WILL LAWYERING STRANGLE DEMOCRATIC CAPITALISM?

Laurence H. Silberman

THE LEGAL PROCESS is essentially the adversary procedure by which we interpret, apply, and sometimes create law. And what we call the "rule of law" is indispensable to the very existence of both capitalism and democracy. For capitalism cannot develop unless private property is, at least to some degree, protected against private assault and arbitrary governmental confiscation. Indeed, as Paul Johnson emphasizes (*Enemies of Society*), the development of the "rule of law" in England gave that country an advantage over its European competitors and therefore explains why the Industrial Revolution developed first in the British Isles. Similarly, democracy, the only form of government that legitimates and even institutionalizes dissent, requires legal support for peaceful political activity—free speech, free assembly, a free press, and the rest—without which dissent cannot flourish. That said, it is also true that the legal process, because of its unbridled growth, has become a cancer which threatens the vitality of our forms of capitalism and democracy.[1]

Capitalism, of course, is based on private, market-oriented decision-making, whereas the legal process, although it normally takes the form of an adversary proceeding in which private interests play their part, is in reality a way in which the government asserts power. Today, there is an increasing awareness in the industrial democracies that a certain degree—a tipping point if you will—of governmental intervention into the workings of the economy begins to erode the natural vigor of capitalism. Reliance on the legal process contributes to the sum total of governmental intervention and thereby endangers our economy.

Democracy is also threatened because it obviously depends on a government that responds, at least over time, to popular majority will. The legal process is a form of governmental decision-making in which those who decide (adjudicate) are, to a greater or lesser extent, removed from politics—which is another way of saying they are not responsive to popular will. As already noted, certain protections *against* the democratic political process are needed in order to ensure the very functioning of democracy, but the growing use of the legal process eventually erodes the vigor of other governmental institutions directly responsive to the populace, and thereby the health of democracy itself.

By legal process I mean to include not only court proceedings but also the activities of the entire panoply of tribunals that have proliferated in the United States in recent

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[1] It is fashionable today to describe the American economy as "mixed," a not very descriptive term employed to avoid giving positive value to the private sector. Since I, unabashedly, assert that value, I prefer "modified capitalism"—a term which raises the issue how much modification capitalism can take without losing its acknowledged virtues. It is, however, with acceptance of its modified character that I use the word capitalism throughout.

years. Some commentators focus concern on the growth of litigation in the United States; others decry the regulatory explosion. But actually those two trends are interrelated and complementary. Certain regulatory agencies adjudicate in what has come to be called a quasi-judicial fashion, others litigate before courts, and most do both. But even when adjudicatory authority is given to a regulatory agency, the courts are always granted authority to review agency decisions (under a greater or lesser scope of review). In other situations jurisdiction to rule on particular issues is given to, or asserted by, the courts directly. In either event, the common link is the displacement of private and political decision-making by adjudicators, whatever their titles, to whom claims are presented in an adversary manner. This work, both the adjudication and the presentation, is normally done by lawyers.[2]

That an adversary procedure is used is fundamental to the expansion of the legal process. If our jurisprudence grew out of an inquisitional tradition—in which judges openly supervised inquiry—it would be much more apparent, and perhaps less tolerable, that the legal process was gaining such power. In a sense the adversary procedure disguises that trend because it deceptively suggests a neutral umpire-like role on the part of adjudicators and merely an advocates' role for the lawyers.

Although the legal process is distinctly adversary, it is by no means uniquely so; all societies devise forms to respond to and channel the adversary or competitive nature of man. Our government, our Constitution, was devised in accordance with the notion that an adversary political clash of various conflicting economic, social, and sectional interests was the best protection against the dominance of any group or class. That concept implicitly assumed that no one economic or social interest was morally superior to the rest—although, as Madison put it, "a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good." The successful coalition of interests—these coalitions inevitably become political parties—would be the one that could attract the greatest number of votes. The legal process, however, is a quite different sort of adversary proceeding because the winner or prevailing interest is the one deemed to have the "better" position in accordance with a legal-moral standard.

