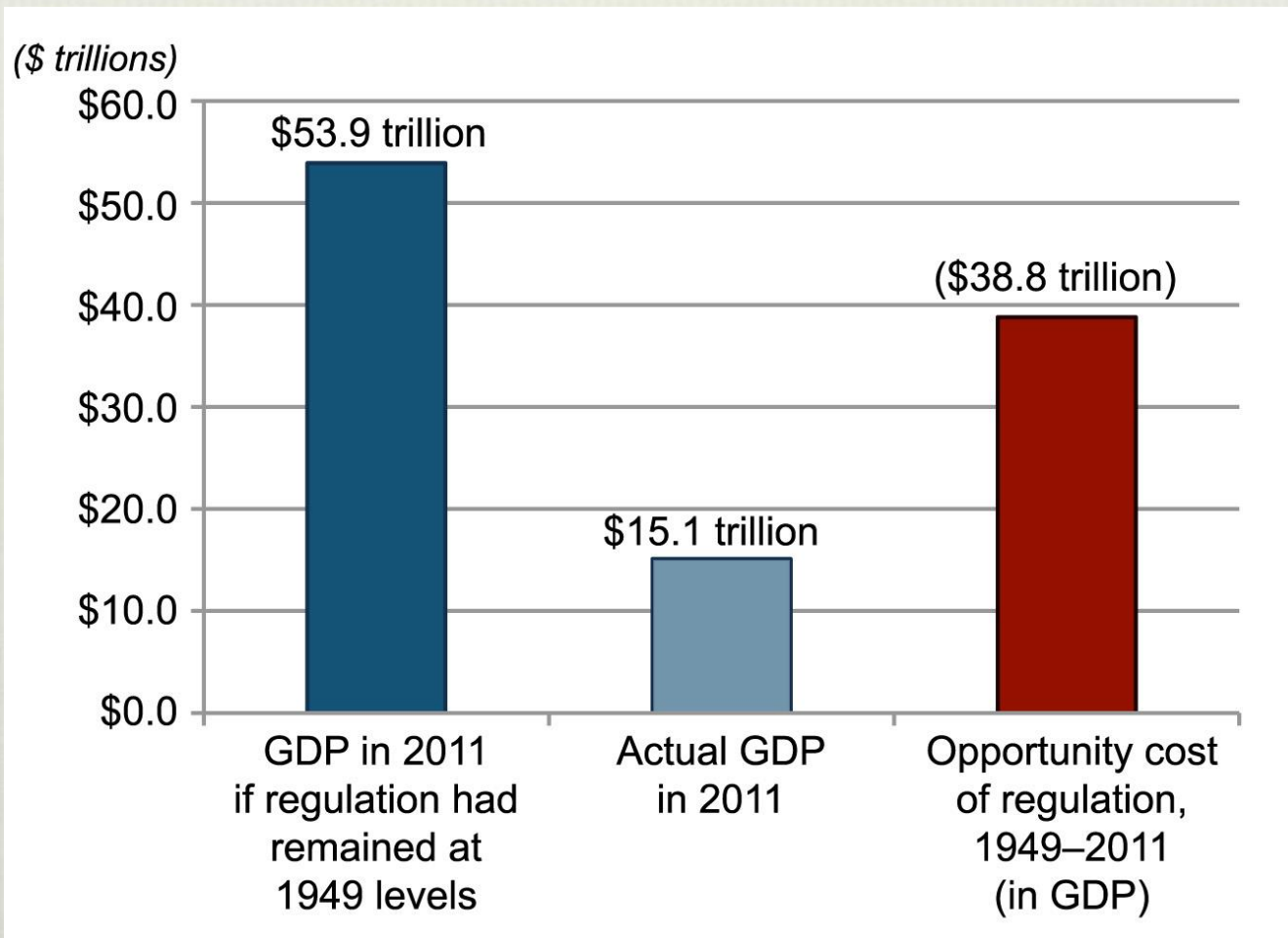
— Economist Antony Davies, "Regulation and Productivity," Mercatus Research

Red tape, regulation & overregulation cont.

