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Symposium on Federalism and Constitutional Checks and Balances: A Safeguard of Minority and Individual Rights

Roger J. Miner '56

FEDERAL COURTS AT THE CROSSROADS

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The current bicentennial celebration, commemorating the framing of the United States Constitution, presents a special opportunity for judges and lawyers to become involved in educating their fellow citizens about our national charter and its implementation. The National Commission on the Bicentennial describes this important occasion as

> an historic opportunity for all Americans to learn about and recall the achievements of our Founders and the knowledge and experience that inspired them, the nature of the government they established, its origins, its character, and its ends, and the rights and privileges of citizenship, as well as its attendant responsibilities.[1]

I have written elsewhere of the "public obligations" of lawyers[2] and of the "communication responsibility" of judges.[3] It seems to me that the entire legal profession has a special obligation to inform the public about the operation of the federal courts created under article III of the Constitution. It is most important that it do so now because, after functioning for almost two centuries, the federal courts are at the crossroads. In this article, I share some of my thoughts about the problems that have brought us to the crossroads, the effects those problems are having on our federal judicial system, and the path we should follow for the future.

That there has been in recent years an expansion in the size of the federal judiciary and in the volume of the cases it handles is common knowledge. The extent of that expansion may not be so widely known.

The framers of the Constitution contemplated a limited number of courts having a very restricted jurisdiction. Hamilton foresaw, in *The Federalist* No. 81, "four or five, or half a dozen"

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1. COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, FIRST REPORT 6 (Sept. 17, 1985).

2. Miner, *A Judge's Advice to Today's Law Graduates*, N.Y. ST. B.J., Nov. 1985, at 6, 8.

3. Miner, *Victims and Witnesses: New Concerns in the Criminal Justice System*, 30 N.Y.L. SCH. L. REV. 757, 757 (1985).

federal districts.[4] Today, there are 94 federal districts with 575 district judges, and 13 federal circuits with 168 judges. Eighty-five of those judges, 61 in the district courts and 24 in the courts of appeal, hold seats first established by Congress in 1984.[5] But the creation of new judgeships has not kept pace with increasing caseloads, and already there are requests for yet more judgeships to be created.[6]

From 1964 to 1984, the caseloads in the United States District Courts grew by 202 percent.[7] Between 1952 and 1982, while the nation's population increased by 50 percent, appeals to the circuit courts grew by 808 percent![8] The growth continues. In 1985, more than 273,000 civil cases were filed in the nation's district courts, an increase of nearly 5 percent over 1984 and of almost 33 percent over 1982.[9] More than 39,000 criminal cases were filed in the district courts in 1985, 7 percent more than in 1984 and approximately 21 percent more than in 1982.[10] In 1985, more than 33,000 appeals were filed in the circuit courts nationwide, about 6 percent more than in 1984 and almost 44 percent more than in 1980.[11] In the Southern District of New York, civil case filings for 1985 exceeded those for 1984 by almost 6 percent, but the increase in criminal case filings for the same period was an astounding 51.5 percent.[12] In my circuit court, appeals filings increased from 2,153 in 1980 to 2,837 in 1985, continuing the trend.[13] These statistics starkly illustrate the litigation explosion that has brought the federal courts to the gridlocked crossroads of which I speak.

What are the causes of these massive caseloads? Where do the cases come from? It is a revealing statistic that more than 43 percent of all civil actions filed in the district courts for the twelve-month period ending June 30, 1985, are classified as statutory actions.[14] Included in this category of cases are state and federal prisoner petitions as well as civil rights, social security, labor law,

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4. THE FEDERALIST NO. 81, at 547 (A. Hamilton) (J. Cooke ed. 1961).

5. Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. §§ 44(a), 133 (Supp. III 1985).

6. *E.g.*, 1984 JUD. CONF. U. S. REP. PROC. 53.

7. Marvell, *Are Caseloads Really Increasing?—Yes . . .*, JUDGES' J., Summer 1986, at 35, 44 (Table 3).

8. *Id.* at 42 (Table 1).

9. 1985 ADMIN. OFF. U.S. CTS., PICTORIAL SUMMARY 2 [hereinafter PICTORIAL SUMMARY].

10. *Id.* at 3.

11. 1985 ADMIN. OFF. U.S. CTS., FED. CT. MGMT. STATS. 30 [hereinafter MGMT. STATS.].

