

Economic Sense # 6

Who Makes our Laws?

SB 6396: Expiring New Agency Rules, Unless Extended by the Legislature

Welcome to the latest installment of "Economic Sense," a data-driven policy summary that examines economic issues facing our state.



Bottom Line: Up Front

In the past decade, agency rule-making has exploded and these rules have the force and effect of law. This raises concerns that significant public policy decisions are being made without the transparency, accountability and public input inherent in the Legislative process.

SB 6396 restores balance and accountability to lawmaking, requiring new agency rules to expire after one year unless extended by the Legislature.

“Are decisions of public policy being made by someone other than those who the people have chosen as their representatives?”

-- Cynthia Farina, Cornell University Law Professor

1. Constitutional Framework & the Troubling Expansion of Administrative Rulemaking

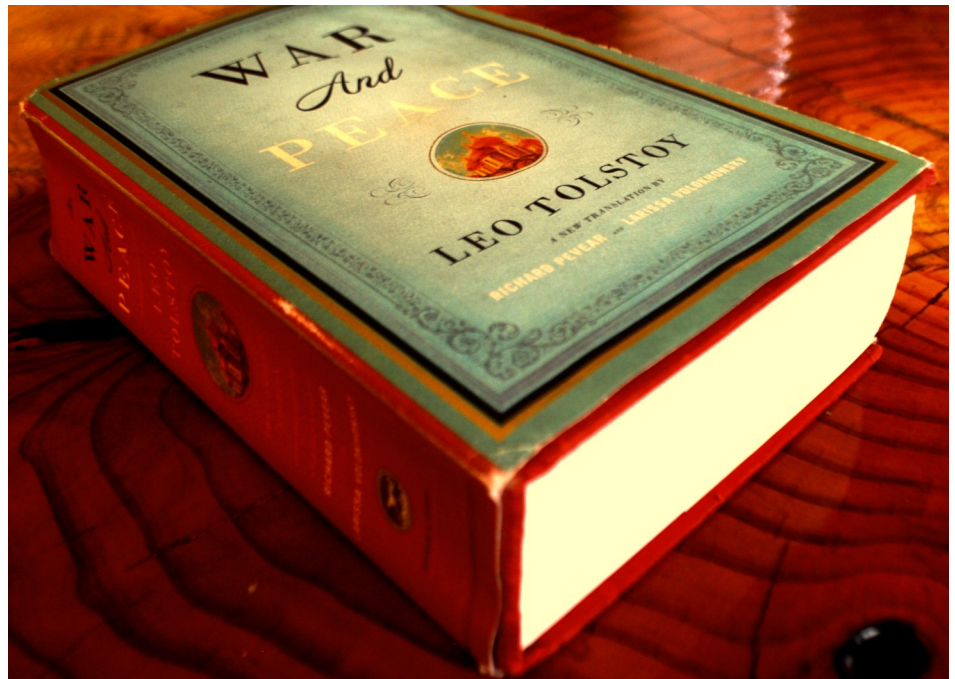
The separation of powers is one of the bedrocks of our republican form of government. As any 4th-grader can recite, the Legislature makes the laws, the Executive enforces the laws, and the Judiciary interprets the laws.

Over time, the Legislature has in certain circumstances delegated the power of lawmaking, via rules, to executive-branch agencies. To maintain the appropriate constitutional roles, the agency power is limited to the level the Legislature has expressly delegated. At least that's the way it is supposed to work.

Here are some statistics about just how much of lawmaking is now being conducted by executive-branch agencies, rather than the elected representatives of the people:

The Washington Administrative Code contains over 22,000 pages. To put this in perspective, those pages laid end to end stretches for nearly 4 miles, and over the last 10 years, state agencies added over 6,100 pages, a 38% increase, to the WAC.

The 6,100 pages of new WACs written by state agencies is more than the total combined pages of War & Peace, the Lord of the Rings series, Gone with the Wind, Crime and Punishment, and the New and Old Testaments of the Bible.



2. Why is this a Concern?

There are numerous concerns with the process, scope and effects of rulemaking:

a. Increasingly, Public Policy Decisions Are Being Made by Non-Elected Officials

The power to make laws is supposed to reside in the legislative branch, elected and accountable directly to the voters. That is not the case when bureaucrats make rules. And, make no mistake, rules have the force of law.

b. In the Original Framework, those who Enforce the Law are Not Supposed to Enact Laws

The framers of the constitution had a very specific design that created a separation of powers divided between the three coequal branches of government. Simply put, the framers feared consolidating too much power in any one branch. Famously, the framers believed that the most powerful branch must be the Legislature - yet over time, more and more of the lawmaking in our state has been ceded to, or accumulated by, state agencies. This runs counter to the original intent of how state government should work.

c. Rulemaking Lacks the Transparency and Public Input of Laws Passed by the Legislature

Rulemaking is far from a transparent process. While there are requirements for agencies to provide notices to the public on proposed rules, public input is rarely offered on rule changes and when offered it is often ignored. In contrast, bills proposed by the Legislature receive extensive public input and scrutiny.

d. Accountability is Lost

Ultimately, the vitality of the republican form of government depends on the elected representatives being directly accountable to the people they represent. In a system where state agencies increasingly create rules that have the force and effect of law, accountability to the citizens of Washington State is greatly diminished and democracy suffers.

e. Not a Partisan Issue

The concerns about rulemaking are not partisan. For example, the increasing scope of agency rulemaking in the areas of privacy at the federal level has drawn the ire and concern of organizations across the political spectrum. To be frank, while those in control of the executive branch, at the state or federal level, would prefer to have as much power as possible, office holders change over time. It should be a vested concern of all who favor a republican form of government that the power to make laws resides, as much as possible, with the branch charged precisely with those duties in our constitution and who are directly accountable to the citizens for the executing of those duties.

3. The Solution: SB 6396 (1-Year Expiration on New Rules, Absent Extension by Legislature)

The delegation of lawmaking to state agencies is exactly that: a delegation by the Legislature that can be reshaped, modified or even done away with.

Senate Bill 6396 is modeled on Colorado's approach to delegation: namely, any new rule adopted or amended expires after one year, unless the Legislature, by bill, acts to postpone the expiration. By acting to renew rules, a Legislature may renew them indefinitely, essentially giving permanent authority to the agency for that rule. Or it may approve them for a shorter period of time. If a rule is allowed to expire by the Legislature, then the agency may not subsequently enact that rule, unless given express statutory authority.

This is a measured approach, designed to restore the accountability for lawmaking to the citizens' elected representatives. It is measured in the following ways:

Only applies to new rules, not those already in place - At 22,000 pages, it would be simply unworkable and fraught with potential unintended consequences to expire the WACs already in place. However, it is reasonable to have a review of new rules adopted by agencies each year. It is this subset of new rules that would go before the Legislature to determine whether those rules should extend or simply let them expire.

Bill puts in place structure to help Legislature make informed decisions - The legislation requires agencies to submit the proposed rule to the Attorney General for opinion as to its legality before adoption. This process does not mean that the rule is void if the Attorney General finds it beyond the agency's authority; doing so would give too much power to that office over other executive-branch agencies. However, the opinions can be used to inform legislative action in the next legislative session.

Requires agencies to carefully consider authority for new rules - Right now, a significant number of rules are adopted by agencies that cite the general purpose of their agency, rather than a clear delegation of authority by the Legislature. The knowledge that the Legislature will be reviewing agency rules each year should give pause to agencies that cannot cite a specific, clearly delegated power for the rule.

SB 6396 provides an important first step toward regaining the balance and accountability that Washington's constitutional framers intended for making laws.