- ❖ The negative effects economic of red tape have cumulative, long-term effects
- ❖ Dawson and Seater found that the U.S. economy is about *one-fourth the size it potentially could be* owing to regulatory burdens
 - “GDP at the end of 2011 would have been *\$53.9 trillion instead of \$15.1 trillion* if regulation had remained at its 1949 level.”
- ❖ That would be \$277,100 per household or \$129,300 per person
 - i.e., an additional \$277,100 per year to spend on caring for children, filling housing needs, saving for college, planning for retirement, investing, and giving to charities serving community needs.

Cumulative cost of federal rules, 1949–2011

Source: John W. Dawson and John J. Seater, "Federal Regulation and Aggregate Economic Growth," *Journal of Economic Growth*, Springer, vol. 18(2), June 2013



Red tape, regulation & overregulation cont.

- ❖ Federal regulation and intervention cost American consumers and businesses \$1.88 trillion in 2014 owing to lost economic productivity and higher prices.
- ❖ Agency officials issued 16 new regulations for every law dutifully enacted by Congress (in total, 3,554 new regulations vs. 224 new laws).

— Clyde Wayne Crews Jr., "Ten Thousand Commandments 2015: An Annual Snapshot of the Federal Regulatory State," Competitive Enterprise Institute

Who makes the rules?

Three branches of government: legislative branch makes the laws, executive branch executes and enforces the laws, and judicial branch upholds and interprets the laws.

Legislators are elected representatives of the people, elected by — and therefore directly accountable to — the voters they represent.

Rules carry the *full force of law* but are made by agencies and commissions (executive branch).

Their authority is *delegated by the legislature* to implement and interpret enacted legislation.

Who makes the rules? cont.

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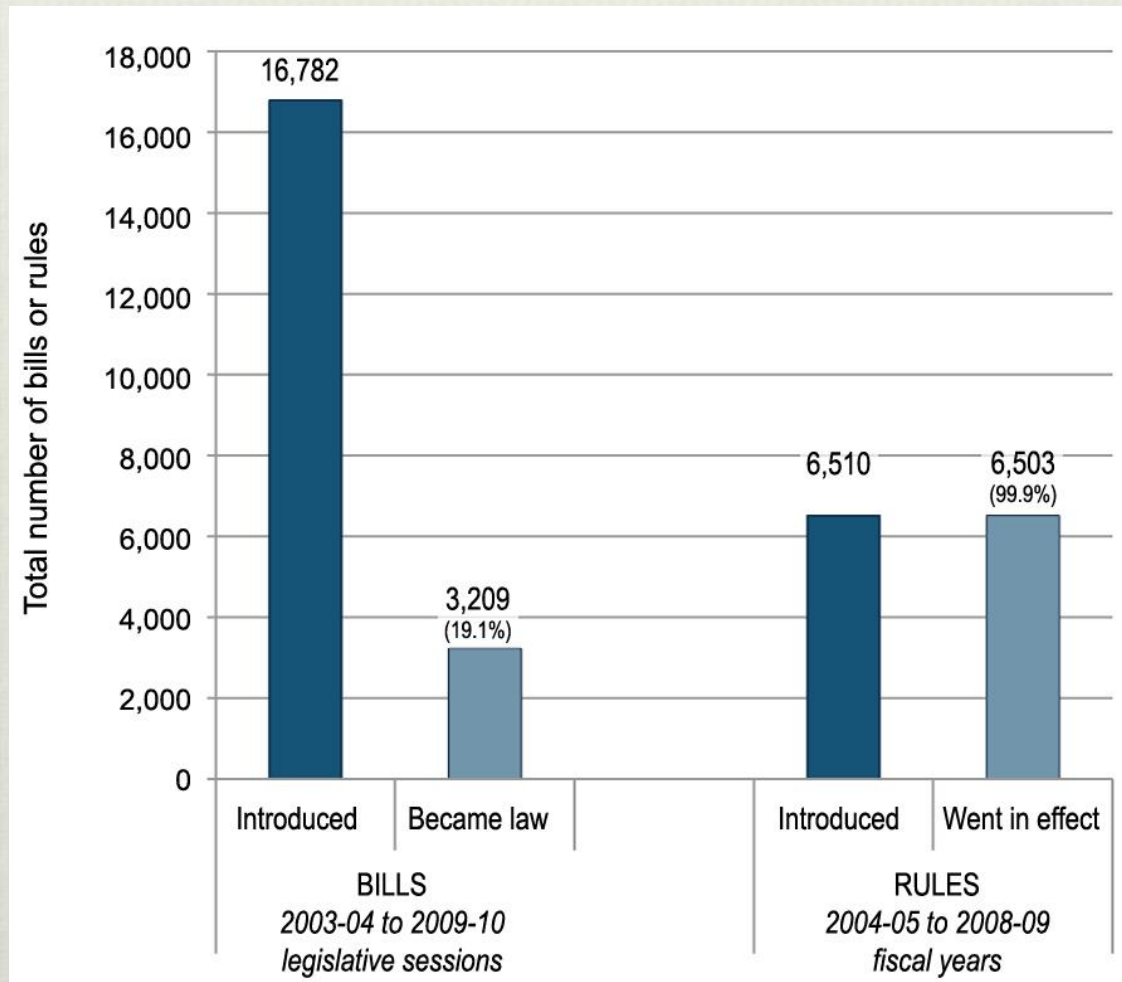
Doing so vests legislative power in bureaucrats who lack direct accountability to the people.

