

## BOOK REVIEWS

THE STATE LEGISLATIVE INSTITUTION. BY JEFFERSON B. FORDHAM. Philadelphia: University of Pennsylvania Press, 1959. Pp. 109. \$2.75.

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Is there any institution of our government that more needs mending than the state legislature?

In recent years, observers of our governmental apparatus have been sounding the tocsin more frequently, more loudly, more insistently with respect to state government and, especially, its legislative arm. These have included, among others, the Council of State Governments, the American Political Science Association, the Commission on Intergovernmental Relations, and the American Assembly, as well as individual scholars.

Now a sharp blow—more telling, I think, than many of its predecessors—has been struck in the cause of state legislative reform by Dean Jefferson B. Fordham of the University of Pennsylvania Law School. It is contained in his Edward G. Donley Memorial Lectures, *The State Legislative Institution*, recently delivered at West Virginia's College of Law. Significantly, these lectures are addressed in the main to the legal profession. That profession, as Dean Fordham observes, has a stake of first magnitude in the integrity and quality of the state legislative process which even in the private law area "has supplanted the judicial process as the prime agency of law reform." (p. 17). As he points out, a number of law schools are giving time and attention to the work of the legislatures, "but the community can hardly wait for the present generation of law students to develop into professional and community leaders before doing something about the improvement of the legislative process" in the states. (p. 49). The lawyers must join now with the political scientists and other interested groups pressing for the needed reforms if these are to be timely achieved, if the tocsin is not to become a knell.

*The State Legislative Institution* is divided into three chapters or lectures covering (1) legislative powers and organization—including questions of structure and representation; (2) the legislative process—including problems of legislative sessions, constitutional provisions on procedure, the standing committee system and popular legislation; and (3) sanctions for effectuation of policy.

A brief introduction sets out some of the general considerations which are the basis for concern about the state legislatures. Whatever

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may be the trend of power as between nation and state, Dean Fordham is cogently right, it seems to me, in stressing that "the responsibilities of government have increased at all levels." (p. 14). The ability of state governments, including the legislatures, to meet these responsibilities is thus of absolute importance. It is familiar history that the state legislatures have been gravely weakened and the state executive exalted through a long course of events rooted in early legislative abuses. History in this case admirably illustrates Coleridge's prediction that "every reform, however necessary, will . . . be carried to an excess which will itself need reforming." As the challenges of this era of statutes and of this "age of acceleration" grow, the state legislature appears more and more inadequate. In the circumstances, Dean Fordham urges vigorous action toward making the state legislative institution a powerful and effective instrument of representative government. It must be "drastic action of a basic character," (p. 18) including constitutional revision where required to secure to the legislatures: powers commensurate with their responsibilities, simplified structure appropriate to the legislative role in policy making, representation soundly based on population, and the continuity and freedom of operation needed to develop effective methods and procedures.

So much discussion of state legislative reform which goes on about us contemplates tinkering. But those who would tinker have had their day, indeed their years, and progress has been minuscule in relation to urgency and need. It is tonic, then, to have the ills expressly recognized to be as fundamental, as far-reaching as they are. It is heartening to be told clearly and forcefully at the outset that: "It is time . . . to have done with palliatives. We should face up to realities and be prepared to make the sustained effort in the way of the public education and political action it will take to vitalize the state legislatures." (p. 19).

Dean Fordham's proposals for reform cover the field, and many do call for drastic action. They include: the restoration of substantive legislative powers now interdicted by state constitutions; establishment of unicameral legislatures of moderate size; revised methods of districting, apportionment and reapportionment to implement representation based on population; more frequent sessions without arbitrary time limitations; higher legislative salaries; reduction of state constitutional restrictions on legislative procedure; revitalization of the standing committees, their powers, structure, and staffing and their operations generally; elimination of the initiative and referendum; study and appraisal of sanctions and establishment of formal legislative machinery to deal with sanctions problems. By and large, the proposals seem to me to make good sense. If they range widely, that is appropriate. The state legislatures suffer from a spectrum of defects. Most of the defects are important and many are interrelated in significant ways—indeed, this is one of the reasons why meaningful state legislative reform proves so difficult. If many of Dean Fordham's proposals are familiar to students of legislation, they are not

familiar enough in the legal profession to which these lectures are addressed. And he argues them with unusual persuasiveness. It is not possible to comment in detail here on all the various proposals or the ills to which they relate. There is room only for a few points.

