



## The Expansion of National Power

by David Hogberg

In “Legislation and Adjudication in a Federal Republic,” Chapter Twelve of *FEDERALIST GOVERNMENT IN PRINCIPLE AND PRACTICE*, Dr. Don Racheter concludes that Federalism has been eroded in the United States. This is due to growth in centralized governmental power caused by changes in legislation and adjudication, and the attempt by elites to transform the Constitution into a “living document.”

Racheter begins his analysis with an examination of the original Framers of the Constitution. Racheter states “that the leading defenders of states’ rights...did not show up” at the Constitutional Convention of 1787. “Thus, all the proposing, debating, and voting was left to the supporters of a stronger national government.”<sup>1</sup> Most importantly, those in attendance at the Convention did not craft Article Three of the Constitution, which creates the Supreme Court, as carefully as they should have. As a result, the Court began expanding the power of the national government almost immediately, in cases like *Marbury vs. Madison* (1803) and *McCulloch vs. Maryland* (1819).

Despite the Court-precipitated expansion of national power, throughout most of the 19<sup>th</sup> century, the national government was fairly limited in scope. A key turning point occurred in 1913 with the passage of the 16<sup>th</sup> and 17<sup>th</sup> Amendments to the Constitution. The 16<sup>th</sup> Amendment created a national income tax, thereby increasing the fiscal power of the national government. The 17<sup>th</sup> Amendment provided for the direct election of U.S. Senators, instead of election by state legislatures. This put the Senate under the control of forces—political parties, the media, interest groups—more favorable to the increase of national power.

The New Deal and the Great Society accelerated the increase of national power. Most importantly, states began to vie for national funding for various projects like highway construction. “This system...opened the states up to national government blackmail to do things that the Constitution did not give the national government a warrant to do directly.”<sup>2</sup> Examples of such “blackmail” include 55 mph speed limits, and mandatory motorcycle helmet and seatbelt usage.

To scale back national power, Racheter proposes a “Federal Questions” Court. Such a Court would hear cases involving conflicts between state governments and the national government. The judges would be randomly selected from

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sitting State Supreme Court Chief Justices. The Chief Justice(s) of any state involved in a case would be precluded from serving on the court. This court might tilt the balance of power back to favor states in questions regarding state vs. national power.

However, Racheter is pessimistic about the chances that we can reassert the system of Federalism unless the public becomes informed on this issue and demands corrective action from our governmental leaders. Creating a Federal Questions Court would require an amendment to the Constitution, and amending the Constitution is a very difficult process. Further, any such proposal will be opposed by those forces that favor expanding the power of the national government. Racheter warns that if nothing is done, “the shift in power from the people, the local governments, and the states to the national government will not be reversed, but will continue, and perhaps accelerate.”<sup>3</sup>

#### ENDNOTES:

<sup>1</sup> Racheter, Donald P. “Legislation And Adjudication In A Federal Republic,” in *Federalist Government in Principle and Practice*, eds. Donald P. Racheter and Richard E. Wagner. Boston: Kluwer Academic Publishers, p.257.

<sup>2</sup> Ibid, p.261.

<sup>3</sup> Ibid, p.264-65.

*This Institute Brief is one in a series on the chapters of a just published book, FEDERALIST GOVERNMENT IN PRINCIPLE AND PRACTICE, edited by Dr. Don Racheter, President of Public Interest Institute, and Dr. Richard Wagner, Economics Professor at George Mason University and Chairman of the Institute’s Academic Advisory Board. FEDERALIST GOVERNMENT IN PRINCIPLE AND PRACTICE looks at the relationship between federalism and liberty and explores the substantive practice of federalism, particularly the centralizing processes at work and the opportunities for decentralization.*

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