12. S. FLANDERS, SECOND CIRCUIT REPORT 31 (1985).

13. *Id.* at 6 (Table 3).

14. PICTORIAL SUMMARY, *supra* note 9, at 9 (Chart 3).

antitrust, tax, and various other statutory claims.[15] While humorists may say that no person's life or property is safe while Congress is in session, federal judges do have cause for alarm every time Congress meets. During the closing days of the last session, for example, major legislative programs affecting taxes, immigration, and drug abuse were enacted into law. Each of the new statutes eventually will require interpretation and enforcement in federal court proceedings, giving rise to more cases in the geometric progression of our workload.

During 1985, more than 33,000 cases were filed in district courts by state and federal prisoners challenging their convictions under statutory provisions for habeas relief.[16] Filings under civil rights statutes rose to almost 20,000 cases nationwide in 1985.[17] Prisoners complaining of their conditions of confinement accounted for a great number of these cases as well. It is no secret that the great majority of prisoners' cases are without basis in law or fact. During my service as a district judge, I was confronted with a complaint by an inmate who claimed that he was deprived of his civil rights because he received a failing grade in some course he was taking in prison. I well remember the particular case, because the inmate referred to himself throughout his papers as "your despondent." I have the impression that these types of cases make many judges equally despondent. Many of the non-prisoner civil rights claims really are state tort claims for malicious prosecution and false arrest dressed up in constitutional finery. The lawyers make it clear that statutory provisions for fees to successful claimants[18] make federal court practice very attractive in these cases.

Many other types of statutory actions presently compete for attention in the article III courts. Social security cases, although subject to several tiers of administrative review, accounted for more than 19,000 filings in the district courts last year.[19] The civil RICO statute now permits ordinary fraud actions to be pursued in federal courts,[20] and filings in these cases are increasing daily. Employment discrimination, labor law, Securities Act, and tax suits of various kinds, all in ever greater numbers, arise under legislation enacted by Congress with little consideration given to the impact of that legislation on the courts.

Of all the legislative activity of Congress in recent years, it

15. *Id.*
16. MGMT. STATS., *supra* note 11, at 167 (pullout page).
17. *Id.*
18. *E.g.*, 42 U.S.C. § 1988 (1982).
19. MGMT. STATS., *supra* note 11, at 167 (pullout page).
20. 18 U.S.C. §§ 1962, 1964 (1982 & Supp. III 1985).

seems to me that our national legislature has outdone itself in defining new crimes. Ever since the Supreme Court decided that criminal jurisdiction could be founded on a congressional declaration that interstate commerce was affected by what essentially is a local crime,[21] the enthusiasm of Congress for enacting criminal laws has known no bounds. Here in New York City, federal prosecutors are using the federal courts to prosecute possession and sale of small amounts of drugs on the city streets. A thirty-dollar "buy and bust" case handled by city police officers recently found its way to our court.[22] These types of cases not only add great volume to the federal courts, they also contribute to the federalization of the criminal law.[23] The Comprehensive Crime Control Act of 1984 added a number of new federal crimes that could just as well be prosecuted in local courts by state and local authorities. Among these is theft of livestock.[24] The Act will have a special impact on the dockets of courts of appeals, because both prosecution and defense will be allowed to appeal the length of sentences when the new sentencing guidelines become effective.

At the beginning of the Republic there were grave concerns that the states would erect oppressive barriers to commerce, interfere with mercantile trade, and prefer their own businessmen to businessmen from other states. One fear was that the citizens of one state would not get a fair shake in the courts of another state. Out of this fear diversity of citizenship jurisdiction was born. Today, we are told, there is little concern about a fair shake for businessmen. Lawyers are frank in arguing the benefits of retaining diversity—choice of forum, liberal and uniform procedural rules, more knowledgeable judges and juries, and even, until Congress acted recently, cheaper filing fees. Whatever the reasons for its retention, the federal courts are awash in diversity cases, and our judges are busy trying to ascertain and apply the laws of fifty states. Last fall, for example, I served on a panel confronted with the problem of interpreting a confusing Connecticut statute, which previously had been addressed by only two state trial courts.[25] If that weren't bad enough, the presiding judge of our panel was constrained to recuse himself when he realized that he had been the Governor of Connecticut at the time the statute was enacted. In any event, there has

21. Perez v. United States, 402 U.S. 146 (1971).

22. United States v. Agilar, 779 F.2d 123 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1385 (1986).

23. *See generally* Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 1301 (1987).