It works when the legislature provides overarching guidance while leaving the particular details to subject-matter experts in agencies.

It carries the great risk of state law being crafted without the consent of the governed — the greater the impact of the regulation, the greater this risk.

Red tape growth

Bills becoming law vs. rules going into effect in N.C.



Red tape growth a fait accompli?

Between fiscal years 2004-05 and 2008-09 there were 6,510 permanent rules introduced. Only 218 (about 3 percent) were subject to legislative review. Only 28 bills were introduced in the legislature to disapprove of those bills. Of those, only seven passed.

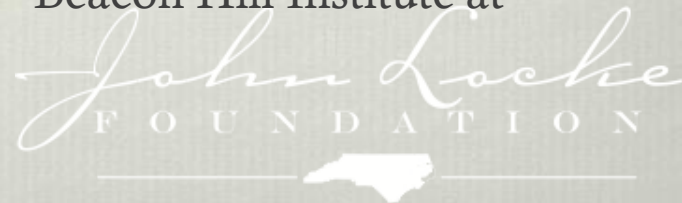
The takeaway was that only about one-tenth of one percent of proposed rules were ultimately blocked. About seven out of eight rules subject to legislative review are ignored and allowed to go into effect.

In a comparable time period, from the 2003-04 to 2009-10 sessions of the General Assembly (the state legislature), only 3,209 of the 16,782 bills introduced (including joint resolutions), or only about 19 percent, ultimately became law.

Red tape's costly burden in NC

- ❖ There are roughly 25,000 individual regulations in the 30 Titles of the North Carolina Administrative Code
- ❖ Over 10,000 rules impose burdens on the private sector (through fees, budget appropriations, and compliance costs)
- ❖ Starting-point (very low) estimation of state red tape's total cost burden in NC is **over \$3.1 billion annually**
- ❖ State regulations could cost the North Carolina economy **\$25.5 billion annually**

— Paul Bachman, Michael Head, and Frank Conte, "The Regulatory Burden in North Carolina: What Are the Costs?" Beacon Hill Institute at Suffolk University, July 2015



Red tape's costly burden in NC, cont.

Why such a large gap (from \$3.1 billion to \$25.5 billion)?

- ❖ Unable to establish cost impacts for most titles
- ❖ Unable to calculate opportunity cost to the private economy of resources going to regulatory compliance
- ❖ View is \$3.1 billion annually is but "*a fraction* of the total cost to the private sector of regulations in North Carolina"
- ❖ "The number of regulations in which we were not able to identify costs is many times more than the number of regulations for which we were able to identify costs"

A more deliberate process

Legislative process is far more deliberative.

