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 Goldberg
  Ohio State University Law School
  Moderator: Prof. Jesse Choper
  University of California, Berkeley Law School
Chicago, Illinois
357 East Chicago Avenue
American Bar Center
November 15-16, 1986

Individual Rights
A Safehaven for Minority and
Checks and Balances:
Federalism and Constitutional

A Symposium
presented by
The Federalist Society

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

If you will be attending the banquet on the registration form:
Admission is free. Lunch will be a $25 fee for the banquet. Please indicate
whether you will be attending.

Registration

202-429-1123

(202) 424-0801

Secretary: 357 East Chicago Avenue, Chicago, IL 60611 (312) 424-0815;
for further information please contact the Northwestern Federalist
Bar Association, 1555 North State Parkway, Chicago, IL 60611.

Accommodations
Special hotel room rates for this Symposium are available at the

Office of Legal Services
U.S. Attorney General

Moderator: Mr. John M. Bolen

Prof. Stephen Carter
University of Toronto

Prof. Thomas Y. Lee
Georgia State University

Prof. Samued Rubin
Franklin & Marshall College

Partner, King & Spalding

The Success of Our Constitutional Scheme
II: 1:45-3:10 p.m.
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, workmen's 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 property 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.