24. 18 U.S.C. § 667 (Supp. III 1985).

25. Coffee v. Cutter Biological, 809 F.2d 191 (2d Cir. 1987).

been a tremendous increase in diversity filings in recent years, an increase that has made a significant impact on the workload of the federal courts.

There are, of course, other causes for the federal court litigation explosion—expansive judicial interpretations of various constitutional and statutory provisions, a great increase in the number of lawyers, free legal services for indigent criminal defendants, and sharp increases in administrative review proceedings. In some districts, the glut of criminal cases makes it almost impossible to schedule a civil case for trial, and the time necessary for disposition of civil cases is increasing everywhere. Judges are unable to devote the necessary time and attention to each case as the load increases, and there is an increasing use of magistrates and encouragement of alternate forms of dispute resolution in the district courts. More and more cases are being dismissed for minor violations of scheduling orders. An impatient judiciary increasingly is turning to the use of sanctions to deter parties and attorneys from perceived violations of rules designed to prohibit unreasonable, vexatious or ungrounded litigation.[26] Ironically enough, applications for the imposition of sanctions may give rise to yet more litigation.[27]

It seems to me that the courts are beginning to relax the standards for summary judgment, and I do not believe that this development is unrelated to the caseload crunch. *Anderson v. Liberty Lobby, Inc.*,[28] and *Celotex Corporation v. Catrett*,[29] decided by the Supreme Court at its last Term, appear to encourage this trend. Chief Judge Feinberg of my court, in an opinion issued last fall, referred to a study demonstrating a 79 percent affirmance rate on appeals to our court from orders granting summary judgment.[30] The Chief wrote of the hope that the study would dispel the "misperception," as he put it, that we are unsympathetic to motions for summary judgment.

The crushing caseload often is the cause of judges pushing harder for settlement than otherwise they might. I am not unaware that lawyers generally welcome some judicial intervention for settlement purposes and that most, though not all, judges are happy to participate in negotiations. Sometimes, however, push becomes shove, with unfortunate results for all concerned. I have even heard rumors that the attorneys who staff our civil appeals management

26. *E.g.*, 28 U.S.C. § 1927 (1982); FED. R. CIV. P. 11.
27. *See, e.g.*, Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986).
28. 106 S. Ct. 2505 (1986).
29. 106 S. Ct. 2548 (1986).
30. Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986) (Feinberg, C.J.).

program[31] are known to apply the "full court press" in an effort to settle appeals. I have no personal knowledge of such things, of course.

Even with the assistance of these CAMP attorneys, the pro se attorneys and the motion attorneys who serve our court, we have been unable to avoid cutting some corners because of the number of appeals. The Second Circuit still allows oral argument to anyone who asks. With twenty-seven or twenty-eight appeals per week, however, the average time allowed is fifteen minutes per side. I suggest that this is wholly inadequate in most cases, and many attorneys have expressed to me their justified frustration at the time limitations on argument. Fifty-three percent of our cases in 1985 were disposed of by summary order rather than by signed or per curiam decisions.[32] The summary orders are not published and cannot be cited,[33] much to the chagrin of the bar. I, too, find great difficulty with the use of summary orders, but the press of business leaves us no alternative.

There are but two options for those concerned about the future of the federal judiciary—continue on the present course, with the expectation of incremental caseload increases and with expansion of the judiciary continually lagging behind need; or divest and restructure some jurisdiction while refining procedural rules. As a proponent of the latter course, I offer the following ten suggestions:

1. *Increase the amount in controversy required for diversity jurisdiction.* I have come to accept the inevitable—that diversity never will be eliminated, no matter how much of an anachronism it becomes. But give us a break! The amount in controversy figure was fixed at $10,000 in 1958. A simple upward adjustment to account for inflation would help reduce the caseflow.

2. *Fix a statute of limitations for state habeas cases, say five years.* This would have the salutary effect of bringing the criminal litigation to a conclusion as well as cutting our caseloads. I think that five years should be enough for anyone to exhaust state remedies and to find any federal constitutional issues.