One point that I believe deserves special emphasis for all who are or may be interested in reform in this field is the problem of the existing state constitutions. The first Fordham proposal, for example, calls for reduction of some of the restraints which the state constitutions now impose on state legislative power in substantive areas. Limitations on taxing power, debt restrictions, provisions regulating local government—these are trouble spots familiar today. A believer in the legislative way can hardly quarrel as to the desirability of constitutional revision to raise the general level of state legislative authority and freedom in such areas, whatever value he may attach to any one specific effort along these lines. But the needs do not, and reform cannot, stop here. As these lectures indicate and as the proposals recognize, the crippling effect of the state constitutions is pervasive. It extends not only to the limitation of policy choices in substantive areas, but is a major concern in connection with legislative organization, sessions, salaries, procedure and many other matters. A glance at the material under the headings, "Laws," "Legislative Procedure" and "Legislature" in the new *Index Digest of State Constitutions*<sup>1</sup> dramatically underlines a part, at least, of the problem. In a large number of states, virtually any substantial plan for the rehabilitation of the state legislative institution will have to reckon with revision of the state constitution. This situation gives point to Dean Fordham's insistence that the need for "drastic action of a basic character" must be faced and palliatives abandoned. Perhaps one may venture to hope that New York's ongoing effort to simplify its constitution<sup>2</sup> and other recent signs of interest and activity in the field will prove harbingers of a new, hard look at the state constitutions generally. I do not see how such a look could fail to bring back a stricter view of the desirable content of constitutions, or to spur a sweeping away of the deadly restraints we have laid on our state lawmakers.

It was something of a surprise—not disagreeable—to find that one drastic step recommended is the establishment of unicameral legislatures in the states. Unicameralism vs. bicameralism is an old debate. Dean Fordham has ranged himself boldly with the "political scientists and other theorists" who according to a past poll have overwhelmingly preferred one house to two, and against the "legislators and other political figures" who just as overwhelmingly have favored two. The case for one house is well

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<sup>1</sup> COLUMBIA UNIVERSITY LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS (2d ed. 1959).

<sup>2</sup> See, e.g., Temporary Comm. on the Revision and Simplification of the Constitution, *First Steps Toward a Modern Constitution*, N.Y. LEGIS. DOC. No. 58 (1959); Special Legislative Comm. on the Revision and Simplification of the Constitution, *Inter-Law School Committee Report on the Problems of Simplification of the Constitution*, N.Y. LEGIS. DOC. No. 57 (1958).

stated in these lectures. It is a compelling case in terms of concentrating and clarifying responsibility, improving efficiency and effectiveness, reducing expenses, and other vital considerations. On the merits I agree with Dean Fordham, but perhaps would rate this change less high in the scheme of priorities for action. It certainly is possible to have an effective bicameral legislature. The single chamber is not a *sine qua non*, to the extent that some of the other proposals are, for the achievement of a viable institution. As a practical matter, though, it might become so. When the public has totted up the cost of adding to the existing bicameral pattern those elements which are more nearly indispensable to effectiveness—such as more frequent sessions, higher pay, interim functioning and more staffing for standing committees, and improved legislative services—then unicameralism with its dramatic slash in cost could become an indispensable part of the reformer's package.

The unicameralism point leads me to note certain limits set upon the approach adopted in this book. Underlying Dean Fordham's argument for the single chamber, and his consideration of reforms generally, there are premises, practical judgments, hardly discussed as such, about the aptness of the representative legislature as a lawmaking institution for the atomic age, and the aptness (beyond, for example, the change from two houses to one) of the standard pattern of American representative government—including its customary dispositions of legislative, executive and judicial power. There are undoubtedly good reasons for so drawing the lines of discussion. It is not necessary to disagree with the judgments implied, however, to say that I miss slightly in this book the dimension which more examination of them would have given. One further note about the scope of the approach, specifically in the first two lectures. The legislature is reviewed piece by piece; one aspect at a time is appraised and a remedy prescribed. What emerges is a challenging set of specifications for an ideal legislature. This is a valid undertaking in itself, and it has been extremely well served. I am describing, not criticising, when I note that these lectures do not deal in a substantial way with further important questions that arise after the specifications are stated, and the goal defined. These include questions of interrelation and priority among reform proposals and of the strategy of change. Another lecture or essay might consider these. I would like to see the forthright and fresh approach of this book applied to such questions as well.

