
BOOK REVIEWS

Federalism: Political Identity and Tragic Compromise

BY MALCOLM M. FEELEY AND EDWARD RUBIN

*Reviewed by George D. Brown**

In *Federalism: Political Identity and Tragic Compromise*, Professor Malcolm Feeley and Dean Edward Rubin continue their assault on American federalism and its defenders. Readers of *Engage* will be familiar with many of the themes, which were set forth in the authors' widely cited earlier article in the *UCLA Law Review*: "Federalism: Some Notes on a National Neurosis." Their book—a slim (153 pages of text and 47 pages of footnotes), but formidable volume—updates their arguments, takes them a step further, and makes an important contribution to the literature of federalism.

The book is divided into two parts: the first develops a general theory of federalism, particularly its preconditions and its utility. The second part applies this theory to the United States. The authors define federalism as a governmental system "that grants federal autonomy to geographical subdivisions or subunits." The subunits must have a reserved domain and the power to assert their jurisdictional rights against the central government. Federalism should be distinguished from other organizational forms such as consociation, decentralization, and local democracy. The key variables within any nation that lead to adoption of a federal system are geography and sharp normative variations among the populations of the subunits.

The basic reason that nations adopt a federal system or maintain a federal regime that was adopted in a prior era... is to resolve conflicts among citizens that arise from the disjunction between their geographically based sense of political identity and the actual or potential geographical organization of their polity.

Federalism can be useful in expanding "the range of psychopolitical resources available for the creation of a political regime," but it is best viewed as "an alternative to dissolution, civil war, or other manifestations of a basic unwillingness of the people in some geographic area within the nation to live under the central government."

This is a core point. Feeley and Rubin see federalism as a sub-optimal compromise designed for only a few situations. They drive home the point by utilizing such adjectives as "tragic" and "grim" to describe federal solutions. For them, uniformity is good, and differences are bad, at least when it comes to a nation's ability to achieve the optimal result of a unified political identity. For the authors, wisdom resides at the center. Thus, real

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citizen participation could be more directly achieved through the national government's "hiring community organizers," and "funding local organizations."

These observations about participation are part of a key step in Feeley and Rubin's overall argument: federalism has no independent value as an organizing principle for nations, other than "grim" ones like avoiding civil war. Thus, they are compelled to knock down such staples of federalism justification as the values of interjurisdictional competition and the role of experimentation, most frequently evoked in Justice Brandeis' laboratory metaphor. For example, Feeley and Rubin's response to the latter justification is largely to deny that experimentation happens, and to insist that when it does happen the phenomenon could just as easily be the "happy incident" of managerial decentralization. Moreover, effective experimentation requires goal-setting by the central authority. "[C]entralization is necessary not only to initiate the experimental process but also to implement the results of that process in any reasonably effective fashion."

Fundamental to the authors' dismissal of experimentation as a value of federalism is the view that in a nation norms come from the center. "Normative variation" is to be avoided. The notion that quasi-independent polities acting through their own political processes might contribute to the dialogue over what basic values are seems impossible. At this point they trot out the example of slavery to show what experimentation can lead to.

Besides, states don't experiment anyway according to Feeley and Rubin. Drawing on economic theory, they conclude that "individual subunits will have no incentive to invest in experiments that involve any substantive or political risk; they will instead prefer to be free riders and wait for other subunits to generate them. This will, of course, produce relatively few experiments." Indeed, the authors suggest that states "must be forced or encouraged to [experiment] by the central authority."

As this review is being written, the national political process is involved in a major debate over health care. Prominent in that debate is an assessment of the results of the Massachusetts Health Care Initiative. The *New York Times* recently engaged in an extensive review of "The Massachusetts Model" and its central role in the national debate. The *Times* examined the state program's "growing pains and glitches," in particular, their financial consequences. For purposes of the federalism debate, the point is not whether the plan "works," but the fact that the state was willing to undertake it. State political actors saw political gain in undertaking an experiment of the sort Feeley and Rubin declare does not happen. The state political processes worked—whether or not the plan does—in large part because they are viable and meaningful.

Clearly, one's evaluation of Feeley and Rubin's negative view of federalism in general depends heavily on whether one accepts their view of it as an organizing principle of limited value, valid in only a few extreme situations. However, as the discussion of experimentation suggests, their real target is American federalism. Independent justifications, such as the laboratory thesis, largely stand or fall based on how they play out in the United States. Indeed, a fair amount of discussion

of the American experience takes place in the first part of the book. For example, several pages are devoted to critiquing Justice O'Connor's opinion in *Gregory v. Ashcroft*.