3. *Require state prisoners to exhaust state administrative remedies before asserting federal constitutional rights respecting their conditions of confinement.* A federal statute presently allows the court to stay such cases for up to ninety days to permit exhaustion

31. *See generally* Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L.J. 755 (1986).

32. S. FLANDERS, *supra* note 12, at 6.

33. *See* SECOND CIR. R. 0.23.

of administrative remedies meeting acceptable standards.[34] This statute should be strengthened to allow states the opportunity to address prisoner complaints in the first instance. I must admit that I was quite confused by the New York State Commissioner of Corrections, who was quoted in the *Wall Street Journal* as saying that, although he spent one-quarter of his time giving depositions in these cases, he thought that it was good to have court decisions promoting consistency in the prison system.[35] I always thought that that was *his* job! The same article quoted me as saying that inmate litigation is a "problem crying out for a drastic curtailment of jurisdiction in the federal courts."

4. *Cut back the criminal jurisdiction of the federal courts.* The ever-expanding federal criminal jurisdiction threatens to engulf our courts with matters best left to state tribunals. The interests of federalism, as well as prudential concerns, argue for restriction of federal criminal jurisdiction to matters of true national interest. A thorough congressional study should be undertaken, with a view toward eliminating a large number of federal crimes duplicative of state legislation dealing with the same subject matter. Consideration should be given to conferring upon state courts jurisdiction over some federal crimes. Certain federal criminal statutes given expansive interpretation because of imprecise language should be amended to provide more specific descriptions of the prohibited conduct.

5. *Award successful civil litigants all costs and attorneys' fees expended in the suit.* The American rule[36] should be abolished in the interest of simple fairness as well as to eliminate frivolous suits. I realize that recent attempts to put more bite into the modest fee-shifting provisions of Rule 68 have not been successful. However, I think that the public would approve this proposal overwhelmingly if it were put to a vote.

6. *Repeal civil RICO.* A compromise bill to restrict the application of the civil provisions of RICO failed in the last days of the 99th Congress.[37] As in most such situations, many interest groups had input, and nothing was accomplished. The Senate version of the bill was called the "Pattern of Illicit Activity Act," probably because it sounded better than "Racketeer Influenced and Corrupt Organizations Act." Why we need any general federal law relating to civil fraud is not clear to me.

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34. 42 U.S.C. § 1997e (1982).

35. Agins, *Jailhouse Lawyers: Doing Time Can Mean Having Time to Learn Legal Ins and Outs*, Wall St. J., Sept. 24, 1986, at 20, col. 2.

36. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

37. *See* Strasser, *RICO Changes are Blocked*, NAT'L L.J., Oct. 27, 1986, at 10, col. 3.

7. *Eliminate unnecessary appellate argument by prescreening appeals.* In spite of the Second Circuit tradition, I think it more important that selected cases have longer oral argument than that every case have some oral argument. Pro se litigants provide little or no assistance to the court through argument. When the proper disposition of a case is apparent from a glance at the briefs, there is no need for oral argument. The time is better spent with a case worthy of extended attention, and the overall result will be the faster movement of cases through the system.

8. *Require Congress to assess the impact on the federal courts of all new legislation.* The assessment should be appended to each bill as a condition of the act's passage, and should include projections of additional costs and personnel.

9. *Confer exclusive jurisdiction of Federal Employers Liability Act cases upon the state courts.* There is no reason why railroad employees should have a choice of federal or state courts for what essentially are local tort actions.

10. *Create an independent commission to study the judicial review of administrative agency decisions.* A number of questions should be formulated for the commission: What review functions should the courts perform? What should be the standard of review? Should there be different standards for different agencies? Is judicial review necessary in all cases? Is it necessary in social security cases to have review at both the district and circuit levels? Should review procedures within the agencies be strengthened? I suggest that the answer to these questions may result in legislation lessening the work of the federal courts in these areas.

Some of these proposals may appeal to you; some may not. In either case, I invite public discussion about the future of the federal courts, as we celebrate the 200th anniversary of the document that created them.

The Federalist Society

presents

A SYMPOSIUM

on

FEDERALISM AND CONSTITUTIONAL CHECKS AND BALANCES: A SAFEGUARD OF MINORITY AND INDIVIDUAL RIGHTS

NOVEMBER 15–16, 1986
AMERICAN BAR CENTER
AT NORTHWESTERN UNIVERSITY LAW SCHOOL
357 EAST CHICAGO AVENUE
CHICAGO, ILLINOIS

Saturday, November 15

REGISTRATION 8:45–9:15 a.m.

