Written by **Bruce Walker** on September 8, 2011

Florida Governor Rick Scott Aims to Rein in Overregulation

Scott has tried to create an Office of Fiscal Accountability and Regulatory Reform, which would be required to sign off on all new rules, but the Florida Supreme Court has ruled that this would violate the state's constitution.

The Florida Supreme Court, however, cannot prevent the state legislature from asserting its power to stop proposed rules from going into effect. Governor Scott observed,

> Every rule costs money. Just the fact that you have to research to find out if you're in compliance. It's so complicated that people have to hire consultants to figure out how to comply. Every dime a company spends on regulations is a dime they add to what you care about as a purchaser of a product or service. You hear stories. Why do we have to do this? What's the benefit? The federal government already mandates it or the local governments should do this. Why does it take so long to get an answer and why is it so confusing?

In some cases, simple bureaucratic inertia seems to keep regulations on the books. Governor Scott, for example, has proposed the repeal of 295 different rules promulgated by the Florida Department of Environmental Protection. Eric Draper, executive director of the Florida Audubon Society, a group historically a strong advocate of environmentalism, has said that the repeal of those rules would not affect environmental protection in Florida.

Scott cannot force the legislature to act, but the response of some key lawmakers is encouraging. Representative Chris Donworth, Chair of the House Rulemaking and Regulation Subcommittee, has said that he looks favorably on taking rule-making from these agencies: "We're very desirous of seeing a comprehensive reduction of rules that negatively impact Florida's business climate."

Not only are Scott's action economically wise, they are constitutionally correct and protect the separation of powers designed into American governance for the benefit of the people. The Founding Fathers created a system of making laws that was fairly straightforward: All legislative (lawmaking) power at the federal level resided with Congress. The role of the President was to execute the laws, not

make them. The idea of an ocean of executive orders replacing, in many cases, actual federal statutes would have horrified the men who constructed our government. The notion that the Supreme Court could have the power to veto acts of Congress (with no power to override that veto) or simply create out of whole cloth "rights" not in the Constitution would have stunned the Founding Fathers.

The President and Supreme Court, though, are at least in the Constitution. (The Supreme Court, however, is granted only few constitutionals powers — the bulk of its powers have been granted by Congress, which can expand or limit judicial jurisdiction.) What are we to make of the myriad bodies such as the Federal Communications Commission, the National Labor Relations Board, the Federal Reserve System, the Interstate Commerce Commission — and so many more of these alphabet agencies?

Created by Congress with members appointed by the President, all these creations have dubious powers. As the Founding Fathers made clear, and as is true with every state government, power is intended to be separated into three distinct areas: Congress has the power to legislate; the President has the power (and the duty) to execute those laws passed by Congress; and the Supreme Court has the power to judge cases involving federal laws.

The independent federal regulatory agencies actually combine all three powers. The agencies make law (in the form of rule-making), and then they execute the laws (by their regulatory enforcement), and also judge the laws (by the hearing power to determine if a citizen or a business has violated its rules). In theory, there is a right to appeal these actions. Congress, certainly, may pass a statute which overturns any rule made by an alphabet agency. Federal courts may review and overturn administrative decisions made by the agency. The President by his power to appoint members may ultimately control the agency and the executive branch agencies directly under his control may largely thwart what independent agencies do.

But Congress may no more delegate away its constitutional law-making power to an extra-constitutional creature than it may grant the President the power to make laws. And just as the President may not grant Congress the power to run executive agencies, he may not grant that power to independent regulatory agencies. Federal courts, likewise, may not grant their right to try cases to some hybrid agencies not under their control (although courts may, and do, properly use such agents as special masters in particular cases, these are creatures of the court and part of the judiciary).

What is true at the federal level is true at the state level as well. The Constitution leaves the structure of government and the rights of citizens of states largely up to the sovereign states. It is not, however, entirely silent on the subject. Article IV insures that each state must have a “republican form of government.” This surely means an indirect, representative democratic government through political offices which have separated power and checks and balances.

State governments have separated executive power, in many cases, by the creation of elected secondary statewide offices. A number of states, for example, elect their State Attorney General and their Secretary of State. The prudence of this may be challenged — who really follows the activities of, say, a State Treasurer elected by the people or a state labor commissioner? But power does reside in the hands of these representative officials.

State governments, however, have proven just as receptive to the shell game of regulatory agencies with the power to make, execute, and judge the law. Florida is such a case. The Florida Division of Alcoholic Beverages and Tobacco has passed rules to penalize bars which allow dwarf-tossing (merely a

feat of strength). The Florida Department of Environmental Protection has rules which require state permits even though existing federal standards are stricter. Hence Scott's plan to eliminate many rules.

If a large and diverse state like Florida is able to pull off this reform, then the idea of restoring legislative powers to legislative bodies could well migrate to sister states.

Photo of Rick Scott: AP Images