Capitalism and democracy, in common, stand for competition for the allegiance of the public as either consumers or voters. The legal process, on the other hand, is fundamentally antithetical to *both* because the competition is for the ear of a government official who will determine the *superior* claim among litigants, usually, as discussed later, in terms of priority of rights.

I

This century has seen enormous governmental growth in all the industrial democracies, ostensibly in pursuit of greater equality of condition. But direct government control of the economy (public ownership of production), although common in Western Europe, has never been attractive to Americans, perhaps because of a residual distrust of governmental tyranny. Moreover, our constitutional system makes the direct accretion of governmental power more difficult here than in any other democracy. The Constitution, of course, grants certain authority directly to the President and the judiciary, but the primary method contemplated whereby the government gains new authority is legislation (the secondary one being constitutional amendment). And legislation requires not only a majority vote of the two separate houses of the Congress but also either the assent of an independent executive or a two-thirds vote of both houses to override the executive's veto. Naturally, the more difficult

[2] Not all American lawyers are directly engaged in litigation, although with the growth of administrative regulatory agencies and the enormous increase in federal and state court proceedings, litigation work is growing much more rapidly than counseling. In any event, legal counseling as opposed to business counseling, which some lawyers do, is always shaped and directed by the prospect of litigation. Moreover, that many, even most, legal controversies are settled after or before suit is actually filed does not detract from the growing reliance on the legal process. Since these negotiated settlements are reached in accordance with lawyers' views on the probable results of litigation, they actually extend the adjudicators' impact. Thus, the relevant question is: what is the rate of transference of controversies into legal disputes? My own guess—the rate would be virtually impossible to measure—is that it follows closely the rate of increase in actual litigated cases or, for that matter, in the number of lawyers.

the legislative process, the easier it is for a determined minority to block passage. Therefore, in the United States, as opposed to the parliamentary democracies, legislation has usually required a fairly broad national consensus.

Not surprisingly then, those in this country who wish to increase governmental power are led to seek it indirectly, and less obviously, through the legal process. So long as inducing judges to rule on complicated social and economic issues is easier than getting bills through Congress, judge-made law is preferable to legislation.

That Americans rely so heavily on the legal process is not totally a new phenomenon; Tocqueville noted this peculiarity of American democracy over 130 years ago. Still, until relatively recently the prevailing view among lawyers, law professors, and judges—mindful as they were of the undemocratic nature of the legal process—was the need for judicial self-restraint. Judges were not to make policy; their authority derived only from the necessity to settle, in accordance with law, disputes between private parties that could not be settled elsewhere.

In the 1930s the acceptance of this judicial limitation led to the creation of a score of independent regulatory agencies. Those who wished to extend governmental power through the legal process but were reluctant to openly grant policy-making authority to judges turned to the concept of an independent agency which, because of its quasi-legislative character and supposed expertise, was thought more appropriate for this role. These tribunals—which Charles L. Schultze, chairman of the Council of Economic Advisers, calls command-and-control modules—engage in lawmaking, but it usually is a peculiar kind of lawmaking in which the extent of policy discretion is often disguised by the use of a form of legal adversary procedure to present alternative arguments and supporting information to those who decide. This procedure suggests mere statutory interpretation rather than creation of policy. Some of these agencies, like the National Labor Relations Board, are still reluctant to issue rules rather than enunciate policy at the end point of litigation because adjudication is even less obviously policy-making than rulemaking.

Paradoxically, after the creation of so many of these regulatory agencies, judges, eschewing concepts of judicial self-restraint, began more assertively to set policy themselves. Appellate review of agency decisions, initially quite restrictive, expanded as judges became more assured of their own policy judgments. Even more striking was the expansion of original jurisdiction to cover disputes not traditionally thought appropriate for judicial scrutiny, and the new ease with which litigants gained access to judges.