OPENING REMARKS 9:15–9:30 a.m.

Speaker: **Dean Robert W. Bennett**
Northwestern Law School

KEYNOTE ADDRESS 9:30–10:15 a.m.

Speaker: **Prof. Paul Bator**
University of Chicago Law School

SEPARATION OF POWERS & ADMINISTRATIVE AGENCIES 10:30–12:15 p.m.

Panelists: **Prof. Cass Sunstein**
University of Chicago Law School
Mr. Joseph Morris
Chief of Staff, USIA
Mr. Theodore Olson
Partner, Gibson, Dunn & Crutcher
Prof. Peter Strauss
Columbia University Law School

Moderator: **Judge Grover Rees III**
High Court of American Samoa

LUNCH 12:30–2:00 p.m.

PRINCIPLES OF FEDERALISM 2:00–3:45 p.m.

Panelists: **Prof. Lea Brilmayer**
Yale Law School
Prof. Harold Hyman
Rice University
Mr. William Kristol
Special Assistant to the Secretary,
Department of Education
Mr. R. Theodore Clarke
Partner, Seyfarth, Shaw, Fairweather & Geraldson

Moderator: **Judge Roger Miner**
U.S. Court of Appeals,
Second Circuit

THE 14TH AMENDMENT & INCORPORATION OF THE BILL OF RIGHTS 4:00–5:45 p.m.

Panelists: **Judge Abner Mikva**
U.S. Court of Appeals,
D.C. Circuit
Prof. Robert Cord
Northeastern University
Mr. Wayne Drinkwater
Partner, Lake, Tindall, Hunger & Thackston
Prof. Phillip Bobbitt
University of Texas Law School

Moderator: **Judge John Noonan**
U.S. Court of Appeals,
Ninth Circuit

BANQUET 6:30 p.m.

Speaker: **William Bradford Reynolds**
U.S. Assistant Attorney General

Sunday, November 16

FEDERAL POWERS TO PROTECT MINORITY RIGHTS 10:00–11:30 a.m.

Panelists: **Judge Nathaniel Jones**
U.S. Court of Appeals,
Sixth Circuit
Prof. Lino Graglia
University of Texas Law School
Prof. Edward Erler
California State University
Prof. David Goldberger
Ohio State University Law School

Moderator: **Prof. Jesse Choper**
University of California, Berkeley Law School

THE SUCCESS OF OUR CONSTITUTIONAL SCHEME OF SEPARATION OF POWERS 11:45–1:30 p.m.

Panelists: **Judge Griffin Bell**
Partner, King & Spaulding
Former U.S. Attorney General
Prof. Jeremy Rabkin
Cornell University
Prof. Thomas Pangle
University of Toronto
Prof. Stephen Carter
Yale Law School

Moderator: **Mr. John Bolton**
U.S. Assistant Attorney General,
Office of Legislative Affairs

Accommodations

Special hotel room rates for this symposium are available at the Barclay Chicago Hotel, 166 East Superior, Chicago, Illinois 60611, (312) 787-6000. The rate will be $85 per night. Reservations can be made by calling the Barclay. Reservations at this rate are first come first serve. For further hotel information please contact the Northwestern Federalist Society, 357 East Chicago Avenue, Chicago, IL 60611, (312) 274-0815, or the Federalist Society, 1625 Eye Street, Washington, D.C. 20006, (202) 822-8138.

Registration

Please fill out the enclosed registration form if you plan on attending. Admission is free. There will be a $25 fee for the banquet. Please indicate if you will be attending the banquet on the registration form.

The symposium is made possible by a grant from The National Endowment for the Humanities

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PRINCIPLES OF FEDERALISM
Panel Discussion
The Federalist Society
Chicago, Illinois
November 15, 1986

Introduction

In 1939, an English political philosopher, Professor Harold Laski, wrote an essay entitled "The Obsolescence of Federalism." In the essay, Professor Laski made this unequivocal statement: "[T]he federal form of government is unsuitable to the stage of economic and social growth that America has reached." According to Laski, America could not afford what he called "the luxury of federalism" at a time he defined as "the age of giant capitalism." This English theorist identified the following deficiencies of federalism: "It is insufficiently positive in character; it does not provide for sufficient rapidity of action; it inhibits the emergence of necessary standards of uniformity; it relies upon compacts and compromises which take insufficient account of the urgent category of time; it leaves the backward areas a restraint, at once parasitic and poisonous, on those which seek to move forward; not least, its psychological results, especially in an age of crisis, are depressing to a democracy that needs the drama of positive achievement to retain its faith. . . ."