If there is to be a scheme of priorities for state legislative reform, I suggest as a working hypothesis that the prime target should be the establishment of a sound, effective standing committee system. What is needed here is excellently stated by Dean Fordham: a rational committee structure; sound rules and procedures; adequate record-keeping and publication of records and reports; staff assistance; investigative powers; continuing "oversight" of administration; continuing life and operation between sessions and aid from improved legislative services. And these needs can

hardly be met unless there is change in other related matters: more frequent sessions, for example, not limited in duration or scope, and adjustments in legislative pay. An efficient committee system is truly a *sine qua non* for an effective legislature. The legislative council is not an acceptable substitute. Without strong committees "we shall continue to witness legislation by party caucus. . . ." (p. 73). With them, the legislature can assume its proper role in the initiation and formulation of policy. Even by the measure of Congress, with all its faults, few state legislative committee systems come anywhere near adequacy.

The third chapter or lecture in *The State Legislative Institution* strikes off in a new direction, into waters relatively uncharted. It is a challenging general discussion of the subject of sanctions, defined as "the means employed by public authority to get people to behave as the law wants them to behave." (p. 80). Various possible classifications and types of sanctions are reviewed. It is a surprising fact, in view of the importance we attach to sanctions in our thinking about the nature of law, that these have had so little systematic scholarly attention. "[O]ur insights into the subject of sanctions," it is pointed out, "are probably less mature than those we have gained as to almost any other major aspect of lawmaking. . . ." (p. 88). Dean Fordham's discussion in this chapter, and the materials on the subject in the legislation casebook of which he is a coauthor,<sup>3</sup> do in fact furnish important insights and a useful basis for further effort to redress this ancient wrong. In a complex society, hedged by ever-increasing regulations, there is a growing need to be vigilant in the cause of individual freedom, to keep rules and sanctions, for example, within the scope reasonably required. At the same time there is need, and opportunity, to direct and exploit modern learning and techniques to the full in formulating the sanctions best calculated to realize a given end. These lectures give new and helpful momentum toward the detailed studies and comparative appraisals of sanctions which must be undertaken.

Having said these things about the chapter on sanctions, I record a passing doubt and a dissent. My doubt relates to the inclusion of this chapter in a work ostensibly devoted to the state legislative institution. Valuable as the chapter is, and unduly neglected as the subject is, it seems to me to belong to another realm of discourse than that of the first two chapters, at least in terms of urgency for *state* legislatures. Sanctions of course are equally of concern to the national legislative institution. We are probably more ready to take up the problem at that level than we are in the states, where the achievement of minimum operating effectiveness now seems to me to claim all priorities.

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<sup>3</sup> READ, MACDONALD & FORDHAM, *CASES ON LEGISLATION*, Ch. 7 (1958). Staff members of the Legislative Drafting Research Fund of Columbia University have participated in efforts to deal with this subject on at least two occasions. See, e.g., CHAMBERLAIN, DOWLING & HAYS, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942); *Report of the Special Committee on Legislative Drafting*, 40 A.B.A. REP. 532 (1915).

The doubt thus expressed is not unrelated to my dissent. The suggestion with which Dean Fordham concludes his third chapter is that a new legislative standing committee on sanctions and law enforcement be established. Its tasks are described as follows:

“. . . it would have at least three important roles to play. It would have the role of testing the basic policy of a legislative proposal in terms of its attainability as a means of ordering human relations. Its second role would be the fashioning or refashioning of the scheme of sanctions devised to implement a given proposal. Its third function would be to learn as much as possible about the effectiveness of existing sanctions in the process of review of administrative performance.” (p. 101).

In this, the committee “would have to work in coordination with regular committees which had jurisdiction over the subject-matter areas of immediate concern.” (p. 101).

Granting that systematic legislative attention to sanctions is desirable, this way of securing it seems to me unwise. To set up a new standing committee through which proposals of other committees must pass could seriously complicate operation of the standing committee system. It creates a new bottleneck, a new chance for blurring the responsibility for action in substantive areas. Two committees, rather than one, and their staffs (four committees and staffs in a bicameral legislature) must familiarize themselves in detail with a given proposal, and they would also be engaged in review of the same administrative performance to assay the effect of existing law. In practice, a sanction problem may often be very closely tied to the nature and context of the proposal concerned, and to the character of the affected groups and administrative agencies; and separate consideration in such cases by a committee not expert in the substantive area may be undesirably artificial.

What the subject of sanctions seems to call for is, at the outset, an organized assault via general and specific studies to collect and order existing material and to explore what has not, or has not adequately, been explored. Hopefully, extra-legislative scholars and research agencies will move first in force. As to legislative action, a temporary joint committee or commission, particularly at the national level, could be an initial step to get spadework done. For the long run, I suggest that more serious consideration be given to a solution within the normal standing committee framework, *i.e.*, settling a clarified sanctions responsibility on each standing committee in its area of legislative activity and “oversight.” Expertise in sanctions is ultimately, I venture, to be seen as essential professional equipment for all legislative draftsmen, for many staff members serving committees and even for legislators, just as acquaintance with procedure is for lawyers.