One hundred years ago litigation was a very chancy business. Rules of court were encrusted with arcane tradition, and a technical mistake in pleading could destroy a cause of action. Trial itself carried almost unforeseeable risks. In those days one did not lightly go to court. But reform came—the reformers asserting the need to bring courts into the twentieth century; litigation was simplified and much of the gamesmanship eliminated. Thus, in the 1930s discovery procedures designed to minimize surprise at trial were introduced into the federal courts.[3] Significantly, these procedures greatly expanded the information available to judges inclined to broaden the reach of judicial decisions.

More recently we have seen the erosion of doctrines by which judges once limited their own jurisdiction. The avoidance of political questions, the requirement that a dispute be justiciable and ripe, the insistence that a party to a cause have standing (a sufficiently direct interest in the dispute)—these doctrines and many others have washed away before the flood of petitions for judicial intervention and, by disappearing, have encouraged more petitions.

Indeed, with the rise of public interest law firms of both Left and Right, devoted to the advancement of scores of political causes, lawyers today increasingly represent these causes rather than parties before the courts. The expansion of class actions has reached the point where the plaintiff is more fictional than real (Nathan Glazer speaks of the phantom plaintiff) and, with the liberal award of attorney's fees, it may soon be possible to do without litigants altogether (so long as the

[3] Discovery procedures include both oral (depositions) and written (interrogatories) pre-trial questioning as well as demands for production of documents. The scope of permissible pre-trial inquiry is much broader than that which governs trial itself.

court finds a target for judgment).

As the courts became more and more accessible and as judges unashamedly reached for policy, the judiciary constituted an even more attractive force for political and social change than the administrative agencies. Ironically, it was once thought that judicial review would hold agency activism to congressionally designed parameters. Today, it is difficult for many agencies to catch up with the pace of judicial activism. Even ambitious civil rights enforcement agencies have been continually challenged by the speed with which courts discovered new meanings in the Constitution and in recent (as well as nineteenth-century) statutes, thereby tending to convert anti-discrimination law into a grand racial or ethnic proportional representation scheme.

II

The growth of the legal process is not occurring without the wholehearted support of a good portion of the American intelligentsia. Those who fundamentally distrust choices made by the population as a whole, in both economic and political spheres, wish to divert as many issues as possible to the legal process. The first step in this transference is to describe an interest as a right. Once that is accepted, it is only a matter of time before courts assert authority to define and protect the right. (As Nathan Glazer points out, in protecting rights courts feel impelled to go to the "root of the problem"—which inevitably results in courts' issuing detailed administrative decisions.) A right is, after all, a priority that the holder can assert against adversary interests—even when those adversary interests are in the majority—because a right is perceived as having a superior moral claim to other interests. Certain rights constitutionally granted are virtually absolute priorities against all comers; others are of a lower order of priority. But all rights are to be protected by those institutions in our society—courts and other tribunals—that are empowered to stand against democratic will. A right, then, is a grant of jurisdiction to the legal process.

We have come a long way since Thomas Jefferson listed as unalienable rights life, liberty, and the pursuit of happiness.[4] The Constitution, particularly its amendments, guarantees the essence of those legal rules that I have described as required by democratic capitalism. But new rights are constantly asserted and judicially recognized. Obviously, every new right so recognized reduces the scope for both private decision-making and the political process. What Peter Berger and Richard Neuhaus call mediating structures — families, churches, schools, corporations, labor unions, and political parties—because they stand between government and the individual (and which I prefer to call intermediate institutions since they should *not* be thought of as owing their legitimacy to any function performed for government) are, without question, indispensable pillars of a pluralistic democracy. Yet, their capacity to manage their own affairs is continually challenged—most often with respect to the crucial matter of internal discipline—by the creation of new individual rights antagonistic to institutional rights. In this profusion only the legal process benefits; its sway continuously expands.

