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Law, Power, and Knowledge

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Professor Joseph Sax presided over the final session of the symposium on Saturday morning, October 31. On that occasion a political scientist, Theodore Lowi gave his view of the changing role of law in American political life.

A panel of professors from the Michigan Law School responded to Professor Lowi. The panel was composed of Theodore J. St. Antoine, Joseph L. Sax, E. Philip Soper, and Francis A. Allen.

Summary:

In America the law has been a great source of civic education. Law as litigation, law as case and controversy, law as dynamic local process between contending parties where obligations are made clear and conflicts are defined by lawyers and judges, law advancing by successive approximations has made our society aware of its problems. Individual citizens learned their political responsibilities from laws and, in obeying statutes, came to believe in their provisions.

This was the case in the "golden age of democracy" that prevailed in nineteenth-century America. In that "First Republic" the states did all the real governing. Issues arose out of local controversies and resulted in legislation by amateurs that was clear in its purpose and clear in the obligation it sought to impose on the citizen. A profound change in the political framework within which legal institutions function was institutionalized during the New Deal and celebrated with the coming to power of the Democrats in 1961. Since then, we have been in the "Second Republic," where the national government has taken on the functions of regulation and redistribution, moving into a coercive relationship to the citizenry. At the same time, although Congress is nominally the source of authority of all policy, it increasingly has delegated policy making to the executive.

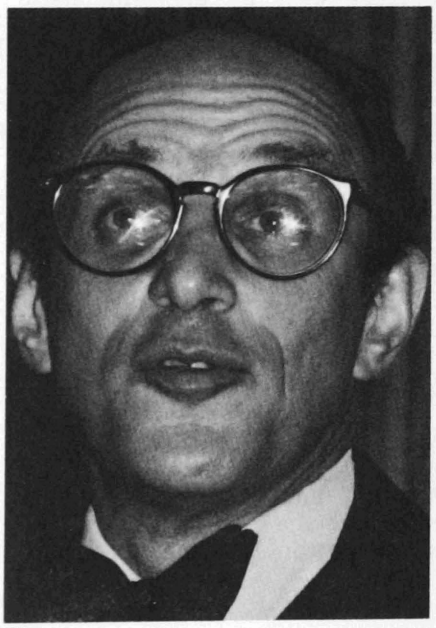
This concentration of power in the national government makes consensus considerably harder to achieve than it was before the New Deal. While bargaining and compromise were always components of democratic government, the nature of compromise has changed in the Second Republic. To understand the new relationships which prevail between compromise and the rule of law, legal scholars and political scientists must examine real laws and the political agreements out of which they arose.

Three cases of legislation by Congress in the Second Republic provide a range of possible types of compromise and resultant legislation. The first is *The Water Resources Development Act of 1974* which authorized a diverse plethora of projects delegated to the Army Corps of Engineers. This act required no compromise, since it "did not involve mutual surrendering of positions." Instead it created a vast but temporary coalition of participants who had nothing in common except for their support of the omnibus bill.

Such logrolling is characterized by a politics of low visibility. The public is uninformed. In Congress there is little debate on the general moral, political, or fiscal implications of the act's provisions and great resistance to application of a general policy governing public works. Standing committees or subcommittees with close relationships to administrative agencies dominate congressional action on such bills.

The Civil Rights Act of 1964, although also an omnibus bill, provides a direct contrast. One principle underlay the entire act: antidiscrimination. This broad and abstract principle was concretely defined by the bill's several titles, each of which covered a separate cause of action. This controversial bill passed only after its supporters had agreed to reduction in jurisdiction and weakening of sanctions.

These compromises were the result of direct confrontation

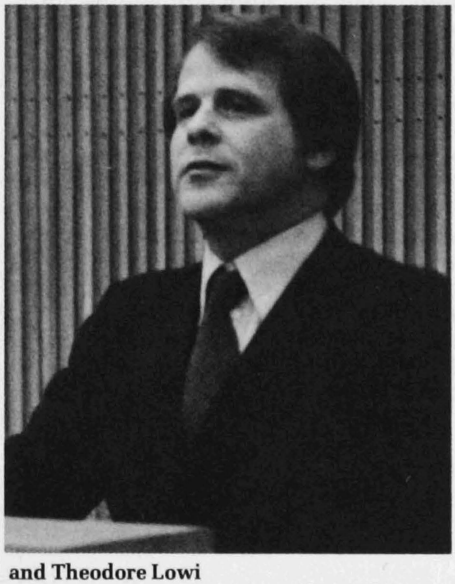


Discussion panel (from left) Theodore St. Antoine, Philip Soper, Francis Allen, Joseph Sax,

between interests which shared an understanding of the types of conduct prohibited by the major titles of the act but disagreed "as to *how much* of each of these principles should become law." The bill was weakened by compromise, but its principles remained clear. "Citizens could clearly grasp, without aid of legal counsel, what new obligations the 1964 Act sought to impose."