Same deliberative process makes it difficult for the General Assembly to block proposed new regulations.

There is an unintended consequence of this deliberation concerning proposed major rules (i.e., rules that are deeply impactful on citizens, businesses, and the economy) — it undercuts lawmaking being the role of elected legislators.

Recent reforms have improved the regulatory climate in North Carolina

- ❖ forbidding state environmental agencies (but not the legislature) from imposing rules more stringent than federal environmental regulations
- ❖ offering guiding principles for new state rules
- ❖ requiring cost estimates for many kinds of rules
- ❖ requiring at least two alternatives be proposed alongside any proposed rule with "substantial economic impact" (i.e., a projected economic impact of greater than \$500,000)
- ❖ applying sunset provisions with periodic review to state regulations

Key: Sunset provision with periodic review

- ❖ Mercatus reviewed regulatory review processes used by all U.S. states
- ❖ Review found the presence of a sunset provision to be "robustly statistically significant" in reducing a state's total level of regulations
- ❖ Impact was "not only statistically but economically significant"
- ❖ Conclusion for effective regulatory reform: "The single most important policy in a state is the presence of a sunset provision."
—Russell S. Sobel and John A. Dove, "State Regulatory Review: A 50 State Analysis of Effectiveness," *Working Paper* No. 12-18, Mercatus Center, George Mason University, June 2012

The sun also rises

Now policymakers can focus on proposed *new* regulations instead of established ones

Sunrise provisions — laws affecting proposed new regulations, prior to adoption

A complement to sunset laws — help stop unnecessary regulations before they start

Chief among sunrise provisions would be a REINS Act

What is the REINS Act?

Federal legislation passed US House, currently before Senate

Acronym for “Regulations from the Executive In Need of Scrutiny”

Would require Congress to pass a joint resolution to approve any proposed rule that would have a *major* impact on the economy

- ❖ Rule would not be allowed to take effect without it
- ❖ Resolution must pass within 60 session days of report of rule
- ❖ Congress would *not* be obligated to draft, vote on an affirming resolution

Goals: more transparency, well-considered laws and rules, more accountability

The REINS Act's statutory purpose:

- ❖ 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.

Applies only to proposed "major rules"

The term "major rule" means any rule, including an interim final rule, that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in--

- ❖ "(A) an annual effect on the economy of \$100,000,000 or more;
- ❖ "B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- ❖ "C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets"

Constitutionality of REINS

Idea apparently started with October 1983 lecture at Georgetown University Law Center delivered 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." — Wall Street Journal, Jan. 14, 2011

"It would be perfectly in keeping with the Constitution's language, Mr. Breyer noted, while simulating the function of the traditional legislative veto." — Wall Street Journal, Jan. 14, 2011

Strong support in academic literature for its constitutionality



Features of a REINS Act for NC

Regulatory reform legislation based on REINS principles would have several features:

- 1. Stipulate that only proposed new rules projected to have "substantial economic impact" fall under REINS scrutiny**

North Carolina already has a statutory distinction of major rules.

General Statutes 150B-21.4(b1): "As used in this subsection, the term 'substantial economic impact' means an aggregate financial impact on all persons affected of at least one million dollars (\$1,000,000) in a 12-month period."

Features of a REINS Act for NC, cont.

2. **Allow — but not require — the General Assembly to consider a joint resolution to approve** any rule with substantial economic impact proposed by a state agency.
3. **Mandate that:**
 - without an affirming joint resolution** from the legislature and the governor's signature (or allowance)
 - within a **set period of time** (e.g., 60 days of publication in the North Carolina Register)
 - a proposed rule with substantial economic impact **would expire** (not take effect)

Features of a REINS Act for NC, cont.