Currently it is fashionable to speak of every American's right to a job. The government should be obliged, according to some, to provide employment (a "meaningful" job at a "decent" wage) to all those who cannot find such in the market. Make no mistake, advocates of this notion well understand the institutional significance of couching it in terms of right; an early draft of the Humphrey-Hawkins bill actually provided for judicial recourse to those who would assert the right. It is hard to imagine a question more central to the political process in this or any other industrial democracy than the relationship between inflation

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[4] Jefferson notwithstanding, Ronald Dworkin in *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) argues that there is no general right to liberty—essentially because you cannot plead it in a complaint.

and unemployment. To allow unemployed Americans to sue the government and assert their priority for employment would be to give judges authority over that central issue. Perhaps, now that courts administer prisons, schools, hospitals, even large portions of state governments, it is time for judges to assume the challenge of macroeconomics. Nevertheless, we should clearly understand what a raid on democracy this rights-creation business really is.

III

Who are the beneficiaries of this trend? Most directly, American lawyers who profit by the increased business and from whose ranks the judges and agency heads are drawn. They share a community of interest with the intelligentsia who wish greater governmental growth and with the bureaucracy that staffs the government agencies. Indeed, the "new class"—the term Irving Kristol and others use to describe those academics who, along with the bureaucracy, stimulate governmental growth (in large part for the power it bestows on its sponsors)—has formed a triple alliance, private lawyers being the third ally. So long as the path of governmental expansion is in the direction of the legal process, most lawyers will support the alliance's goals. Even lawyers who philosophically oppose governmental expansion are understandably somewhat mollified when it takes familiar and profitable forms. This is not to suggest they are greedy, only human.

Perhaps it is inevitable that those who train for law school reflect attitudes consistent with self-interest. Still it was not always true, at least not to the present extent; law faculties at one time were heavily staffed, if not dominated, by professors who brooded over the anti-democratic character of the legal process and therefore impressed upon their students the need for its cautious use. Now it seems that law schools are centers of distrust for capitalism (and contempt for businessmen) as well as impatience with democratic institutions.

One reason for the antipathy to capitalism that marks so many American lawyers and law students is their tendency to think of the legal process as outside, or unrelated to, economics. The phrase "everyone is entitled to his day in court" tacitly implies that litigation is essentially a free service. Of course, lawyers recognize the reality of legal fees, but most are unconcerned with the full costs of the legal process and therefore are normally instinctively hostile to suggestions for dealing with social problems that do not rely on the legal process.

Thus, the characteristic lawyers' response to the legal problems of the poor is not to attack those problems directly, but rather to provide lawyers at public expense. That family disputes and automobile accident claims, for instance, are disposed of through elaborate adversary legal procedures is a costly national scandal. But lawyers expiate any feelings of responsibility by supporting free legal services for needy individuals, thereby conveniently ignoring the total costs of this litigation, which inevitably, in one form or another, are passed on to society.

The economists, whose methodology calls attention to all costs and employs the concept of trade-offs, are particularly aggravating to most lawyers because they constantly threaten to prick that balloon of legal illusion (even though trade-offs, the stuff of compromise, fit neatly with the democratic political process). Recently, Charles Schultze, calling for a change in the federal occupational safety and health program, proposed that government-created incentives and disincentives would promote worker safety and health more effectively than thou-shalt-not rules. Schultze was greeted by a tumultuous outcry from lawyers in the bureaucracy, the Congress, and the public interest law firms. Why? Because his proposal, as the critics put it, would place an economic value on human life. Of course the present regulatory system, despite protests to the contrary, cannot avoid at least implicitly balancing regulatory costs with the increased health and safety benefits to be achieved. So long, however, as this process is never explicit, the illusion of a free legal process can be perpetuated. The sad truth is that Schultze's proposal engendered such hostility not because it placed an economic value on human life but because it placed an economic value on the legal process.

