ARTICLES

Madison's Nightmare

Richard B. Stewart†

I. The Special Interest Regulatory Welfare State

James Madison identified domination by economic and ideological factions as the central problem in a liberal polity. He argued that such domination was more likely to occur in smaller, territorially limited units of government than in the proposed national government. An extended republic would encompass so many diverse and scattered factions that no single interest group could gain dominance, nor could permanent coalitions be maintained. Liberated from servitude to faction, federal officials would forswear parochial and partisan loyalties and adopt measures for the common good.[1] The separation of powers within the national government would provide an additional safeguard against domination by factions while preventing the growth of excessive and irresponsible central power.[2] The form of national political integration achieved through the new Constitution's legal structure would thus ensure government in the public interest.

Economic integration and development would accompany political integration, aided by federally guaranteed free movement of labor, goods, and capital within a multi-state economy. Furthering Madison's vision, the federal courts during the nineteenth century provided security for interstate contracts and investments, en-

---

† Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice. The views expressed here do not necessarily reflect those of the Department of Justice or the United States. The assistance of Jonathan Wiener in the preparation of this article is gratefully acknowledged.

[1] See Federalist 10 (Madison) in Clinton Rossiter, ed, *The Federalist Papers* 77, 77-78 (New Am Lib, 1961).

[2] See Federalist 51 (Madison) in id at 320, 323-35.

couraged the growth of multi-state business corporations, curbed state protectionism, and fostered the development of a common commercial law. These measures, together with Congress's creation of a national currency and its investment, along with the states, in a transportation infrastructure, promoted economic growth and the rise of regional and national markets. Other aspects of economic policy and virtually the entire field of social life were left to the states and localities. With the striking exception of slavery, events throughout the nineteenth century amply justified Madison's optimism.

By the end of the nineteenth century economic growth had resulted in full-scale industrialization and spawned giant multi-state business corporations.[3] These developments generated demands for political control of the new leviathans—demands asserted not only by consumers and workers but also by business, as small businesses sought protection against the competition of large enterprises, and the large enterprises sought governmental measures to stabilize the vicissitudes of the market. The courts could not or would not provide such protection. Private adjudication was inherently ill-suited to addressing the collective consequences of industrialization. Moreover, most judges were firmly committed to market competition as the preferred mode for organizing economic activity. Legislatures responded more favorably to these demands, but generally rejected government ownership of industrial enterprises as a solution. Instead, they chose regulation.

Originally the states performed the bulk of the regulation, but eventually the national government stepped in as decentralized regulation in a federal system of numerous states proved to be hampered by several factors. First, the interstate mobility of capital and commodities, which the federal courts have so zealously promoted, undermines the willingness of states to impose stringent controls on business enterprises. States fear that such measures will handicap their own industries in competition with those of other states, and also drive business investment elsewhere. Second, many of the smaller states have far fewer administrative resources than the corporations that they seek to regulate. Finally, coordination problems make a system of decentralized state regulations especially ill-suited for controlling national transportation systems and product markets. Thus, federal regulation was first enacted in these areas.

---

[3] See Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (Harvard, 1977).

The dominant form of government regulation, whether at the state or national level, was a "command and control" system implemented by specialized administrative agencies. This system was first developed in railroad regulation, where price, entry, and service controls were used to combat the perceived evils of market power. It was later extended to such diverse fields as pharmaceuticals, trade practices, and broadcasting.[4] Then came the Great Depression, a vivid lesson in economic interdependence. Fresh political demands arose for ambitious new federal regulatory programs aimed at stabilizing the national economy. The command and control system of regulation was extended to labor relations, securities, agriculture, trucking, aeronautics, and other sectors.