By the end of the first part, the reader will have probably made up his or her mind both on federalism in general and on American federalism in particular. Thus, I will focus briefly on only three aspects of the second half: how federalism developed in the United States; whether it does or should play a role as a contemporary organizing principle; and why there are those who defend it. As for why we have federalism, the authors view particular documents, e.g., the Constitution, as less important than "basic questions of political identity." Thus, "the Constitution should be regarded not as a definite determination of the relationship between the national government and the states but, rather, as one event, albeit an important one, in the four-hundred year evolution of political identity among a group of people whose outer boundaries had been autocratically defined."

Looking both at the key documents and at questions of political identity, the authors find ambiguity in some of the former—particularly the Constitution—and a growing sense of a national identity in the latter area. The main issue which kept federalism alive was slavery. "The slave states could only protect themselves through slavery..." Indeed, "[b]y the 1850s, this was the only function federalism served."

What is federalism's role today? Rubin and Feeley insist that it has none. Pre-existing centripetal, nationalizing forces have accelerated sharply since the Civil War—itsself "a defeat for the federalist conception of the United States"—and twentieth century phenomena such as the New Deal. There are no profound regional attitudinal features that would make federalism attractive. "The United States, despite its size, its ethnic diversity, and its self-image as a vast and variegated nation, is in fact a heavily homogenized culture with high levels of normative consensus." The absence of the criteria that, occasionally, justify a nation's recourse to a federalist structure means that "federalism no longer serves any purpose in the United States." Following this logic to its conclusion, Feeley and Rubin declare flatly that "the United States is no longer a federal regime."

The last statement is not literally true, of course. The Constitution still contains the Tenth Amendment—suggesting that some powers are reserved to the states—and the list of enumerated national powers—suggesting that some powers are not granted. The authors offer a partial justification for the statement based on the evolution of the system as reflected in Supreme Court doctrine. Over the years, the Court has permitted the enumerated powers—particularly the Commerce Clause—to develop into the equivalent of a national police power. Cases like *United States v. Lopez* and *United States v. Morrison* are outliers, decisions possible only because a national consensus on the underlying normative issues had not yet formed.

One can, of course, defend *Lopez* and *Morrison*, and the constitutional vision they represent, on the ground of original intent or by citing the obvious fact that no constitutional amendment has declared the end of the federal system or the conferral of a general police power on the national government.

It is important, however, to understand the crucial role that the first, theoretical part of the book plays in bringing the authors to this point. Suppose they are right that federalism is a suboptimal organizational compromise that is valuable in a limited number of situations, and that those situations long ago ceased to exist in the United States. Perhaps American federalism would become obsolete, existing on paper but not anywhere else, including Supreme Court decisions. That is why it is important for those who disagree with the claims in the second half of the book to take issue with those in the first half—to defend, for example, the concept of experimentation as one that takes on particular importance in sub-national polities where the government has real power and where citizens perceive its processes as worth participating in. It is essential to argue that federalism furthers important values because of the status it grants to sub-national units, and that it merits a broader role than the highly limited one to which Feeley and Rubin consign it—a suboptimal compromise "to resolve conflicts among citizens that arise from the disjunction between their geographically based sense of political identity and the actual or potential geographic organization of their polity."

Since the authors reject any broader role for federalism—and notions that it advances a range of values—they are forced to come to grips with the third question: why does anyone defend it? At first blush they seem to offer the vision of benighted, albeit benign, individuals who act based on "nostalgia-drive sentiments, the bromides of high school civics, and conceptual confusion." The theme of nostalgia is repeated—the current Supreme Court is described as "particularly nostalgia-driven"—but a darker explanation is easy to discern. As noted, the authors contend that by the 1850s, preserving slavery "was the only function federalism served." Despite the Civil War and emancipation, many Southern states preserved a high degree of segregation which Feeley and Rubin label "apartheid." The authors hammer home the point that with formal slavery gone, "states rights meant, in essence, the right of Southern states to preserve apartheid." Thus, in a slight modification, or updating, of their earlier statement, the authors identify slavery and apartheid as "the only rationales for federalism for the past 150 years or so."

This sounds more than a bit like labeling those who support federalism as racists, especially since the analysis on the next page turns to island territories and suggests that they are kept in a form of federalism because they have "overwhelmingly nonwhite populations." In fact, "[t]he motivation for this continued reliance on federalism... is the same as the motivation for the continued reliance on federalism within the United States in the years preceding World War II—namely, racism."