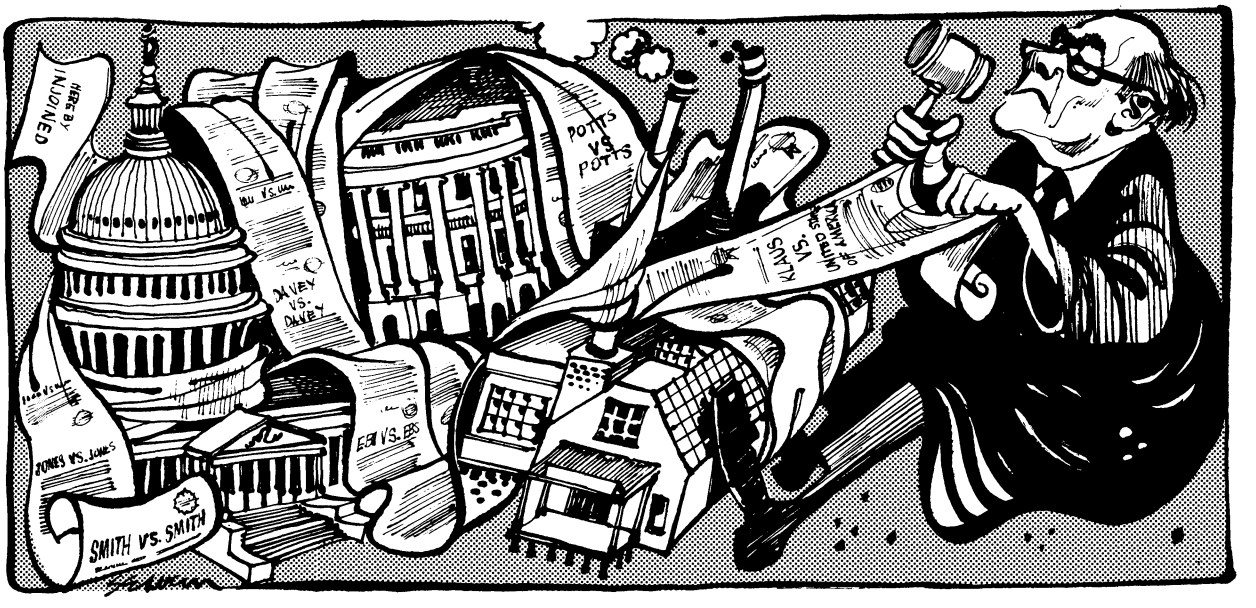
The sheer number of American lawyers—their ranks augmented by a staggering annual influx from our law schools—stimulates the

prodigious growth of the legal process. There is an ancient story, which lawyers love to tell, of the small town lawyer who almost starved until another lawyer moved to town—at which point they both waxed prosperous. The story tells us a great deal; it is really about a variation of Say's law, which preceded Lord Keynes's emphasis on demand management: an increase in supply (in our case, the supply of lawyers) creates an increase in demand.[5] This trend is helped along by the manner in which lawyers—because of their relative mobility and the obvious direct returns to their professional interests—pursue elective office. Since lawyers dominate the Congress (and state legislatures), legislative recourse to the legal process to resolve problems is virtually inevitable.

Of equal concern, however, is the percentage of our very best talent that is drawn into law rather than business. Undergraduate professors are struck by this trend and examination of the legal registers that list academic honors confirms it. Interestingly, a Yugoslav economist recently expressed concern to me about the number of that country's finest graduates who were avoiding business enterprises (because of recent ideological trends) and, instead, choosing safer government bureaucratic jobs. His nation's productivity would, he thought, inevitably suffer. In the United States it is not the bureaucracy that attracts a disproportionate share of our talent. It is the legal profession, and lawyers today are more and more simply a structural continuation of the bureaucracy. As the regulatory portion of the legal process has grown, lawyers—particularly those concentrated in urban centers—increasingly function as intermediaries between the regulatory agency/judicial complex and the regulated targets. They mold the multiplicity of legal rules through the legal process so that they fit snugly around American corporations, unions, and other institutions. If we drastically reduced the nation's private lawyers, there would be an inevitable push to increase the number of bureaucrats. Otherwise the government's capacity to dominate our society would be threatened.

