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## Book Reviews

Scott Barclay, Editor

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*Federalism: Political Identity and Tragic Compromise.* By Malcolm M. Feeley and Edward Rubin. Ann Arbor: University of Michigan Press, 2008. Pp. x+225. \$35.00 cloth.

Reviewed by Lawrence M. Friedman, Stanford University Law School

In 1998, Feeley and Rubin published *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*. This was a fine book about cases on prisoners' rights in federal court. Many prison systems, especially in the South, were a brutal and nasty disgrace; in a series of decisions, the federal courts intervened in massive ways and called for reforms. This action seemed to punch a huge hole in the fabric of federalism. What could be more local, more traditionally a state matter, than the prison systems? Feeley and Rubin therefore added to their book a trenchant discussion of the meaning and fate of federalism. Now, in this current book, they expand on that discussion. The result is an incisive, convincing, and closely reasoned text. The theory of federalism will never be the same again. At least it should not be.

Federalism may be a good national strategy—or at any rate, the best that can be had. But when it works, it can still be labeled a “tragic compromise.” Federalism may be necessary, and healthy, when a country is sharply divided, and when the components are geographically concentrated and have separate political and cultural identities. The compromise is this: the country remains a single country, for some purposes; but the subunits are granted considerable power. Federalism made sense in the United States when there were slave states and free states, and cultural and political identities ran very deep along this fault line. There were good arguments, then, for a federal system in the first half of the nineteenth century. But not now. The split between North Dakota and South Dakota is not the sort of division that justifies federalism. And times have changed, dramatically. The United States is, more and more, a cultural and economic unit. The primary identity of Americans is as Americans, not as Wyomingers or Rhode Islanders. This is even true for Texans.

In modern America, then, federalism makes little or no sense. Moreover, it has also ceased to be a living, breathing structural element of society. Federal is, to put it bluntly, dead. Feeley and Rubin make no

bones about this: the United States “no longer has a federal system of governance” (p. 125). Courts and theorists invoke federalist ideas out of a kind of “nostalgia for a bygone past” (p. 125). But basically the federal government has plenary power to make national policy. The decisions of the Supreme Court, on the commerce clause, for example, make this crystal clear. The autonomy of the states is an illusion.

Some people might find these assertions rather startling. But Feeley and Rubin make a powerful case. There are many claims for the virtue of federalism, both normative claims and empirical claims. Feeley and Rubin take these claims up, one by one, and dissect them mercilessly. To be sure, often the case for decentralized authority is very strong. Many writers who sing songs of praise for federalism mix up federalism and decentralization. A national government can, and often should, decentralize some functions. But no country needs a federal system to do this; and in fact decentralization would conflict with true federalism. True federalism gives autonomy to subunits. Autonomy means power to frustrate or ignore national policy. True federalism, then, is rigid and inflexible. Decentralization is not. It can be reversed or expanded as the need arises.

Feeley and Rubin also discuss the recent case law that *seems* to resurrect a more robust brand of legal federalism. They show, first, that there is less here than meets the eye. The Supreme Court can tell Congress it has no power to pass a law about guns in schools (at least not the one it tried to pass), but the Court is not about to restrict the power of Congress over the national economy or over anything else of major importance. The Court unanimously upheld the Civil Rights Act of 1964, for example, on rather attenuated commerce clause grounds. There is no sign of a genuine retreat. The Court nibbles a bit around the edges of congressional power, but this amounts to nothing very much. And the decisions are muddled and incoherent. Indeed, they have to be.

I found the line of argument that Feeley and Rubin put forward totally convincing, though this might be because I started out presupposed to agree with them. I do think this is a very good book: sound, clear, coldly logical. Page after page, older myths and assumptions fall away like tenpins. It is a bracing and welcome change from the muddle of court doctrine and political theorizing. I wish this book were required reading for all political scientists. It should be required reading for judges and for law professors too; but this is not likely to happen.

#### Reference

- Feeley, Malcolm M., & Edward L. Rubin (1998) *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*. Cambridge, United Kingdom: Cambridge Univ. Press.