The New Deal also produced the first wave of large-scale national social insurance and welfare programs, including the social security and unemployment systems. These and later national social welfare programs responded to the states' inability to meet the growing demand for government provision of social services and assistance. As theorists of fiscal federalism have shown, there are grave structural impediments to providing such benefits through a system of decentralized government.[5] The interstate mobility of commodities and capital discourages states from raising taxes to fund generous social programs because states fear burdening their own businesses and triggering an exit of wealth. An additional disincentive is the mobility of individuals among states—a mobility that has been legally guaranteed by the federal courts. States fear that if they adopt generous social programs, they will attract an influx of the needy, necessitating further tax increases. On the other hand, this fear may be overstated, because in practice many poor, ill, aged, or otherwise needy individuals cannot readily move and may remain trapped in poorer states or localities that lack the fiscal resources to adequately provide for them.[6]

Two basic types of national measures have been enacted by Congress to deal with these fiscal federalism problems. One consists of the federal government delivering benefits to individuals in the form of cash (social security retirement and disability pay-

---

[4] Stephen Breyer, in *Regulation and its Reform* (Harvard, 1982), analyzes the functional relations between different types of market activity thought to require government modification, and different types of tools (including command and control measures) that government might use to regulate such activity.

[5] See, for example, Wallace E. Oates, *Fiscal Federalism* (Harcourt Brace Jovanovich, 1972).

[6] See Oates, *Fiscal Federalism* at 49-53; and Richard B. Stewart, *Federalism and Rights*, 19 Ga L Rev 917, 949-50 (1985).

ments) or near-cash (food stamps and payment of medical expenses). The other consists of federal grants to states and localities to support various state and local social services (education, housing, health care services, rehabilitation, transportation) that otherwise might not be adequately funded because of the factors previously noted. These grants are generally conditioned on the states and localities dedicating the funds to specific purposes, supplying matching funds, and complying with various other requirements.[7]

When these and similar regulatory and social welfare programs were challenged on constitutional grounds, the Supreme Court sustained them, repudiating earlier dual federalism jurisprudence that had sought to allocate distinct roles to the state and federal governments. In doing so, the Court not only had to construe Congress's taxing, spending, and commerce powers very broadly, but also had to reject claims that these exertions of national authority violated structural principles of federalism protecting state autonomy. Moreover, the implementation of these federal programs required the development of vast and unprecedented federal bureaucracies. In sustaining the validity of these new bureaucratic arrangements, the Court allowed Congress to delegate broad lawmaking powers to administrative agencies, invest them with adjudicatory powers that would traditionally have been exercised by courts, and limit the President's power to remove and thus control their directors. At the same time, the Court abandoned constitutional protection for common law economic rights and liberties. This was the New Deal constitutional revolution.[8] In its aftermath, majoritarian politics determined economic and social policy, creating a system of competitive federalism in which either the federal government or the states could adopt and implement such policies.

Increasingly, it was the national government that was best able to meet rising political demands for economic stabilization, growth, and economic justice. The courts' relaxation of traditional separation of powers limitations freed the national government to meet these demands. Congress created the regulatory and social welfare programs of the New Deal and Great Society, and estab-

---

[7] Another technique, adopted by Congress in the 1930s to deal with unemployment compensation, is to impose a federal tax on business but recognize an offsetting credit if a state imposes a similar tax and uses the proceeds in ways specified by Congress. See *Steward Machine Co. v Davis*, 301 US 548 (1937) (upholding constitutionality of Title IX of the Social Security Act).

[8] See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L J 1013, 1069 (1984).

lished vast administrative bureaucracies to implement these programs.

The abandonment by the Supreme Court of dual federalism and other structural principles of constitutional law was little mourned.[9] Commentators found adequate safeguards for federalism in the political structuring of the Constitution, which provided for territorially-based representation in Congress and in the presidential electoral college. Also, the national political parties have a decentralized structure based primarily on states and large cities. This system was thought to ensure the effective representation of state and local interests in Congress. Given this composition, Congress would accordingly be sensitive to federalism values and not enact new national programs unless necessary to meet overriding national need.[10]

Moreover, the several branches of the federal government were increasingly viewed as more responsive to racial and other minorities than state or local governments. As federal civil rights legislation extended and enforced the initiatives of the federal courts during the late 1960s and early 1970s, the successes of the civil rights movement were emulated by advocates for the poor and for consumer and environmental interests. The advocates asserted that their constituents were not adequately served either by the market or by state and local governments. They thus sought appropriate protection from the federal courts and Congress.