I do not wish to end on this note of dissent. It is, in fact, a minor point in a highly favorable general judgment on Dean Fordham's book.

*The State Legislative Institution* is a stimulating, first-rate piece of work. Thanks to the author and others, the legislative process which used to be thought of as the domain of the political scientist and the politician may now increasingly be seen as a pressing concern of the lawyer as well. All capable hands are required to save this process in the states, and these lectures sketch the objectives.

As I suggested earlier, we must now consider how the drastic reforms required may be achieved; how to that end we should organize and focus, articulate interrelations among, and assign priorities to, our reforms; and what strategies we should adopt for remedial action. One of the main roads to change, of course, leads through the legislature itself. "When me they fly I am the wings" runs a verse of Emerson. We should ask ourselves whether and how the legislature may be persuaded to alter itself, or allow itself to be altered, in bold ways that overturn the settled interests of the caucus, the executive and others.

Must we here, as so often elsewhere, wait for revelations of corruption, shocks, disasters before we move to mend? Is it true, for purposes of change in this sphere, that "till we be rotten we can not be ripe"? Does progress only begin, as was once suggested, "with a crime"? Or can we rouse ourselves and our communities in time to the essential but truly awesome task of remaking the basic documents in our states, and radically reconstituting one of our fundamental institutions? Dean Fordham, I think, believes we can. That, in any case, is a faith we must labor to justify.

LAW AND LOCOMOTIVES: THE IMPACT OF THE RAILROAD  
ON WISCONSIN LAW IN THE NINETEENTH CENTURY.  
BY ROBERT S. HUNT. Madison: The State Historical Society of  
Wisconsin. 1958. Pp. xiv, 292. \$6.50.

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The Iron Horse first came to Wisconsin in the mid-19th century. The frontier state had not then attained the economic and financial know-how characteristic of the already industrialized population centers of the East. The agricultural, forest and mining products of the area moved to market cumberously and inefficiently—by wagon to the lake or river ports for transshipment by water to Buffalo or New Orleans. There were few large cities and still fewer industries. Although the state legislature and court system were geared to cope adequately with the work-a-day problems and issues of the rural citizenry, neither had had occasion to be concerned with the more sophisticated corporate and financial legal concepts necessary for

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the expansion of railroad transportation. There was no Wall Street in Madison.

Foreseeing the economic benefit of faster and more reliable transportation, the citizenry of Wisconsin at first welcomed the railroads with more enthusiasm than wisdom. The vast and crucial political and legal problems which the interaction of law and locomotives would soon thrust upon the people of the state could not then be anticipated. *Law and Locomotives* is a narrative of these problems and the efforts of the legislature and courts to resolve them. The author's exhaustive and detailed research, evidenced by the 115 pages of notes, attests to his scholarship and commends this book to any serious student of Wisconsin or railroad legal history.<sup>1</sup> But it is not a pedantic treatise. The author's refreshingly readable style has condensed his voluminous and complicated subject into only 175 pages. Mr. Hunt admirably has refrained from adopting a partisan viewpoint. Instead he has written, as stated in his dedicatory quotation from Spinoza, "neither to mock, nor to bewail, nor to denounce men's actions, but to understand them."

Throughout this recital of action and reaction between the law and the railroads, the reader is inescapably impressed with the monumental inadequacy of the legislature and the corresponding ineptitude of the state executive. The most striking example is the "Wisconsin Purchase." Vying with each other for legislative grants of land in order to obtain capital, the railroads early entered the legislative arena armed with fortunes in railroad securities. Unashamedly, willing legislators succumbed to temptation, and even a Governor and a chief justice of the state supreme court were corrupted. The public grants were parcelled out to their benefactors. The resulting scandal shook the faith of the people in their elected representatives and in the railroads themselves at a time when the new corporate phenomenon required the utmost support from state and people.

Whereas the decadence of the legislature continued undiminished, the courts of Wisconsin exhibited greater wisdom. The constitutional prohibition against state financing of internal improvements prompted the railroads to inaugurate a novel and ingenious scheme to raise the vast amounts of capital needed by the fledgling industry. Stock subscriptions secured by mortgages on their lands were obtained from farmers who were eager to participate in the plan, believing that the benefits which would inure to them as a result of railroad operation in the state would enable them to redeem their land. The railroads obtained funds by selling the securities to eastern banking interests, which in turn sold them to bona fide pur-