In 1962, twenty-three years after the Laski essay, Nelson A. Rockefeller, then Governor of New York, delivered the Godkin Lectures at Harvard University. In his Lectures, entitled "The Future of Federalism," Rockefeller said that the course of events

had proven Laski's pronouncements wrong in all respects. Governor Rockefeller saw federalism as fostering dynamic expansion of a free economy, providing mechanisms for dealing with decentralized giant capitalism and allowing for decision-making at the "circumference," as he put it. According to Rockefeller, "federalism -- its ideas and its practice, has continued to show itself the adaptable and creative form of self-government that the Founding Fathers of this nation conceived it to be." His thesis was that federalism continued to be a vital force in America -- in economic, social and political terms.

On Sunday, November 9, 1986, twenty-four years after Rockefeller's lectures on federalism, the New York Times brought us news of a confidential report on federalism submitted to the Domestic Policy Council, a cabinet-level advisory body, by its Working Group on Federalism. The Working Group is chaired by an Assistant Attorney General, according to the newspaper dispatch, and is composed of various officials serving in the present administration. The Working Group report criticizes Congress for using the commerce power to "undermine the sovereign decision-making authority of the states," and it finds fault with the Supreme Court for acquiescing in improper expansions of federal power. The Report finds that the states' legitimate powers have been pre-empted and invalidated, and concludes with a number of recommendations designed to restore the perceived rightful place of the states in the federal system.

With this background in mind, we turn to our discussions of the principles and issues of federalism. Is federalism alive and well, dead and gone, or somewhere in between? Is there a place for federalism in modern society? Do present-day economic and political concerns outweigh any interest in maintaining a federal system of government? What are the advantages, if any, of maintaining fifty separate political structures? Finally, if federalism is worth preserving, who or what is responsible for preserving it?

Professor Harold Hyman has prepared an excellent paper, that he will summarize, to foster our discussions. He speaks to us from an historian's perspective and takes to task social and political scientists (of the Laski ilk, I presume), who say that federalism is a fiction or a dead issue. Professor Hyman tells us that historians still consider federalism a vital aspect of constitutionalism, a fundamental value worthy of study and celebration. He also tells lawyers and judges to keep current with historical reinterpretations in order to better understand the principles of federalism. I know that you will enjoy hearing from him. Mr. _____ will comment on Professor Hyman's paper.

Professor Lea Brilmayer's paper provides a fascinating guide to what she calls "the other" federalism issue -- the arcane field of conflict of laws. A specialty area for certain legal scholars, a dreaded discipline for law students, and a confusing mélange for lawyers and judges, choice of law issues are

important to all who are concerned about interstate relations. Professor Brilmayer convincingly argues that some disturbing premises underlie modern developments in conflict of laws jurisprudence. As a confused judge, I very much look forward to her presentation. Mr. _____ will comment on Professor Brilmayer's paper.

Benefits of Federalism for Today's Society

1. Experimentation -- states as laboratories -- reforms in education; no-fault insurance laws; regionalized banking; deregulation; free enterprise business zones; licensing of occupations; labor laws (unemployment insurance, workmens' compensation, manpower training, right to work); housing; welfare programs; criminal laws; rights not guaranteed by U.S. Constitution but by state constitutions.

2. Competition among states to attract people and business.

3. More responsive law-making by state legislatures -- inability of Congress to respond quickly with new legislation or to repeal old laws.

4. Public policy can be tailored to local circumstances -- e.g., 55 mph speed limit not reasonable for all places.

5. Dispersion of power is better than concentration of power for protection of liberties. Powell dissent in Garcia: The balance of power between the states and the federal government is "designed to protect our fundamental liberties."