In the period 1965-1980, Congress adopted sweeping new environmental, health, safety, and antidiscrimination regulatory statutes. There are at present over sixty major federal programs regulating business and non-profit organizations. Congress dramatically increased funding for direct federal social insurance and assistance programs, many of which also apply to state and local governments. Congress also greatly increased federal funding of conditional grant programs to states and localities. They now impose over one thousand different sets of conditions and requirements on state and local governments. Nonprofit organizations such as universities and health care institutions that receive federal grants are also subject to these conditions. In many cases, these grants regu-

---

[9] See Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va L Rev 1, 21-23 (1950).

[10] See Morton Grodzins, *The American System* 254-89 (Rand McNally, 1966); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government* in Arthur W. MacMahon, ed, *Federalism: Mature and Emergent* 97 (Russell & Russell, 1962). This view remains popular today. See *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 551-52 (1985) (states should look to Congress, not courts, for protection of their interests).

late not only the recipients' substantive policies, but their organizational structure, employment practices, and decisionmaking procedures as well. State and local governments submit to these requirements because of irresistible pressures from local interest group constituencies that stand to benefit from the federal funds.[11]

On Madisonian premises, the growth of these federal programs should be welcomed as an authentic expression of the public interest and an appropriate consequence of the national government's superior performance in promoting that interest. The Founders, one could argue, clearly intended for a politics of the national good to override state and local measures. National regulatory and social programs can be understood as correctives for state and local neglect fostered by indifference, the local entrenchment of privilege, or the structural impediments in a federal system to decentralized regulation and redistribution.

These confident assumptions of latter-day champions of national control have, however, been badly shaken during the past decade. It is now widely understood that the processes through which national measures are adopted and enforced do not always ensure that assertions of national power serve the general interest. Instead, they can invite the very domination by faction that Madison so desired to prevent. This realization has been sharpened by the rise of public choice theory, which applies the methodology of economics to political conduct.[12] Public choice theorists use a more detailed formulation of Madison's faction analysis to look beyond stated public interest goals and to focus on political incentives and their interplay with institutional arrangements. Genuine aspirations for social and economic progress may be subverted by institutional structures that fail to properly reconcile the incentives of the various decisionmakers.

Several factors explain the vulnerability of national policy to factional control. First, the strength of traditional territorially-based political parties has been sapped by the rise of a new political system, one based on the national media, mass mailings, and single issue political contributions. This system is dominated by nationally-organized economic and ideological interest groups of single issue rather that majoritarian politics.

---

[11] Richard B. Cappalli, 2 *Federal Grants and Cooperative Agreements* § 11:24 at 54-55 (Callaghan, 1982).

[12] See, for example, Daniel A. Farber and Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex L Rev 873 (1987); James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (U Mich, 1962).

Second, federal conditional grant programs, sometimes celebrated as a form of "cooperative federalism,"[13] are used to co-opt state and local interest groups and officials. The programs do so by exploiting such groups' dependency on federal monies to convert them into supporters of federal measures rather than defenders of state and local independence.

Third, the dominant reliance on legalistic "command and control" strategies to achieve national goals inevitably involves a substantial shift of decisionmaking power from Congress and the President to federal bureaucracies and courts, sidestepping the already weakened federalism and separation of powers safeguards against factions.

Command and control regulatory strategies attempt to achieve national goals by requiring or proscribing specific conduct on the part of regulated entities, such as the use of specific pollution control technologies, or the adoption of particular workplace safety measures. The rapid growth of federal controls has outstripped the capacity of Congress or the President to responsibly make the thousands of decisions required to dictate conduct throughout a vast, diverse, and dynamic nation. Such decisions are either delegated within Congress to subcommittees that are subject to only weak political accountability, or outside the legislative branch to federal bureaucracies and courts—whose political accountability is even weaker.

The exercise of administrative discretion is heavily influenced by organized economic and ideological interest groups, who offer political support, threaten political opposition, and deploy legal remedies to block or delay administrative actions. Since the 1960s, it has been popular wisdom that regulatory agencies are typically "captured" by the industries that they are supposed to regulate. But economic interests beyond the regulated entities have also played a major role in influencing agency decisionmaking. These include labor, government contractors, agricultural interests, and other client groups. In recent years, a variety of new ideological interest groups, including organizations championing the environment, consumers, religion, the handicapped, women, abortion rights, unborn children, and others, have arisen to join the "regulation game."[14]

---

[13] See Grodzins, *The American System* at 25-48 (cited in note 10).