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<sup>1</sup> The author is eminently qualified to write authoritatively about his subject matter. After World War II, Mr. Hunt was granted a Rockefeller Fellowship in Legal-Economic History at the University of Wisconsin Law School, where he completed the research for his book. He is a graduate of Oberlin College, has a Master's Degree from Harvard, a Law Degree from Yale, and a Doctor of Juridical Science Degree from the University of Wisconsin. Mr. Hunt is now engaged in general practice as a partner in a Chicago law firm.



chasers for value. Unfortunately for all concerned, increased costs and embezzling promoters consumed much of such capital and foreclosure proceedings were begun in catastrophic volume. Sensitive to the demands of a populace enraged at being dispossessed of its dearest possession, the legislature passed several acts voiding the whole scheme and prohibiting the foreclosures. These statutes threatened the very foundation of the law of contracts. But the Wisconsin courts were not swayed by political or popular pressures. Reiterating the supremacy of law as the fundamental strength of democratic government by which ill-advised expediencies could be counterbalanced, the supreme court gave effect to the common law of contracts and mortgages and struck down the legislature's pronouncements as unconstitutional.<sup>2</sup>

Ultimately the court had an opportunity to redeem itself in the eyes of the people. To remedy what it believed were exorbitant rates and in response to the clamor from a public already prejudiced against the railroads, the Wisconsin legislature enacted the Potter Law in 1874. This statute was a fumbling attempt to regulate transportation by prescribing maximum charges therefor. Mild by comparison with the federal statute in the offing, this was an unprecedented step at the time. The difficulty with the statute was not its basic philosophy but, rather, that it provided no effective sanctions for its enforcement. The state was given no power to proceed directly against the railroads to enforce the rates prescribed. In addition, the three-man commission created by the statute was empowered only to inquire into operating costs and to reduce, not increase, the maximum charges established by the legislature. There was thus no delegation of power under the Potter Law which would remove regulation from the vagaries of a pliant legislature.

Despite the ineffectiveness of this law, a jurist of extraordinary stature, Chief Justice Edward G. Ryan of the Wisconsin Supreme Court, recognized it as embodying a principle theretofore overlooked by other Wisconsin legal institutions. Sustaining the validity of the Potter Law, his opinion emphasized that a railroad corporation differed from other private corporations in being subservient to the public interest and lawfully subject to regulation by a state through its legislature.<sup>3</sup> But shortly after this historic decision, any good which might have resulted from increasing the effectiveness of the Potter Law was precluded when the legislature, now attuned to the demands of the railroads, fatally weakened the statute by divesting the railroad commission of most of the feeble power originally given it. The legislature thus defaulted from the most auspicious position it had attained throughout the period.

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<sup>2</sup> *E.g.*, Callanan v. Judd, 23 Wis. 343 (1868); Oatman v. Bond, 15 Wis. 20 (1862); Cornell v. Hichens, 11 Wis. 353 (1860); but see Von Baumbach v. Bade, 9 Wis. 559 (1859). Another legislative enactment to benefit the mortgagor-farmer was rendered ineffective by narrow construction. Truman v. McCollum, 20 Wis. 360 (1866).

<sup>3</sup> Attorney General v. Chicago & N.W.R.R., 35 Wis. 425 (1874).

When the railroads first entered Wisconsin, the legal anarchy then existent permitted them excesses contrary to the public interest and ultimately redounding to their own injury. The tardy appearance of effective regulation permitted serious injury to the economic and social order. For this the mediocrity of Wisconsin's political leaders must bear the greater part of the shame.

Whatever is its lesson for the present, *Law and Locomotives* does not suggest a wistful return to the pristine era of unregulated transportation. The railroads are no longer monopolies, and the excesses engendered by their former practices are not feasible in the face of today's intense competition between different modes of transportation. Had this been the case when the railroads first made their way across Wisconsin, the author would have had a different narrative to relate. Competition itself surely would have been more successful in regulating the abuses perpetrated by the railroads than was the legislature or even the courts. Mr. Hunt's book suggests that the dream of a modern railroad man should be, not of unregulated anarchy in one monopolistic form of transportation, but of many forms of transportation, free to regulate themselves in the purest possible laissez-faire tradition of free and unfettered competition, unburdened by obsolete laws and regulations considered proper and expedient in the long past days of railroad monopoly. Has not the railroad industry been divested of a large measure of the public interest with which it was "affected" at the time of the Potter Law? Perhaps today's danger lies in the possibility that legislatures will again prove the mediocrity of their members by failing to adjust the law accordingly. For lawyers this means an even greater challenge than existed in Wisconsin during the period covered by Mr. Hunt's book. The opportunity to create new concepts, new law and a fresh philosophy of railroad regulation is as alive today as it then was.