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The State Legislative Institution

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BOOK REVIEWS

The State Legislative Institution. By Jefferson B. Fordham. Philadelphia: University of Pennsylvania Press, 1959. Pp. 109. \$2.75.

In this slender volume "Doctor" Fordham, long respected for the accuracy of his diagnosis of the ills of local government, pestles pills for legislative mulligrubs. The active ingredients are for the most part familiar simples from the pharmacopoeia of reform: deletion of procedural and subject-matter hobbles from the state constitution; unicameralism, with a reduction in the size of the assembly and an increase in the compensation of its members; restructure of the committee system to deemphasize seniority and accent ability; the maintenance of continuity through the creation of a system of standing committees with full subpoena powers and adequate permanent staffs; annual sessions with power to call special sessions and to determine the agenda. A special bow is made to the employment by the standing committees of "social science techniques" and the reconstituted general assembly is exhorted to create a special committee on sanctions, the better to use the growing knowledge of the social scientists on the subject of the carrot and the whip.

Undoubtedly there are those who would cavil at the individual ingredients or predict that the patient isn't as yet sick enough to consent to such a cathartic dose, however great the need.¹ I propose to do neither,² but rather to take issue with some of Dean Fordham's major premises.

The State Legislative Institution is a series of three lectures delivered in 1957 at the West Virginia University. In a border state so soon after the decision in the *Brown* case,³ Dean Fordham could not forbear to extract a moral from the dispute over segregation in the common schools. "Unhappily," he said, "it is not solely in the totalitarian states that the authority of the state has been looked upon as having independent significance. Once again, in the national

¹ In a review of this book in the *Pennsylvania Law Review*, Kernochan shows a high measure of agreement with Fordham. He does take issue with the suggestion that the general assembly create a special committee on sanctions, warning that splitting the consideration of substance and enforcement creates just the sort of inefficiency and spreading of responsibility which Fordham seeks to correct. Kernochan, *Book Review*, 108 U. PA. L. REV. 765 (1960).

² At least not in the text. In the obscurity of a footnote I can say I have doubts about the possibility of encouraging the participation of a better grade of person by making the position a full time one, even when the salary is substantially increased. It is certainly true that higher salaries open the possibility of service to a broader group, but there is great doubt that it will increase the general level of competence. It eliminates from service the professional who would not give up his profession to serve, or who could not be lured by any salary likely to be paid. The higher salary might tempt the hack.

³ *Brown v. Board of Education*, 349 U.S. 294 (1954).

community, we are seeing a fetish made of what, in largely emotive terms, is called states' rights. I refer, of course, to the rationalization of the opposition to full equality of opportunity and equality before the law for our Negro citizens. In the tense situation, which has developed since the public school desegregation decisions, states' rights are invoked as if they were an end in themselves. . . . It is not difficult to perceive that the underlying concern is with the preservation of a social order. The political argumentation, however, glorifies a conception of governmental authority to a point of serious distortion" (pp. 11-12). The moral to be drawn from all this is that we should stop talking about states' rights and talk about states' responsibilities.

To those familiar with Dean Fordham's writing in the local government area this will come as a familiar theme. In *A Larger Concept of Community*, a series of lectures delivered at Louisiana State University in 1955, the point is made in a slightly different way:

I make bold to offer one further cautionary observation. Where the real objection to federal activity in a given field is that government as such should leave the field to private enterprise, the case should be presented squarely on that basis. I discern some tendency to hide such objectives under the announced purpose of restoring state and local autonomy.⁴

Put pithily, Dean Fordham's point amounts to this: There is more than enough work to go around and the important problem in government is not fixing the boundaries of federalism but rather the design of institutions for rational decision-making at all levels. This is a simple and attractive faith. It bespeaks a positive, active concept of government and great confidence in popular assemblies. It is comforting to the intellectual because it looks upon government as a device for achieving consensus through rational discussion of facts scientifically assembled and winnowed. It emphasizes the merits over the choice of forum. I suggest, however, that it ignores, or at least underemphasizes, the role of government as an arena for human competition and conflict. It is odd that this should be so, for this is a point which Dean Fordham makes indirectly in the very first paragraph of the very first lecture. "In a deeper sense, I suggest, all governmental power is ancillary; it derives its significance from the individual and group or social values, which it may properly be expected to serve" (p. 11). I should like to follow up this statement at a level which I hope is not too naively Watsonian.⁵

People want things, and often different people want the same things. Government is one of the devices through which today many individuals seek these human satisfactions, and obviously some win and some lose. In a democratic society these conflicts of interest are settled by counting heads. There is, however, a condition to the success of this process; the voting public must be homogeneous enough to warrant the prediction that the forty-nine who vote

⁴ FORDHAM, *A LARGER CONCEPT OF COMMUNITY* 11, 12 (1956).