[14] See Bruce M. Owen and Ronald Braeutigam, *The Regulation Game: Strategic Uses of the Administrative Process* 2-30 (Ballinger, 1978). Various theories of the regulatory process are explored in Barry M. Mitnick, *The Political Economy of Regulation* 79-167 (Columbia, 1980).

Rather than offsetting each other through mechanisms of countervailing power, as Madison envisaged, these groups have instead divided power among themselves. This parcelling of power has been accomplished though congressional delegations of authority to functionally specialized bureaucracies. Each of these new power centers is dominated by the officials of the agency in question and the small number of legislators and private groups interested in that agency's decisions.

Madison identified the problem of factional domination in territorially limited government. The growth of the national regulatory welfare state, however, has spawned a new form of factional domination. By an irony of inversion, Madison's centralizing solution to the problem of faction has produced Madison's Nightmare: a faction-ridden maze of fragmented and often irresponsible micropolitics within the government.[15] The post-New Deal constitutional jurisprudence of majoritarian politics has helped produce this result, because the demands for national regulatory and spending programs have outstripped the capacity of the national legislative process to make decisions that are accountable and politically responsive to the general interest. This has subverted the very premises of Madisonian politics.

II. Attempting to Cure Madison's Nightmare Through Administrative Law: Entitlements and Public Interest Law

The shortcomings of the new bureaucratic system, at once centralized and fractionalized, constitute Madison's Nightmare. Affected political constituencies have viewed these shortcomings from two basic perspectives. The constituencies that were supposed to have benefited from new bureaucratic and regulating programs—the poor and disadvantaged, environmentalists, consumers, and workers' organizations—have found the benefits delivered to be far below those promised. The constituencies whose conduct has been centrally regulated in order to provide these benefits—state and local governments, businesses, and large nonprofit organizations—believe that their institutional autonomy and freedom of initiative have been unduly and arbitrarily curtailed. Both problems can be traced to the inherent difficulty in attempting to order a vast and dynamic country through the Federal Register and the Federal Reports.

---

[15] See Theodore J. Lowi, *The End of Liberalism* 200-06 (Norton, 2d ed 1978).

The legal commands adopted by central agencies are necessarily crude, dysfunctional in many applications, and rapidly obsolescent. These characteristics, which have received much publicity in the United States in recent years and helped fuel the political movement for deregulation, are the inescapable result of centralization. Bureaucrats in Washington simply cannot gather and process the vast amount of information needed to tailor regulations to the nation's many variations in circumstances and the constant changes in relevant conditions. In order to reduce decisionmaking costs, national officials adopt uniform regulations that are inevitably procrustean in application.[16] The same problems that have plagued the Soviet effort at central management of the economy hamper American efforts to plan selected aspects of the economy through centralized regulations.

These dysfunctions not only overburden the regulated entities but also cause them to fail at their intended goals. Legal blueprints drafted in Washington inevitably fall short of their postulated outcomes and produce unintended side effects when officials attempt to apply them to unforseen or changed conditions. The problem of "implementation gaps" is exacerbated by the dependence of the federal government on the states to enforce federal regulations. This enforcement problem is vast.[17]

Furthermore, the Supreme Court has steadfastly refused to preempt the growth of the centralized regulatory welfare state. During the 1980s, attacks on the system's shortcomings became politically popular. The Reagan administration even attacked its constitutional underpinnings, which had remained virtually unchanged and unchallenged since their New Deal foundation. With a few wavering exceptions, however, the Court refused to reconsider key, long-established rulings that had construed Congress's commerce and spending powers in sweeping terms, unconstrained

---

[16] See Eugene Bardach and Robert A. Kagan, *Going By the Book* (Temple, 1981).