The Economic Stabilization Act of 1970, which provided for the first nonemergency wage and price controls in American history, contains no such principle or specificity. "It provides no standard by which the intention of the state could be fathomed." It authorizes the President to decide when to, and when not to, apply controls; he may also delegate this power to any governmental office he pleases. "This is a case of compromise by obfuscation" or "policy without law." Such vaguely worded bills undermine the educational function of law. The politics surrounding them declines quickly into logrolling. Congress gives such bills little floor debate; agencies administering them look to interested clientele for help in developing operating patterns.

In the following excerpt, Professor Lowi concludes with a description of the role of lawyers in the Second Republic and with his proposals for reform of the procedures and ideologies that result in vapid or dangerous legislation.



and Theodore Lowi

Excerpt:

I would posit a general entropic tendency in politics: The more obfuscated and empty the rules or standards in a law, the more likely the politics will run down toward low intensity, low visibility, decentralized and autonomous elites, and resistance to the introduction of broader considerations that might produce debates and rules. Conversely, the clearer and stronger the rules and standards in the law or bill, the more likely the politics will be visible, volatile, and contentious; the more creative will be the role of debate on the floor of Congress; the more likely that groups will be in confrontation rather than cooperation; and the more frequently agencies will confront adversaries, even with arguments over rules and standards. . . .

It should now be all too clear how laws and their politics can so quickly affect knowledge. It should also be clear how the Second Republic has contributed to the decline of the education function of both politics and law. Under the First Republic national government was not particularly relevant. Its output, though dominated by the pork barrel and other distributive outputs, was relatively small. It might also be argued that the political stability a young and socially vibrant nation got from a national pork barrel was worth the price paid in moral or educative irrelevance. However, once the national government became a modern state and assumed so many responsibilities to intervene coercively in the economy and society, it could no longer ignore the moral and educative implications of its actions. Yet, by and large, it did ignore them. The two types of policies most frequently produced by Congress—distributive and vaguely worded regulatory and redistributive laws—share one very important attribute: the absence of a rule or standard of conduct. This explains the similarity of their politics as well as their low potential for civic education. . . .

It is in this sort of context where the function of the lawyer has been transformed by the change from laws made by state legislatures and state courts to national policies without law. Lawyers operating by the thousands as legislative and executive staff members are not officers of the court. They are not involved in adversary proceedings. They are hardly advocates. They are functionaries, and their legal training is often only of marginal relevance, except to prove to their employer they are of sound mind and dependable character. . . .

Lawyers who are functionaries have an important role to play, but if they are not officers of a court or legislators or administrative rule makers, they are irrelevant to the historic lawyer's role as lawmaker and educator. It is in this sense that the Second Republic has revolutionized the place of the lawyer by changing the character of law and the place of legislature and courts within the national scheme. This does not address itself to local legal institutions performing traditional functions, though, most likely, statistics would confirm the proposition that increasingly smaller proportions of holders of law degrees ever set foot in court or in any other way play the traditional role of adversary at law.

Certainly it is the nonadvocacy careers in law that enjoy the highest income and social status. Moreover, those who want most to use their legal training to make laws and shape principles into laws tend to have to resort to marginal careers in public interest law firms or special

cause groups in such fields as consumer law, environmental law, civil rights or civil liberties litigation, or welfare law. For those who've made their peace with it, the Second Republic is built on a relatively efficient administrative process liberalized by procedural restraints. For those of us not at peace with it, the Second Republic is a hell of administrative boredom.

The question of what to do about it quickly boils down to the question of how to reduce at the margins the frequency of distributive and vague regulatory laws while at the same time increasing, again at the margins, the proportion of regulatory or redistributive laws that embody some legal integrity. Since it is clear what society gains from the latter, one important solution is to take the message to lawmakers and federal judges. We will have gone a long way toward improving the public realm if we can just get legislators to feel more uncomfortable about the stupidities of draftsmanship they call laws. This solution requires everyone else to teach the lawmakers so they can improve the educative value of their product.