⁵ J. B., not Dr.

may will acquiesce with reasonably good grace in the 51 to 49 victory for the *yeas*. In some instances we concede that this condition is not met, and on these matters we do not vote, e.g., the subject matter left to pure whimsey by the Bill of Rights. This much Dean Fordham recognizes. He also concedes the doctrine of separation of powers as a limitation on democratic action. It is his thesis, however, that "good constitutionalism" thus fixes the outer boundary of government action and distributes authority among the coordinate departments of the government but abjures any effort to channel decisions into fora which seem appropriate to their peaceful solution, or to specify areas in which action must be predicated upon a show of more than fifty-one hands to the hundred. This, he suggests, is contrary to the "political principle of representative government."⁶

In this sense our history and our system are made up of "bad constitutionalism," for our government from top to bottom is shot through with points at which minorities of various sorts are able to veto, or at least slow down the wheels of legislation. At the federal level, for instance, the Senate was designed specifically to give a large geographical minority a veto on positive federal action by making it necessary to muster a majority of area representatives as well as a majority of popular representatives. As Dean Fordham points out, the early state constitutions were relatively free from specifics, but I suggest that this was because intrastate factionalism, geographic and economic, had not then reached the point at which it demanded this variety of minority protection. Dean Fordham's "political principle of representative government" seems to make it ordained that *any* fifty-one persons should have the power to coerce *any* forty-nine. It overlooks the fact that political majority is a concept affected by deepness of feeling as well as the number of heads, and the fact that the delineation of the voting public is crucial to the outcome of any vote.

We all belong to many voting publics. At the governmental level we are operating units in a minimum of three—federal, state, and at least one local. In one of these we may be a member of a majority, and in another find ourselves outvoted. Thus a Chicago Democrat is a majority member at city hall, a minority member in Springfield, and in Washington he may have the ear of the Congress but receive a deaf one at the White House. Obviously majority and minority status varies with ideas and policy positions as well as with party and power. A Democratic Senator from Virginia may find his views sufficiently in the minority in his party to prompt him to refuse his support to the Democratic national candidate, or an Oregon Republican's views may be so little in keeping with the majority party thinking that he will cross the aisle.

Dean Fordham's example from the segregation dispute affords an excellent example of the process and in my opinion cannot be casually described as a

⁶ Dean Fordham's "political principle of representative government" is akin to the familiar skull-cracking theory of democracy. Voting serves the purpose of demonstrating to the minority the futility of dissent. It is tempered, however, by the assumption of a high degree of consensus after rational discussion. In either case intensity of feelings is a factor in the prediction of success.

"rationalization." A Negro resident of Warren County, Virginia, who favors the operation of the county's public schools on a non-segregated basis is in all probability one of a minority—at that level. In Richmond he is similarly on the short end of the count. Were a vote taken on a nationwide basis, however, it is conceivable that he would be on the winning side. It follows that he considers the question one for solution at this level. To initiate positive action he must do more than get a majority. He must get a majority in the Senate and he must generate high enough feeling about his case to overcome the internal inertias which are brought into play upon issues on which large geographic minorities feel strongly. He may have a popular majority but he does not have a political majority, and it is a cardinal principle of democratic government that a minority cannot coerce the majority directly into positive action. At this point the Negro is pushed into the use of *his* methods of veto and obstruction. He shifts the forum to the courts, and here he finds that his view of the matter is shared by the members of the Supreme Court. The court is not a popular assembly; it is one of our veto mechanisms, one of our obstructions to democratic action. It may only see to it that the county does not operate a segregated school. This has shifted the inertias, however, and the Negro hopes that, with the alternatives narrowed to unsegregated common schools or none, his view will become a majority one back in Warren County and Richmond.