Perhaps this is just an example of what the book jacket calls "bold argument... certain to provoke controversy." Still, Feeley and Rubin do exhibit a tendency to denigrate those who disagree with them. Shortly after a slash-and-burn analysis of Justice O'Connor's opinion in *Gregory v. Ashcroft*—for example, she advances "pseudoarguments"—they state that "[i]t seems difficult to imagine that any American, even a Supreme Court Justice, is so parochial as to be unaware that such unitary regimes as England, Sweden, Denmark, and the Netherlands have met the highest standards of political participation and human

rights protection.” One doubts that the gratuitous reference to Supreme Court Justices encompasses Ruth Bader Ginsberg or Stephen Breyer.

Feeley and Rubin also display a singularly off-putting pretentiousness, seeking, it would seem, to beat the reader into a submissive acknowledgement that people who know so much must be right. Thus, by the bottom of page ten, the following authors and thinkers have been cited or invoked (here given in order of appearance, by last name, unless otherwise indicated): Eleazar, Riker, McKay, Etzioni, Sandel, Dryzek, J. Cohen, Habermas, Lijphart, Dahl, M. Weber, Arendt, Schutz, Siddens, Touraine, Rawls, Descartes, Locke, Kant, Husserl, Heidegger, Hegel, A. Cohen, Saint Augustine, Anderson, E. Weber, Miller, Oommen, and Smith. In one paragraph (!), the authors draw lessons from ancient Athens, Norman Sicily, the second-century Roman Empire, the early Tang dynasty, the Umayyid caliphate, the Carolingian Empire, and “premodern empires—such as the Abbasid and Ottoman in the Middle East, the Mauryan and Gupta in India, and the Nara-Heian in Japan.”

Jargon rears its head, almost to the point of parody. We learn that “[i]dentity can be understood as the self’s interpretation of itself. This would be true for the Cartesian, Kantian, Husserlian, and Heideggerian self, although it would have different ontological significance in each case.” Things are more complicated, however. Some philosophers “urge that the self develop an identity as an independent, morally responsible agent.” Others “argue that this is impossible in the ordinary course of life, where socially constructed conceptions of identity prevail, conceptions that can only be escaped if the self sheds its identity through either a transcendental *epoché* or a reconnection with the essence of *Dasein*.”

All in all, the book’s mixture of condescension and pretension can be annoying at times, but should not deter the reader from exploring the arguments against American federalism. Feeley and Rubin have made an important contribution to the dialogue about it. The viewpoint they represent is not about to go away. Neither is federalism.

Regulation by Litigation

BY ANDREW P. MORRISS, BRUCE YANDLE, AND ANDREW DORCHAK

*Reviewed by Margaret A. Little**

Regulation by Litigation, an innovation in American political theory, has descended upon the American polity, hardly noticed by its citizenry and arguably even less understood by its elected political representatives, the mainstream press, and most legal or political analysts.

What a fascinating story it is, this business of regulation by litigation, using litigation and the courts to achieve and enforce regulatory regimes against entire industries without having to go through the expense, uncertainty, or trouble of securing legislative or rule-making authority for such regulation. And a business it most certainly is—when wielded by private lawyers, it is the most lucrative new field of practice in the legal market purchasable by a law license and friends in high places.

Three scholars, Andrew Morriss, Bruce Yandle, and Andrew Dorchak, have undertaken a painstaking dissection of regulation by litigation by examining three case studies—1.) the EPA’s 1998 suit against heavy-duty diesel engine manufacturers, 2.) asbestos and silica dust private mass tort litigation, and 3.) state and private sponsored lawsuits against the tobacco industry.

The book begins with a comprehensive discussion of the academic legal and economic theories and constructs underlying the regulation by litigation approach such as *public choice theory*—the use of economic analysis to explain political decisions—and its unfailing dark companion, *rational ignorance*—to assist the reader in understanding both the origin of this species of regulation, its taxonomy, and its surprising ability to transcend legal and constitutional prohibitions, to say nothing of public outcry. Though a bit of a slog for the general reader, the walk through the theoretical constructs—*public interest theory*, *capture theory/rent-seeking*, *special interest theory*, *political wealth extraction*, and the delightfully and quite accurately named *bootleggers-and-Baptists theory*—is well worth it to equip an informed citizen with the tools to understand how such a lucrative and often lawless phenomenon could arise and flourish. But the devil, as always, is in the details. The empirical case studies shorn of theory best illustrate the dark matter that makes up this constitutionally and legally flawed model of regulation. A brief synopsis of the facts of each case study follows to assist in enlightening the reader—and the public.

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