Book Review. Pound, McIlwain, and Nichols, Federalism as a Democratic Process

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Book Reviews


The needs of the post-war world have advanced Federalism from academic theorizing to practical discussion that envisages early actual and important modifications in international organization. Everyone recognizes the desirability of limiting sovereignty while at the same time the demands for autonomy are equally insistent. Obviously the American experience of 160 years provides the laboratory of greatest significance.

Three distinguished scholars have written the essays that comprise this little volume. Two are mainly historical: McIlwain treats of mediaeval and early modern England. His argument is that numerous pamphlets published in this country in 1774 and 1775 show familiarity with this history and the major constitutional issue dividing England and the colonies, namely whether the relationship was a federal one or whether power was centered in Westminster. In an acute commentary on McIlwain's position, Francis Coker points out that the 1774-5 American pamphleteers were arguing "for a devolution of governing authority," since they wished to refute the English view that authority remained centered; whereas in 1787 the framers of the Constitution felt a great need for strong central government—at least in comparison with the impotent Confederation. In the second historical essay, Nichols discusses the Civil War as a controversy on Federalism. This essay is notable for its emphasis on the economic aspects of the problem—with the North and West developing free from slave labor, the interests of the southern slave economy required insistence on states' rights and federal protection. Pound's essay, a combination of history, political theory, and jurisprudence, raises a number of important issues on the relation of Federalism to Democracy. It is the only essay that is avowedly polemic, the other two purporting to be merely historical.

It would require much more space than is available to consider any of the major theses involved in Federalism. The reviewer must here be content with a few general remarks. Some bias for the American system is evident, and it is even assumed that Federalism is especially adapted to maintenance of Democracy. Reference to Dicey's discussion in his Law of the Constitution will reveal how debatable these positions are. Indeed, in this aspect, the essays are dogmatic rather than critical, and many of the more subtle and difficult problems are left untouched. Hence, even though the general plan of the book was excellent, the final result falls short of expectations, probably because specific issues were not formulated and the means to further analysis of common problems were not adequately developed. The book is nonetheless suggestive because of the indicated possibilities for co-operative analysis of major problems.

Finally, the readers of this Journal will be interested in the significance of this book for the problems of crime control. This question is, of course, not discussed, but some general considerations may be readily inferred. McIlwain points out that whereas, under conditions of modern transportation and communication, defense against external attack requires great centralization of power, the very opposite was true under mediaeval conditions. Where it required weeks to travel from Westminster to Chester, in time of stress "large powers had to be conceded to local authorities to act on their own initiative" (38); these became necessarily permanent. Criminal behavior
calls for similar instantaneous action, and limitations on centralization are likewise suggested for crime control. But more than that, many writers in the crime field have in recent years assumed that centralization and efficiency are synonymous. Some of them have almost been obsessed with a vision of a single authority ruling out all possible conflicts (on paper!), and they have not even considered it necessary to study the problems of organization. If a conflict is theoretically possible, *ipso facto* centralization is the one and only answer! Federalism suggests quite a different approach to these problems, and it is to be hoped that the current interest will encourage students to re-examine their opinions of these very important problems.

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This excellent monograph is delightfully informative. It gives in clear, simple language a history of probation during the last hundred years without sacrificing scientific presentation, analysis, and good organization. It appeals to the legal student because of its documentary evidence. The sociological student is pleased by the lucid manner with which the author explains what has occurred in terms of sociological concepts. He refers to probation as a social invention having a polygenetic origin which spread throughout the world by a process of imitation and diffusion.

In 1841 probation appeared almost simultaneously in Boston, Massachusetts and Birmingham, England, as a new method of treating corrigible offenders. This social invention was not born in a vacuum but arose out of similar cultural and institutional backgrounds found both in England and in United States at that time. Probation was antedated by the common law practice of, (1) suspension of sentence, (2) the recognizance for peace and good behavior, and (3) the friendly supervision of delinquents and ex-convicts by benevolent persons and charitable societies. These three practices considered separately are not probation because the possibility of applying punishment for failure to perform was lacking; but these three practices in combination plus a potential penalty for non-performance constitute probation.

Massachusetts was the first state to write the word “probation” into statutory law in 1878. This example was followed by several states until the first period of development of probation in this country came to an end with the enactment of the Illinois Juvenile Court Law in 1899. Probation was not introduced into the statutory law of England until 1879 and differed somewhat from the American concept and practice. This difference accounted for two separate patterns of imitation which for awhile vied with one another, caused some mutations, but later converged to follow the predominant American practice. Probation as known today throughout the civilized world can be referred to as an American social device.

The monograph adheres closely to statutory evidence, showing the parallel development throughout the United States and the British Empire. This evidence is convincing and illustrates in a very interesting manner the underlying sociological theory of the author.

**Charles H. C. Meyer**

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The colorful account of Florence Monahan’s administration of the re-