Ironically, we see that the market works, even for those who challenge it: talent is drawn into law because that increasingly is where the power is (as well as handsome economic rewards). Disdain for capitalism and capitalists, elitism couched in Naderite concern for consumers and the poor, impatience with the democratic process as an inadequate engine for social change—all follow from the power afforded those who join the ministers of the legal process. They respond to the prospect not of the rule of law, but of the rule of lawyers.

[5] If I am correct in this application of Say's law, attacks on legal profession entry limitations and advertising restrictions may be misguided. The economy as a whole might be better off if we considerably toughened bar examinations and thereby reduced the number of practicing lawyers, as well as tightened, rather than loosened, advertising restrictions.



IV

Recently, a corporate executive amused an audience of lawyers by describing his corporation's annual earnings as seven times legal fees. Attorneys' hourly rates have, of course, increased—but probably no faster than other costs in an inflationary age.[6] The real direct cost increase is in the proliferation of legal services. One finds an analogy in medical care, where sky-rocketing costs are attributable not so much to increased doctors' fees as to the widespread use of sophisticated machinery and "pioneering" medical services, including surgery, with only marginal utility (stimulated, according to many economists, by extensive "free" insurance coverage—which should give pause to those who advocate the spread of employer-financed prepaid legal insurance plans). In any event, the direct costs are probably dwarfed by indirect costs; every piece of litigation diverts hundreds, in some cases even thousands, of non-legal personnel from productive work. And the charge upon the creative energy of senior executives—the most valuable asset any business enterprise enjoys—is surely the most serious cost of all.

In a capitalist economy, efficiency and, therefore, productivity depend quite clearly on speed of response to changing market conditions. The legal process importantly delays both the making of decisions (the willingness to take risks), because it introduces external imponderables, and the carrying out of decisions already made. In truth, litigation of all kinds is becoming a major structural impediment to our economy. This is most dramatically apparent in the energy field where nuclear power plants, the Alaskan pipeline, and offshore oil exploration have been delayed interminably to the detriment of our national economy while judges ponder issues beyond their ken. But there is virtually no business investment contemplated today that is not to a greater or lesser extent surrounded by legal process snares. Naturally then, the willingness to risk capital is diminished and economic growth suffers. Indeed, perhaps some measure of the competitive advantage that Japan and some European nations seem to enjoy vis-à-vis the United States is attributable to their much less intrusive use of lawyers.[7]

If the impact of the legal process threatens the vitality and growth of our economy, it is no less a problem for our democratic institutions. As discussed before, our Constitution grudgingly permits accretions of government power: legislation requires a dominant consensus. And the need for consensus stimulates compromise, thereby moderating intolerance of opposing views. The legal process, on the other hand, offers the prospect of victory without compromise (which is what makes it so attractive to those who see moral imperatives in the satisfaction of proliferating rights). As the legal process becomes the favored procedure for resolving issues, the ability of legislative institutions to forge compromises that truly resolve contentious issues is lost.

I do not mean to ignore the executive branch. The President, uniquely responsive to the entire popular will, once had great policy latitude over the administration of the executive departments. Now, of course, much of the executive function has been diverted to independent quasi-legislative, quasi-judicial agencies. With respect to the part that remains, the executive branch is so plagued with law suits either forcing it to do what it does not wish to do or deterring it from doing what it does wish to do that it resembles, alternately, a giant puppet dancing to legal-process strings and a Gulliver tied with Lilliputian legal bindings.