4. **Clarify that a vote approving the joint resolution 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 rule with substantial economic impact under the rule adoption process
5. **Retain the existing procedure for the General Assembly to disapprove rules outside of REINS scrutiny** (for example, rules without substantial economic impact that draw 10 or more objections in the comment period)
 - ultimate authority should rest with the legislature
 - avoid an unintended consequence of a complete legislative deference to agencies and commissions with respect to rules of lesser impact

Why REINS should apply only to rules with substantial economic impact

REINS strikes a balance between

- ❖ preserving efficacious action by agencies to *execute the will* of the legislature
- ❖ preventing deleterious action by agencies that *usurp the position* of the legislature

REINS that required legislative approval of small matters would unnecessarily hamstring efficient governance

With REINS, the General Assembly would not be bound by actions of previous legislatures that gave away too much authority to an agency

What a well-crafted REINS Act would do

- ❖ Increase accountability for — and transparency in — the regulatory process
- ❖ Return improperly delegated legislative authority
- ❖ Bring about more carefully crafted rules (to withstand legislative scrutiny)
- ❖ Bring about more carefully crafted laws (to avoid agency confusion about how to execute the will of the legislature)

Expected outcome: a **slower, more deliberate, and less aggressive regulatory environment**, which the bulk of peer reviewed economic literature suggests would **encourage a greater rate of economic growth**.

Disambiguity: What REINS is *not*

Not the same as 1996 Congressional Review Act

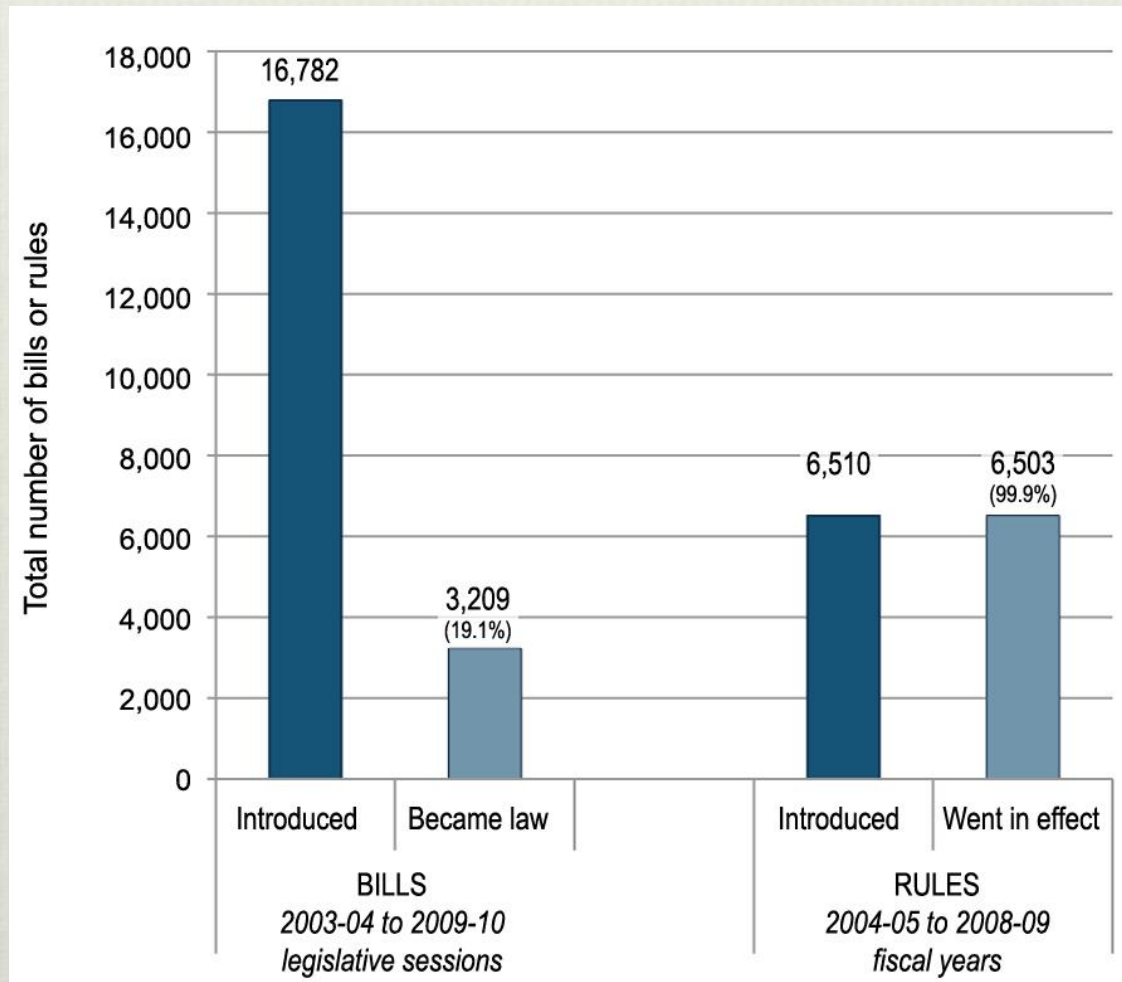
- ❖ CRA gave Congress a mechanism to act to overturn agency rules
- ❖ Congress must act on its own initiative, however
- ❖ Deliberative process of Congress works against that, even if rules seem controversial, unjustifiable, or excessive