This sort of maneuvering, blocking, slowing down, and obstructing goes on all the time and the argument over the propriety of decision-making in any particular forum is part and parcel of it. As Dean Fordham observes, beneath the states' rights plea is a problem of preserving a social order. Dean Fordham "makes bold" to suggest that underlying most states' rights arguments lies a policy position opposed to the predicted position of the federal government. In my opinion he need not make so bold in stating this. I think that it is so natural and proper that it is almost apodictic. In litigation, by analogy, it is not thought surprising that litigants who object to the jurisdiction of the court are, more likely than not, those who think that their chances on the merits will improve with a shift in the forum. This is only to repeat that "governmental power is ancillary and draws its significance from . . . individual and group or social values" (p. 11).

Now what does all this have to do with "Doctor" Fordham's pink pills for pale legislatures? I share his concern over the general bumbling quality of state legislatures in action. I think that there is certainly a great deal which can be done to improve the general level of their efficiency. I think that it is very undesirable, however, to proceed upon the assumption that independent of the question of homogeneity of the interests to be represented, a "truly representative" general assembly can determine policy which is good for the state—even with the aid of today's blessed words, "social science techniques." In Nebraska

⁷ "Social science techniques" remind me of Urwick's statement about planning. "Planning' is in serious danger of becoming a 'blessed' word and a 'blessed' word is one of the major curses of society." URWICK, *THE ELEMENTS OF ADMINISTRATION* 26 (2d ed. 1947).

this may be⁸—in Illinois I am sure that it is not. Here relationships between Chicago and its environs and the agricultural areas of the state often hang in precarious balance, based upon uneasy bargains. In California, too, north and south may have very different interests to preserve, not likely to be resolved by counting heads. In such situations it is often necessary to throw obstacles in the way of poll counting, to withdraw such subjects from state-wide action until some higher degree of unanimity can be demonstrated by a campaign for constitutional amendment, or to provide for a representational scheme which makes minority consent a requirement for action. I see no indication that geographic factionalism has disappeared, and I think that it is important that the states and localities continue to experiment with ways in which factional competition over the good to be achieved through government can be resolved. I think that brakes on action, inertia points, vetoes, and the mechanics for determining the limits of the voting public in particular areas of decision are important subjects for such experimentation.

The pills which Fordham prescribes will make the general assembly brawnier and beefier; of that I am certain. As a nostrum I suspect them. Above all, I warn that they are compounded of prescription drugs and should be taken only on the advice of the family physician.

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⁸ Though even here the reaction to the unicameral legislature has been mixed, the feeling being generally that it hasn't been as bad as its critics thought it would be, nor as good as its proponents had hoped. See Rodgers, *One House for Twenty Years*, 46 NAT'L. MUNIC. REV. 338 (1957); Lancaster, *Nebraska's Experience With a One-House Legislature*, 11 U. KAN. CITY L. REV. 24 (1942).

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Administrative Law Treatise. By Kenneth Culp Davis. St. Paul, Minnesota: West Publishing Co., 1958. 4 vv. \$70.00.

Administrative Law Text. By Kenneth Culp Davis. St. Paul, Minnesota: West Publishing Co., 1959. Pp. xxiv, 617. \$10.00.

For many years Professor Kenneth Culp Davis has labored in the vineyard of administrative law with sustained brilliance and industry. Fortunately, he has been productive as well as energetic, and the fruits of his efforts have been made available to the profession, first in a series of articles, then in a one-volume text,¹ and now in a four-volume treatise and its one-volume abridgement.² Judged by any standard, these writings are a major accomplishment of legal scholarship for which Professor Davis is justly celebrated. Teachers of adminis-

¹ DAVIS, *ADMINISTRATIVE LAW* (1951) (hereafter referred to as the 1951 text).

² The 617 pages of the text contain nearly all of the analysis of the 2,154-page treatise (not counting indices and forms). This is made possible by smaller print, double columns, and the omission of the detailed discussion and citation of authorities. The text will prove most useful to the law student and the treatise to the practitioner or scholar.