[17] There are over 200,000 industrial sources of air pollution, 200,000 sources of water pollution, and over one million generators of hazardous wastes subject to national regulation. Since states and municipalities have already established regulatory authority in these areas and are thus well-equipped to monitor and enforce, national programs related to the environment and many other fields rely heavily on state implementation and enforcement. Such reliance is also inherent in the conditional grant programs. States, however, are reluctant, for reasons already noted, to enforce national regulations against their own industries or raise taxes in order to comply with costly federal grant conditions. See page 3 above. In order to prevent state backsliding, federal officials have resorted to court actions and other coercive measures to command compliance. This coercion directly short-circuits state and local political processes.

by federalism concerns.[18] The Court meanwhile abandoned received separation of powers understandings in order to allow Congress to delegate its own lawmaking authority to administrative bureaucracies effectively insulated from political control. At the same time and fueled in important part by powerful civil rights concerns, state and local governments were induced by conditioned grants of funds or directly coerced by federal regulators to implement federal programs and to conform their own programs to federal standards. The task of controlling these new federal powers was largely assumed by the federal courts, which developed new subconstitutional principles of administrative law to replace the now waning separation of powers jurisprudence that had previously limited the scope of the national government.

Administrative agencies in the United States have long been required to follow adjudicatory hearing procedures in making decisions, and their decisions have been subject to judicial review. But review was traditionally afforded only to regulated actors subject to coercive orders. Beginning in the late 1960s, the federal courts created new remedies for the beneficiaries of social programs by recognizing individual claims to benefits as entitlements protected by procedural due process. Following Charles Reich's logic,[19] courts held that benefits analogous to traditional common law property rights—including social insurance, assistance payments, housing, and employment—could not be withheld by the government without affording the affected individual an administrative hearing and judicial review. This stratagem was, however, of limited reach because of the government's need to readjust the content of most broad benefits in light of changing economic and social conditions.

---

[18] The Court had decades earlier established Congress' broad authority under the spending power, see, for example, *Helvering v Davis*, 301 US 619 (1937) (upholding old age benefits); and *Steward Machine Co. v Davis*, 301 US 548 (upholding unemployment compensation), and the commerce clause, see, for example, *Wickard v Filburn*, 317 US 111 (1942) (upholding the Agricultural Adjustment Act); *United States v Darby*, 312 US 100 (1941) (upholding the Fair Labor Standards Act); *NLRB v Jones & Laughlin Steel Co.*, 301 US 1 (1937) (upholding the National Labor Relations Act); and *West Coast Hotel v Parrish*, 300 US 379 (1937) (upholding minimum wage and maximum hour rules). The Rehnquist Court's general refusal to depart from these precedents is illustrated in its reversal of field from *National League of Cities* to *Garcia*, discussed in the text at notes 30-32, and in, for example, *South Dakota v Dole*, 483 US 203 (1987) (upholding federal law conditioning state receipt of federal highway funds on state passage of 21-year-old minimum drinking age); *Hodel v Virginia Mining & Reclamation Assn.*, 452 US 264 (majority), 307 (Rehnquist concurring in the judgment) (1981) (upholding Surface Mining Conservation and Reclamation Act under, among other things, commerce powers).

[19] In Charles A. Reich, *The New Property* 73 Yale L J 733 (1964).

The federal courts accordingly developed other remedies for the beneficiaries of *collective* benefits such as a cleaner environment, safer workplaces and products, or a better-informed consumer market. Reacting to the emerging perception of "capture" of regulatory agencies by regulated entities, federal courts in the late 1960s began to extend rights to administrative hearings and judicial review to consumer representatives, environmental and civil rights groups, and other collective interests affected by agency decisions. The result was a new "interest representation" model of administrative law in which all affected groups have the right to participate in agency decisionmaking procedures and obtain judicial review in order to ensure that the agency has adequately considered their interests.[20] The key developments included greatly expanded principles of standing to obtain judicial review; a changed approach to statutory interpretation that recognized legally enforceable agency obligations to protect the interests of program beneficiaries; the creation of "paper hearing" rulemaking procedures that afforded all interested groups an opportunity to submit data, analyses, and comments to an administrative record without hobbling the agency process under trial-type adjudicatory procedures; and the creation of a "hard look" standard of review of administrative discretion to ensure that an agency's decision addressed in a reasoned fashion the concerns and contentions of the interested parties.