Not a way to *cut* red tape

- ❖ REINS would slow the pace of adding new deeply impactful rules
- ❖ It would promote more carefully considered legislation, regulation
- ❖ It is a good-governance reform

Red tape revisited

Bills becoming law vs. rules going into effect in N.C.



Other sunrise reforms to consider

- ❖ **Red-Tape Reduction Act**
—also known as regulatory reciprocity, or trading in old rules in order to adopt new ones.
- ❖ **Small business flexibility analysis**
—compliance costs for small businesses (98 percent of employers in NC) are higher than for larger firms. North Carolina is one of six states lacking some form of small business regulatory flexibility statute.
- ❖ **Actionable cost/benefit analysis**
—include a rejection requirement for rules with projected costs greater than projected benefits. A decision to establish a law whose costs exceed its benefits should be up to the publicly accountable General Assembly.

Other sunrise reforms to consider, cont.

- ❖ **Full consideration of alternatives to regulation**
—agencies now must consider at least two alternatives and explain why they were rejected. The agency should also be required to consider *making no change* along with the alternatives to consider and quantify.
- ❖ **No-more-stringent laws**
—prohibit state agencies, but *not* the legislature, from imposing stricter rules in areas also covered by federal rules (already applied to environmental agencies).

Other sunrise reforms to consider, cont.

❖ **Stated objectives and outcome measures**

—for use to scrutinize rules under periodic review

—important to be able to test a rule according to its *foundational* purposes

—discard rule if it is marked with unintended, negative consequences

—also discard if it has unintended positive consequences for a “winner” group, creating a special interest in perpetuating an ineffective rule that only benefits them

One other reform to consider

❖ Default mens rea provision

- Loss of common-law tradition of mens rea to protect the unwitting lawbreaker, whereby the wrongful deed (*actus reus*) is not enough for conviction; it must accompany a guilty mind (*mens rea*)
- Regulations especially tend to lack explicit mens rea protection (strict liability)
- With default mens rea, silence over mens rea would no longer mean *lack* of mens rea; it would mean *presence* of it
- To enforce strict liability concerning a particular regulation or law, legislators or regulators would have to do so intentionally, directly, not indirectly

REINS features and goals, revisited

- ❖ Affects only proposed new major rules (i.e., rules of "substantial economic impact")
- ❖ Requires a joint resolution to affirm by the General Assembly, within a set time period
- ❖ Does *not* require General Assembly to act
- ❖ Prevents major rule from taking effect without affirming resolution

“... more carefully drafted and detailed legislation, an improved regulatory process, and a legislative branch that is truly accountable to the...people for the laws imposed upon them.”

*For more information, see my November 2015 report
“Reining In Regulation: Proposing a State REINS
Act to Address the Costly Regulatory Burden in
North Carolina,” available at JohnLocke.org or by
email (jsanders@johnlocke.org).*



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