We see a vicious circle. Judges apologetically say, We must decide because the Congress (or the executive) will not. However, the more apparent it becomes that the courts will at some point intercede, the less likely it is that the other two branches—particularly the Congress—will move on their own. The fundamental error is that of the judges. A lack of congressional action usually means a strong public consensus has not formed—which, in democratic theory, normally means that until it does government should not act, no matter how offensive the state of affairs to those who are "certain" of the need for a governmental

[6] Ralph Nader's recent complaint about the rise in legal fees qualifies as a new definition of "chutzpah." No one has done more to generate legal fees than this modern Torquemada who seeks to "purify" our society by using the legal process instead of the stake.

[7] West Germany has less than a quarter the lawyers per capita the United States has, Japan less than a twentieth. Great Britain, which suffers from its own brand of excessive government intervention, has only a fifth *(New York Times,* May 17, 1977).

response.[8] It does not follow that the political process is not working merely because debate on an issue does not lead to a federal program. Discussion in news media, books, or congressional hearings could have caused people to conclude that government action was inappropriate.

Even when Congress acts today, often it is only to delegate to the judiciary—sometimes indirectly through a newly erected regulatory agency. Characteristically, the delegation is preceded by a general—often contradictory—statement of purpose that really reflects congressional abdication. It is often said that Congress's typical response to a social problem is to throw money at it in the form of a new federal grant program. That is true only half the time; the other half, Congress throws the problem to the legal process. Some argue that this trend does not threaten democratic institutions, or the Congress itself, for what the Congress creates it can abolish. It could, therefore, take back from the legal process the policy-making role which that process has acquired. Theoretically yes, but unfortunately only theoretically. The Congress is losing, or perhaps has already lost, the psychological disposition to challenge the "imperial judiciary" (to borrow Glazer's term), in part because its members see the expansion of the legal process as coming at the expense of the executive rather than themselves.

Take as an example the proposed Consumer Protection Agency. Its purpose as described by congressional adherents is to protect consumer "rights" by acting as a consumer advocate before administrative agencies and executive departments and even *against* those agencies in court. This would institutionalize the legitimacy of judicial resolution of intra-executive branch disputes, clearly resulting in an enormous shift of executive authority to the judiciary. After all, the power to resolve disputes within an organization is central to the ability to manage that organization. Less apparent but equally true, the proposal abandons the precept of congressional responsibility for setting basic policy to guide executive and independent agencies. Surely if Congress concludes that one or more of these agencies has become insensitive to public needs (presumably because captured by the regulated constituency), it has the capacity to remedy the situation directly. The truth, of course, is that Congress is split on these questions and rather than hammer out a resolution, a consensus, it finds it easier to give various "interests" an advocate and entrust the courts with the policy resolution. But each time Congress chooses this seductive approach, grappling with the next policy dispute becomes harder.

[8] This is not to be critical of the Supreme Court's decision, as opposed to its sociological theorizing, in Brown v. Board of Education. All that was necessary was to overrule Plessy v. Ferguson, the earlier "separate but equal" decision that had frustrated the purpose of post-Civil War constitutional amendments. More troubling, however, is the Court's decision in Baker v. Carr, the famous reapportionment case that propelled the judiciary into the very "political thicket" Frankfurter had predicted in the earlier Colegrove v. Green opinion. Although the Court's justification for intervention (that a mal-apportioned legislature cannot adequately respond to popular will) is a powerful one, on balance the costs of judicial intervention have outweighed the benefits. As difficult as it is for the political process to ameliorate mal-apportionment, it is even more difficult to liberate our election procedures from a judicial straightjacket.

V

The continuing shift of private and public policy formulation to the judiciary has caused discomfort as well as gratification to the nation's judges. The courts are, quite naturally, overloaded, and we hear of the need for more judges and new inferior tribunals as well as new layers of judicial review. But it is not merely the number of cases that threatens to overload judicial capacity; the size of certain cases, augmented by expanding discovery procedures, engenders talk of new reform. It is now proposed that discovery be cut back to more manageable proportions by tightening the standards of relevance.

