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Panel Discussion:

Commenting on Theodore Lowi's "Law, Power, and Knowledge"

Participants:
Professors Francis A. Allen, Theodore J. St. Antoine, Joseph L. Sax, and E. Philip Soper of the University of Michigan Law School

Professor Sax: I think by suggesting the destruction of the legal profession, Professor Lowi is certainly going to generate some comments.

Professor Allen: Where in the Second Republic described by Professor Lowi are the concerns which we were talking about yesterday?

Professor Sax: It seems to me that the Lowi paper is of a piece with much of what was said yesterday; it points to an enormous proliferation of intervention on the part of the federal government and proliferation of administrative law. Whereas some of the criticism brought to that development yesterday was put on the level of inefficacy of one kind or another, Lowi is trying to respond critically to those developments at what one might call the most elevated theoretical level. He says that democratic government now perceives itself as obliged to respond positively to all the demands that are made on it. He said today that at some point in the development of the Second Republic, government intervention changed from being merely a necessary evil to a positive good. This phenomenon of proliferating involvement which he is pointing to is what everybody was discussing yesterday.

What to me is provocative and appealing is his notion that law is no good unless it plays a legitimating, educative role. He even uses a term like "civic virtue," a very old-fashioned one, but very revealing of his views. In the obfuscating model, which he views as now being dominant, the fundamental goal of law, this educative role, is lost.

In the area that I know best, that is in the environmental area, air pollution, water pollution, toxic substances, and so forth, it seems to me that laws, for all their complexity, really are not models of obfuscation. They look much more like his model civil rights law. There is a principle; there is a widespread agreement in Congress on the principle. So, I'm not sure, at least in the area that I know, that the obfuscating model really is dominant.

Professor Lowi: My hypothesis is that the level and intensity, and the public character, of the politics in the environmental field account for the clarity of the statutes. One has a clearer sense of what the stakes are, what the costs and gains would be.

I want to emphasize that the legal integrity as I call it, the clarity of the rule, is only one criterion by which to judge laws. The state laws in the nineteenth century were clear; but a lot of the state laws were so bad in their purpose that I would definitely have voted against them had I been there. At least I would have known what I was voting against.

Professor Allen: It occurs to me that Professor Soper might have some comments here. Do you have a sense that the problems that we are talking about are basically founded upon a failure of legislators to do the job of articulation and statement of principle that they should be doing?

Professor Soper: The only way that I know to assess Professor Lowi's claim about legal imprecision is ask what other plausible explanations there may be for such imprecision. The most obvious candidate, it seems to me, alluded to by Professor Lowi himself, is inherent complexity in the subject matter, though Professor Lowi denies that is the explanation. If the subject matter is inherently complex, I think, none of the theses that Professor Lowi has advanced can be demonstrated. Imprecision will exist, regardless of whether it is a case of delegation or statutory compromise through weakness or through obfuscation. Nothing better is to be expected, in fact much worse is likely to occur, if we revert to the situation of the First Republic.

I think the way to demonstrate these claims is to draw on examples from more or less the same era that Professor Lowi draws on. Joe Sax has already mentioned the primary example, the case of pollution control legislation. In the early 1970s Congress passed legislation that in many respects fits exactly the aspects of the Second Republic that Professor Lowi decries. Congress virtually usurped the role previously exercised by states and localities, and the legislation took both forms as far as precision.

In some cases, Congress could not have been more precise. In other cases, Congress gave virtually unrestricted delegation to EPA to come up with standards. In both cases the process was the same. There was high visibility—I think Professor Lowi himself suggested that was the case—with effective interest groups moving from the administrative agency to court, to Congress, and back again, extending deadlines, changing standards, fine tuning the process as they gained information about what was technologically feasible.

The result may be a fourth kind of compromise: compromise by experiment that recognizes the inherent complexity in two senses. First, it recognizes that the problem of environmental regulation transcends jurisdictional boundaries of states and localities, so it requires broader attention. Second, it admits that even when approached from the right geographical perspective, regulating pollution is complicated by uncertainty about the scientific effects of pollutants and the costs and feasibility of control. When that is the case, there may be some sense in starting to get the information we need, either administratively or legislatively, and then responding. If that is true, if complexity makes a difference, then one has to fine tune the analysis and ask questions like, "What matters are inherently complex and might be appropriate for Second Republic treatment?"

Consider Professor Lowi's two examples: the Civil Rights Act and the Economic Stabilization Act. The first is a better kind of legislation, Professor Lowi suggests, than the second. Is that because the first, the Civil Rights Act, involves moral issues

which, however divisive, are not factually complex in the way that questions about pollutant effects might be? Regarding the other example, I'm not nearly as confident as Professor Lowi that the effects of wage and price controls are sufficiently certain, scientifically and factually, not to justify some experiment before we make a definite decision. If that's the case, then one needs to fine tune the question of when it is and is not appropriate to use new devices like delegation and vague legislation.