The interest representation model attempted to cure Madison's Nightmare by frankly acknowledging the delegation of legislative discretion to administrators and creating a judicial forum in which all interests could participate. The hope was that decisions in furtherance of the public interest would emerge out of the judicially-supervised clash of factions.

The new system of administrative law sought to cure "implementation gaps" by giving new legal remedies to consumer, environmental, and other "public interest" groups. In addition to securing review of administrative action or inaction, courts empowered these groups to enforce federal controls directly against regulated firms or state and local governments. The protections of the interest representation process were not, however, limited to the beneficiaries of federal programs. The heavy reliance on central mandates to carry out these programs bore heavily on business firms, state and local governments, and nonprofit organiza-

---

[20] See Richard B. Stewart, *Reformation of American Administrative Law*, 88 Harv L Rev 1669, 1760-90 (1975).

tions. The courts thus also sought to provide relief to those regulated, by requiring agencies to pay greater attention to compliance burdens and to ameliorate the arbitrary consequences of uniform rules.

III. THERMIDOR

The attempt to cure Madison's Nightmare through new systems of administrative law has produced improvements, but may in the end only succeed in entrenching the nightmare. The "new property" ideal—to afford individual social program benefits the same security as traditional property rights—could not be fully reconciled with the exigencies of bureaucratic administration and the inevitable limitations on the legal resources available to claimants. The security of traditional property interests lay as much in market forces as in their legal underpinnings. The administrative capacities and traditions necessary to equivalent protection of special program beneficiaries were and remain sadly underdeveloped. Formal adjudicative hearings cannot provide a substitute without creating intolerable delay, cost, and other burdens. Moreover, the interests affected even by programs that provide individual benefits have a collective character that cannot be reduced to bipolar adjudication.

The interest representation version of administrative law frankly recognizes these collective elements. But it puts a premium on organizational and legal resources, and these resources are unevenly distributed. Once the traditional model of adjudication is abandoned in favor of an interest representation approach, there is no feasible way to ensure that all affected interests are represented, or that the litigants truly represent the broader constituencies for which they claim to speak. A combination of bureaucratic hearings and review by unelected judges is an unlikely process for selecting and implementing measures in the general interest. Courts and agencies are buried in lengthy adversary hearings that often take many years to resolve. Federalism values are severely undermined because interest groups can circumvent state and local political processes by bringing federal court actions to force local officials to carry out national directives. No one bears clear responsibility for decisions. The already severe fragmentation of central authority is exacerbated by treating each agency decision as an isolated event to be judicially reviewed on the basis of its separate

evidentiary record. The result is a self-contradictory attempt at "central planning through litigation."[21]

The Supreme Court has reacted to the burdens and dysfunctions of Great Society administrative jurisprudence only by priming its growth; it has failed either to reject the new approach or to develop any alternative systemic remedy for Madison's Nightmare. The Court has, however, taken several steps to ameliorate the inevitable difficulties of subjecting administrative management to trial-type adjudicatory procedures in the name of the "new property." Thus, it has refused to recognize substantive constitutional entitlements to social benefits such as assistance payments, education, and housing. Rather, it has made clear that Congress and the states retain political discretion to determine and change the content of the benefits afforded. The judicial role is limited to ensuring adequate procedural guarantees for whatever advantages the political authorities choose to provide, regardless of claimants' needs or their expectations of entitlement.[22] In addition, the procedural protections afforded have in almost all instances been sharply depreciated from the judicial adjudication model through use of a cost-benefit calculation that gives considerable weight to administrators' concerns for managerial efficiency.[23] *Goldberg v Kelly*[24] remains an isolated high water mark of a reformist tide long ebbed.

The Court has also pulled back from full implementation of the interest representation model for protection of collective interests. Liberal standing to secure judicial review still prevails, with only a few trimmings at the margins. But the ability of regulatory program beneficiaries to mandate affirmative protection by federal agencies or state authorities has been restricted.[25] The Supreme Court has underscored the broad discretion of agencies to determine the substantive content of administrative policies,[26] and has given them a similar discretion in shaping administrative procedures.[27] These accommodations to political-managerial interests in

---

[21] See Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 Wis L Rev 655, 655.