Panel on "Principles of Federalism"

Summary of Discussion

The Moderator began the panel discussion by reviewing an essay entitled "The Obsolescence of Federalism," written by Prof. Harold Laski in 1939; a series of lectures called "The Future of Federalism," delivered by Nelson A. Rockefeller in 1962, refuting the Laski thesis; and a 1986 Report on Federalism, submitted to the Domestic Policy Council, criticizing Congress for using the commerce power to undermine state sovereignty and finding fault with the Supreme Court for acquiescing in improper expansions of federal power. The Moderator then challenged the panelists and the audience to discuss the principles of federalism in terms of their vitality, their relevance and value in modern society and the institutions and individuals responsible for their preservation.

The discussion focused on two papers summarized by their authors. Professor Harold Hyman presented "Federalism: Legal Fiction and Historical Artifact." Speaking from the historian's perspective and describing the historical context of the topic, Professor Hyman argued that federalism continues to be a vital aspect of constitutionalism and a fundamental value worthy of study and celebration. Contrasting the views of historians and lawyers with those of social and political scientists, who have condemned federalism to the status of a fiction or a dead issue,

Professor Hyman nonetheless took the legal profession to task for being "ahistorical," goal-oriented and unfamiliar with historical reinterpretations. Mr. R. Theodore Clarke, commenting on Professor Hyman's discussion, agreed that collaboration between lawyers and historians was essential to a better understanding of federalism, but accused historians of misconceiving the role of lawyers and of preferring federal to state government for historical study. Mr. Clarke discussed Supreme Court cases construing the tenth amendment, and referred to the advantages of experimentation by the states in dealing with some of the current issues facing government.

Professor Lea Brilmayer presented: "Interstate Federalism: Political Orphan?" Questions frequently arise in litigation about what state's laws should be applied. The area of law dealing with such issues is known as "conflict of laws" and implicates federal constitutional provisions such as full faith and credit and due process. Professor Brilmayer discussed what she perceives to be some disturbing developments in this field -- the quest for "better law" and "just results" without regard to the right not to be subject to state coercion. Reviewing the most recent cases in the area, she found a sensitivity to the needs of plaintiffs, a lack of sensitivity to the needs of defendants and preoccupation with the interests of the forum. Professor Brilmayer argued that interstate federalism, or conflict of laws, should be a bipartisan political issue because of its civil libertarian overtones and because it involves

protection of propertied interests from unwarranted government interference. Commenting on Professor Brilmayer's presentation, Mr. William Kristol focused on the effect of legal realism philosophy on interstate federalism. He noted that legal realism originally was thought to reduce the power of the judiciary, but that the reverse now is true and that constitutionalism in general has been undermined by this philosophy.

Several questions from the audience, relating to both the historical aspects and the current implications of federalism, elicited responses from the Moderator and members of the panel.

Notes on "Federalism: Legal Fiction and Historical Artifact?"

by: Professor Harold M. Hyman, Rice University

I. Many social and political scientists consider federalism either a fiction or a dead issue. However, it continues to be of concern to lawyers and historians. The latter consider it a vital aspect of constitutionalism, worthy of study and possessed of continuing significance.

II. Lawyers and judges are poor historians. Most law practitioners appear to be "ahistorical." Some judges and lawyers invented a history that never was, for goal-oriented purposes. Historians rarely did better by constitutional law. Cooperation is needed. Historians must keep the bench and bar current on historical reinterpretation as the search for improved knowledge about federalism continues.

III. Re: Meese-Brennan dispute -- We cannot know the "intentions" of the Framers. The sparse body of uncertainly reliable sources cannot be the basis for court decisions and public policy. There should be a middle ground -- the common sense of practical politicians, according to Bator. Kurland says that neither Brennan nor Meese provides a formula for resolving ambiguities. There must be articulable reasons, of which history

is one. Hyman says that there is a need for effective collaboration between lawyers and historians.

IV. State models of constitutional organization included a tripartite separation of powers long before the Framers came upon the scene. Intrastate federalism caused a drift toward rural towns and county seats. This was reflected in state constitutions. Federalism was not created at Philadelphia but woven from threads connecting state citizens to the states.

V. After Civil War, the new measure of national freedom was uniform intrastate justice.

VI. Author calls for lawyers and judges to cooperate with historians in providing access to research materials; is unconvinced that federalism depends on legal fiction; applauds de Tocqueville suggestion that limits and extent of American Federalism can be discerned only by [improved] understanding.

VII. Perhaps this meeting will aid that improved understanding by devising ways for lawyers and historians to join in non-goal-directed, unideological constitutional history and research.