Professor Lowi: As far as environmental control is concerned, I don't have full details of the politics of the various efforts in that area, but I am aware that the broad EPA structure was set up by presidential order more than by Congress. I don't call that nearly as visible as the first strikes at air pollution which were rather specific. So my theory would be that as the legislation became more vague, the politics also became less visible and less centered in Congress.

There's a point on which I would like to agree with Professor Soper. It may be that legislation is a way of getting the information that we need. I don't call it compromise by experiment; but whatever you call it, learning from experience is extremely desirable. One of the great problems with broad delegations is that they make it more difficult to learn by experiment. One of the advantages of federalism was that you could experiment with one state trying something one way, one state trying it another, and a few states not trying it at all, and see which ones work out. The more vague is our principle of action, the less basis we have for a kind of controlled experiment from which we can learn. The more vague the first assertion is, the less likely it is that Congress and the agencies will learn by the experience.

Professor Allen: The question of the use of law for purposes of the education of the republic looms very large in this paper. Of the lawyer members of this panel, Ted St. Antoine has probably been in a better position than any of us to react to the assertion that one of the losses in the Second Republic is this educational function of law. Ted has been a Washington lawyer; he has had as a client one of the principal interest groups, the labor unions. What is your reaction, Ted?

Professor St. Antoine: I would like to start off with a personal word of thanks for Professor Lowi's contributing a rare intellectual gift, namely, some new ideas. The Second Republic is a very provocative concept. Provocative is sometimes an academic euphemism for wrong, but in any event he has stirred us up. As we have discovered, however, any bold, new, imaginatively designed structure has a certain tendency to leak. I would like to draw attention to what I believe are some of the leaks in the Lowi thesis.

I find pervading Professor Lowi's presentation a kind of wistful yearning for an earlier and simpler America. He and I probably both come from small towns. I certainly do, up in Vermont. The town meeting is a wonderful way to run a society. It is personal, it is intimate, and also extraordinarily exclusive. Lowi referred to the nineteenth century as the "golden age of democracy." During that golden age of democracy, women could not vote. During two-thirds of that golden age of democracy, blacks weren't citizens. I realize that Lowi is not in favor of denying either women the right to vote or blacks the right to be citizens. He would say that it's the process, the bubbling up from below, that he likes about the golden age of democracy, but it seems to me that the number of people that you let into the process has an enormous bearing on how that process is going to work.

I think Professor Lowi is unhappy about the muss of letting the masses into the process. It's going to be a devil of a lot harder to govern New York City than to govern the Union League. Where you have many conflicting interests, the process does have to take account of compromise that may not be all that pretty.

I will try to say something about Professor Allen's question, concentrating upon the three specific examples that Professor Lowi gave us. The Water Resources Development Act of 1974, a part of the new republic, is, as far as I see, nothing but a modern extension of the land giveaway, or subsidy programs, that Lowi said typified congressional legislation in the nineteenth century when Congress was doing what it was supposed to do, not dealing with the great social issues of the times.

The Economic Stabilization Act of 1970 I regard as an aberrational piece of legislation. Historically, I think you'll find it was an effort by a Democratic Congress to embarrass an unpopular President of the United States by giving him enormous powers, and daring him to do something to solve our wage and price problems. I do not think it was a serious piece of legislation. It didn't last. It's gone.

To pick that out as an example is to concentrate upon the aberrational instead of the typical. Much more typical in my field *is* the Civil Rights Act, which he dealt with, and it isn't alone. The amendments to the National Labor Relations Act have become increasingly clear and precise, even if misguided. I would also cite the Landrum-Griffin Act, dealing with internal union affairs, the Fair Labor Standards Act amendments, the Pension Reform Act, the Occupational Safety and Health Act, the Social Security Act, and that monument of specificity, if perhaps nonsense, the Internal Revenue Code. Congress has had full debate and direct confrontation again and again during the modern era. I really don't understand the concern about the lack of standards where standards are feasible.

In the National Labor Relations Act, one will find both kinds of approaches. You'll find it stated in very general terms that employers should not coerce employees, that unions should not coerce employees. That *is* a delegation to an administrative agency to fill in many blanks. I would agree with Phil Soper that this is really of the nature of the problem and that there must be generalization. A sense of direction is provided, but Congress had no sense of the infinite variety of ways in which employers and unions with imaginative lawyers can coerce employees. Other sections state that employers can't bribe union officials and give a long list of specifically stated exceptions.

When you are dealing with a society as diverse as ours, when you are opening the doors to all kinds of different individuals, highly diverse individuals, individuals who will not meet over cocktails at the Union League to resolve their problems quietly, interest groups are the way the system has got to work. If there's any educative lesson in all of this, it is the lesson that the law is responding to the way the real world is and to a far more open society than the golden age of the nineteenth century.