[22] *Dandridge v Williams*, 397 US 471, 487 (1970); and *Bishop v Wood*, 426 US 341, 349-50 (1976).

[23] *Mathews v Eldridge*, 424 US 319, 343-47 (1976); and *Heckler v Campbell*, 461 US 458, 465-68 (1983).

[24] 397 US 254 (1970).

[25] *Heckler v Chaney*, 470 US 821, 837-38 (1985).

[26] *Chevron U.S.A., Inc. v NRDC*, 467 US 837 (1984); and *Campbell*, 461 US 458.

[27] *Vermont Yankee Nuclear Power Corp. v NRDC*, 435 US 519 (1978).

the context of collective benefits closely resemble the similar accommodation the courts have made in the "new property" context.

The accommodations have often been accompanied, in judicial opinions and more explicitly in academic commentary, by invocations of the superiority of political processes for resolving issues of social and economic policy. These invocations, however, seldom betray real enthusiasm for these political processes. The case for cutbacks in Great Society administrative jurisprudence rests far more on discontent with its burdens than on affirmative support for any particular alternative. The problem of Madison's Nightmare therefore persists.

IV. Curing Madison's Nightmare

Political and academic discourse identifies three prevailing cures for Madison's Nightmare: reinvigoration of judicial controls over the administrative state; structural change to restore political responsibility; and dissolution of the regulatory welfare state through deregulation and devolution. This essay briefly considers each of these alternatives and offers a fourth—reconstitutive law.

A. Reinvigoration of Administrative Law

Many hold that the Supreme Court's retreat from Great Society administrative jurisprudence is a mistake, and that reinvigorated judicial supervision of the regulatory welfare state is the best cure for Madison's Nightmare. Even more liberalized standing, ready judicial review of administrative discretion, more stringent procedural requirements, assured access for public advocacy groups, greater judicial control of agency discretion through statutory construction and other techniques, and more expansive judicial remedies (especially against state and local government), are affirmed as the solution to the ills of the centralized regulatory welfare state.

The author himself has joined parts of this chorus, believing that the Supreme Court has sometimes spoken in too sweeping terms and that a more finely-tailored adjustment of judicial controls was preferable.[28] But refurbishing judicial innovations of the late 1960s is not a sufficient remedy for Madison's Nightmare in the 1990s. These remedies respond more to the symptoms of the

---

[28] Richard B. Stewart, Vermont Yankee *and the Evolution of Administrative Procedure*, 91 Harv L Rev 1805, 1821 (1978); and Richard B. Stewart and Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv L Rev 1193, 1305-07 (1982).

problem than its underlying roots. They may nonetheless be worthwhile, even if costly and burdensome; contemporary administrative law does afford greater access and accountability than would otherwise be available. But administrative law alone is not a sufficient response, as its most knowledgeable advocates recognize.[29] Moreover, the current and likely future federal judiciary has little enthusiasm for it.

B. Constitutional Fundamentalism

Critics of the national regulatory welfare state have sought to shake its jurisprudential foundation by advocating judicial revival of traditional structural principles of constitutional law. The federal courts were, for example, urged to revive a form of dual federalism by reserving certain functions or fields to the states and limiting the powers of the federal government in order to protect state and local independence. The Supreme Court attempted such a revival in its 1976 decision, *National League of Cities v Usery*,[30] invalidating as an unconstitutional invasion of state autonomy the application of national minimum wage laws (adopted by Congress in an exercise of its commerce power) to municipal employees. This decision, however, bore little fruit and in 1985 the Court overruled it.[31] Proposals to revive the constitutional principles prohibiting delegation of legislative power to agencies, and limiting the transfer of adjudicatory responsibilities from courts to federal agencies, have similarly been unavailing.[32]

The problem seems to be that a full-fledged revival of traditional structural principles would impose serious limits on federal governmental powers and plunge the courts into acute and perilous political controversy. On the other hand, more modest efforts to use constitutional adjudication to limit federal power at the margins, as exemplified by *National League of Cities*, inevitably seem arbitrary.

Similarly, any judicial effort to reserve certain functions or fields of policy to the states runs up against the need for national

---

[29] Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv L Rev 421, 485-91 (1987); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv L Rev 405, 505 (1989); Christopher F. Edley, Jr., *Administrative Law* (Yale, 1990).