Attorney General Griffin Bell recently horrified much of the antitrust bar by suggesting that large antitrust cases bogged down in endless discovery might be tried in Congress instead of the courts. To be sure, the suggestion cannot be taken literally—such a trial would be a circus—but the attorney general implicitly acknowledges that the appropriate forum for resolving broad economic policy questions raised by adventuresome antitrust cases is Congress, not the courts. One wishes that his antitrust division as well as the Federal Trade Com-

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seem to suggest—a process through which important groups receive benefits, there is little hope that Congress will act. The individual gainers would be unlikely to gain significantly, while the losers would suffer large losses.

Perhaps there would be a chance, though, even in this case, if consumer groups, Common Cause, the media, and a combination of liberals and free market conservatives could be induced to work for deregulation. At this time, two influential senators, Edward Kennedy and Charles Percy (Republican, Illinois) are actively in favor of change. With White House support, deregulation of trucking is possible in the next three to five years.

Conclusion

The best chance for regulatory reform now lies in the airline industry, where the case for change has been clearly made and its proponents are in a strong political position.

If airline reform fails in Congress, there is no hope for deregulating any other sector. But even if airline reform does occur, achieving trucking deregulation will be difficult. Yet, the probability is not zero and the industry is clearly worried. If motor carriers are deregulated, it will be important to turn again to the railroad industry and make a bold move to reduce ICC controls there. With trucking even partially free, railroad managements would probably support deregulation of their operations, leaving only shippers and labor opposed.

To end on an optimistic note, economists have shown that their profession can be influential. Without the studies and testimony of scholars, there would have been no movement towards deregulation. While economists can become discouraged with the pace at which Congress adopts their obviously brilliant analyses, given the opposition and given that economists generally "haven't met a payroll or run a railroad," it is amazing that they have had so much influence. ■

Lawyering and Democratic Capitalism

(*Continued from page 22*)

mission, whose new chairman promises "innovative" litigation, would take the hint.

Plainly, both adding judges and limiting discovery procedures will reduce judicial bottlenecks and permit even more questions to be brought to court. Is that really desirable? Perhaps it is only as the legal process becomes clogged and, therefore, judicial decision-making less available that private and political institutions will regain their own decision-making capacity. Of course, that suggests a form of rationing, which is always an extreme remedy—and particularly so here, since we cannot be sanguine that the courts or Congress would adopt the proper methodology to order the queue. It might well be those matters least appropriate for judicial resolution that gain the highest priority. (Note that the Speedy Trial Act of 1974, one attempt to order the queue by giving criminal cases a first priority, has had perverse consequences because of unrealistic time limits.) In any event, those at the bottom of the queue will surely protest their placement vigorously, claiming discrimination. Even now, Supreme Court efforts to limit class-action relief have been attacked as anti-poor, anti-consumer, and so on. However, to those who would so protest, I offer the thought that they might be benefitted in the long run, since they might gain greater effectiveness in the political process and that might be infinitely more valuable than reliance on adjudicators.

Still, we face a dilemma. Unless our political institutions mount a virtual counterrevolution against the legal process, our only hope of preserving the vigor of democratic capitalism may be for the legal process to become so unwieldy that private and political decision-making gain a comparative advantage. But then the legal process would be less available for those matters for which it is truly needed.

Is it too much to ask of American lawyers that they accept major responsibility for finding ways out of this dilemma? I do not think so. After all, American democracy was founded and set on its course by lawyers—albeit lawyers who were simultaneously farmers, businessmen, architects, and philosophers. Chief Justice Burger has repeatedly, but virtually alone, warned of the dangers of an over litigious society but he is, of course, constrained in what he can say; he cannot criticize specific legislative proposals or, except in his opinions, judicial imperialism. He deserves more support from an American bar that eschews self-interest (as far as that is possible) and concerns itself with the harmful impact of an ever expanding legal process on our society. ■