Professor Lowi: How can I respond to a set of comments that are so popular with the audience? I'm not against women or blacks being in the system. The golden age to me was the golden age of legislative democracy, and I have a feeling that if blacks, women, and others had been admitted to membership, the legislature could have worked just as well. I don't like the idea of blaming whatever ills we have today on the inclusion of new people.

I agree here and in print that there are elements of labor legislation that would stand up better than others as clear principles; but is it easy to confuse specificity with a clear rule. The Internal Revenue Code is an example. While it is highly specific, it lacks unifying principles. We've got to make a lot more distinctions in types of law, so we can set up experiments and do research on whether different kinds of politics, the more public or more private kinds of politics, flow from different kinds of legislation. Then we would have a good discourse going between the political scientist and the lawyer.

Professor Sax: It seems to me Professor Lowi is arguing that a law that is infinitely detailed can have exactly the same problems as a law that is utterly empty: no identifiable center or principle.

I think what Phil Soper said is more troublesome in terms of the Lowi paper. If, as he says, these laws are really experiments, that suggests the whole enterprise is a kind of bureaucratic technological function. It suggests that legislation is designed to find out the answers to some very detailed questions and that these answers will tell you automatically what to do. That is a really technological view of law. It seems to me the centerpiece of what Lowi says is that the law has got to have some clarity about what basic resolution has been made of important kinds of value conflict.

Professor Lowi: To project or defend or rationalize an act of authority as an experiment is a way of seriously reducing its legitimacy, almost a way of undercutting the very experiment itself. If everybody knows a law is an experiment, they may very well say, "No one will seriously punish us for disobeying this." If you state that a law is an experiment, you may very well undercut the purpose and wind up with a false experiment.

Professor Soper: Federalism was a way of experimentation, and nobody thought that was bad. If complexity includes an explanation for why we can no longer treat the subjects locally rather than nationally, then we simply. . . .

Professor Lowi: Theorists of federalism said different experiences would be a form of experiment, but you cannot find in the literature a state defending an important state statute as experimental. Theorists of federalism said that federalism was a great laboratory, not the legislators themselves.

Professor St. Antoine: Professor Lowi, I'm having some trouble finding out exactly what are the distinctions between your First and Second Republic, and whether you think that there are advantages in the approach of the First Republic. You said that really suffrage was not your thesis here, and I am certainly prepared to say that you are not opposed to women's voting or blacks being citizens. Nonetheless, you did state that when we had a model democracy, the party leaders controlled the state legislatures of the East, and big corporations controlled the state legislatures of the West. I find that very troubling as a characterization of a golden age of democracy.

You have also made the point that recently Congress, in working out law, has produced policy without law. Now the Internal Revenue Code may be blamed for being law without policy, but that's not the same thing. I suppose you would say the ideal is to have both law and policy reflected in clear edicts. I guess we can all agree on that ideal. My concern is that when we do have as widespread a system of participation in government as we now have, with many different interest groups genuinely reflecting the interests of many different groups of people, a clear univocal articulation of principle is, by the very nature of our present form of democracy, often impossible.

Finally, answering Professor Allen's question, I think we have chosen against any kind of authoritarian educative function of law by the kind of system we have installed. Ideally, I might prefer a simpler and clearer, more authoritative and more univocal policy, but it seems to me that we have sacrificed that in order to let more persons of widely varying views participate meaningfully in the political process.

Professor Lowi: Those ideas are all very interesting. I just want to touch on a couple of them. One, I'm an expatriate southerner, and I don't yearn for anything of the nineteenth century past. Second, you're absolutely right that pork barrelling is all they did in the nineteenth century. I say the same thing. It's just that the national government didn't quit doing that when it became a Second Republic. A very large portion of the budget is pork barrelling—public works, internal improvements.

The secret of the stability of the national government in the nineteenth century was that pork barrel legislation was all it did. Only when it took on all these new functions did it become unstable, unsteady, and ridden by interest groups.

Interest groups have always been part of American politics, but in the nineteenth century there were mediating institutions, parties and legislatures that routinely forced special interests to amalgamate to form a coalition as the only basis for getting enough votes to pass a law. The Second Republic lacks those institutions that would intervene in a mediating way. You cannot talk about interest groups as though they are something new. You cannot even talk about single-issue interest groups as new. You can simply talk about a changed institutional and constitutional environment in which they operate.

One doesn't have to be anti-democracy to say that interest groups under certain circumstances can become harmful. That is not to argue that we should go back to the nineteenth century. I want to go forward to something that we don't yet have, while learning something from the nineteenth century. The one thing I would look to in the "Third Republic" is the revival of the mediating institutions of party and legislature.

This transcription of the Panel Discussion was prepared by the editor from a tape recording of the proceedings.