Another approach to reform is through direct public exposure of bad deeds before they have happened. Because we can know something about the relationship between type of compromise, type of law, and type of politics, we can with good, critical writing head off some of the worst products. By the time a bill becomes a law and is handed over to a large agency, it is too late to raise questions about its lack of educative quality or its tendency to produce tight little self-defensive coalitions. Even if these bills cannot be improved, they can be delayed or prevented from passage if people can be shown the potential for logrolling and downright corruption. Analysis of this sort might even embolden a President to veto bills that don't give him enough instructions about how to be faithful in his execution of the laws. I know from my own limited experience that members of Congress tend to be more sensitive to charges of idiocy in draftsmanship (as a dereliction of duty) than to charges of making unsavory deals. Now that we see the two are related, our ammunition may be stronger and more accurate.

Another approach, important mainly in strengthening the previous two, is playing on the emerging fear of government but using it as leverage to focus on better rather than less. A great deal of nonsense has come out of "conservative," "deregulation," and "free market" parties and publications during the past decade. To oppose regulation or intervention on principle requires opposition to all the state property laws, banking laws, exchange laws, contract laws, incorporation laws, etc., etc., that have made American capitalism what it is. It would also require opposition to all the zoning laws, construction codes, and municipal laws that have made life so comfortable for all the suburban middle classes. Cutting through their silliness is that great element of truth that it is probably better to leave things unregulated wherever you can. The beauty of this is that it gives us an argument for delaying legislation until we can make it clear what we are legislating for. As long as people were arguing that the political system will lose legitimacy and society will fall apart if the legislature doesn't respond to each demand with a law, a counsel of delay was a counsel of defeat or a front for selfishness. Now that even the liberals have seen virtue in the private sphere, delay in the name of better law will not be suspected as too selfish or too risky. It was never really plausible in the U.S. to favor the free market for its own sake. Now it has become plausible to accept a freer market as a consequence of the momentary inability to formulate the rule for properly regulating it. I call this "neo-laissez-faire."

Let me close on a still more drastic idea—deregulation of the legal profession. Legal historians recognize the adaptability of the profession as one of the secrets of its continued importance in the U.S. However, if the work of the lawyer has increasingly become that of the functionary in the private as well as the public sphere, why go on pretending it needs to be a licensed profession? A political scientist is not needed to recognize this as a myth and to unmask its defense as a cover for state-sponsored control of an occupation by a small elite. Before this begins to sound arrogant as well as inconsistent with my entire argument, I want to add quickly that my intention is not to denigrate law or legal training but to permit the introduction of distinctions within the profession, not identical to but inspired perhaps by the more stratified legal professions of Britain and the continental countries. If we freed the legal profession, it could continue to develop as probably the best graduate training for public affairs. That is at least where I will continue to send the students of mine who want careers in public affairs. However, the degree itself is sufficient certification. On the average, lawyers have less need of licensed certification than practicing public economists. With that distinction established—call it public service or administrative law—we could welcome then an even more severe and state-controlled licensing process for those lawyers who would seek a career in litigation and law making, especially leading to judicial positions.

As our Chief Justice has so often pled, we need more judges, but we don't need lawyers who merely fill judicial posts or who may know a bit about judicial procedure. We need more guarantees, which we might get through licensing, that we have a trained and democratically recruited elite who have a better sense of what law is and who have the stature and self-esteem to confront legislatures and groups with *juridical* and not merely judicial opinions. Robert Jackson, one of the most thoughtful of men ever to serve on the Supreme Court, once observed that "the Supreme Court is not final because it is infallible; the Court is infallible because it is final." I am arguing that we could move a bit closer toward infallibility if we stratified the law profession and developed within it a class of persons truly dedicated to the development of law for itself. One thing that has not changed in the Second Republic is the expectation that the federal appellate judiciary will be final. Statutes with or without legal integrity require agencies to implement their decisions through court orders and/or to submit questions of jurisdiction, legality, and constitutionality to normal judicial appeal and review. The world would quake but not crumble if the courts took that job seriously, even to the extreme of reviving the *Schechter* rule. This would become realistic if judging were truly a profession.

This last so-called solution evokes a second iron law of politics: There is an inverse relation between feasibility and effectiveness. Infeasible as they may be, my modest proposals at least help to round out the analysis. Like good law, they may be educative, to this extent—in politics as in psychiatry the solution to a problem may lie in the awareness of the problem.