[30] 426 US 833 (1976).

[31] *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985).

[32] Such proposals are reflected in, for example, Justice Rehnquist's opinions in *Industrial Union Dept. v American Petroleum Institute*, 448 US 607, 671 (1980) (concurring in the judgment), and *American Textile Manufacturers Institute v Donovan*, 452 US 490, 543 (1981) (dissenting).

measures to deal with the far-reaching consequences of integration in a federal system (at least one comprising fifty states)[33] and the impossibility of principled, a priori line-drawing. Alternatively, the judges could prohibit the national government from using certain policy instruments, such as conditions on federal grants to state and local governments, that are especially destructive of federalism values. But such instruments may sometimes be necessary to achieve common goals. And if such measures were prohibited, Congress could devise alternatives (such as total federal preemption) that are equally or perhaps even more destructive. Finally, case-by-case judicial balancing of national and state interests leaves major national programs prey to subjective, shifting assessments by unelected judges. The court's overruling of *National League of Cities* reflects its unwillingness to venture these hazards.

Another possible constitutional cure for Madison's Nightmare is invalidation of broad congressional delegations of regulatory authority to federal administrative agencies.[34] Advocates claim that forcing Congress to make detailed policy choices would restore political accountability, reinvigorate the political safeguard of federalism, and ensure more responsible decisions in the general interest. But such a step would also amount to a constitutional counterrevolution. The Supreme Court has only twice invalidated national statutes as unconstitutional delegations of legislative power.[35] These decisions, rendered early in the New Deal period, were soon abandoned. The Court concluded that it should not, save in the most extreme and improbable circumstances, second-guess congressional decisions that broad delegations are necessary and proper means of realizing regulatory and welfare goals.[36] Resurrecting the doctrine against delegation of legislative powers would force the courts to make essentially subjective and standardless judgments about which delegations are constitutionally per-

---

[33] Experience in Canada and the Federal Republic of Germany suggests that in a federal system that has a smaller number of states and constitutionally derived reservations to the states of power in specific fields , the states may be able to agree on common measures to deal effectively with the effects of economic integration. For example, in Germany broadcast regulation is the responsibility of the Länder, but a largely unified system of governmental policy has nonetheless emerged.

[34] This remedy is advocated in Lowi, *The End of Liberalism* at 128-56 (cited in note 15), which documents the rise of factional micropolitics within the national regulatory welfare state.

[35] See *Panama Refining Co. v Ryan*, 293 US 388 (1935); and *A.L.A. Schechter Poultry Corp. v United States*, 295 US 495 (1935).

[36] See Stephen G. Breyer and Richard B. Stewart, *Administrative Law and Regulatory Policy* 68-95 (Little, Brown, 2d ed 1985).

missible and which are not. Similar difficulties would attend judicial efforts to impose strict limits on Congress's transfer of adjudicatory authority from courts to agencies.

Even if the courts did enforce the non-delegation doctrine rigorously and in doing so invalidated many current federal programs, it seems likely that Congress would react by passing the writing of detailed measures on to its own legislative subcommittees. Experience with Congress's use of the legislative veto of agency regulations suggests the hazards inherent in this approach.[37] Subcommittees are subject to the same interest group influences as administrative agencies. Moreover, the safeguards of public hearings and judicial review that apply to federal administrative agencies do not apply to Congress or its subcommittees. Increased internal delegations by Congress could well have the effect not of ending but of prolonging Madison's Nightmare.

Some changes in structural jurisprudence may nonetheless be justified as enhancing political responsibility and accountability. For example, the Supreme Court's decisions in *INS v Chadha*[38] and *Bowsher v Synar*[39] have properly restrained Congress's efforts to exercise ongoing controls over powers delegated to the executive. In addition, the freedom of the President and his staff to deliberate with and advise administrative officials deserves firmer elaboration and protection. Finally, the issues of campaign financing and incumbent entrenchment require systematic examination in concert with more traditional discussions of the legal foundation of national governance and politics. But such measures alone will not cure Madison's Nightmare.

C. Deregulation and Devolution

The Reagan administration's New Federalism program proposed that much of the national regulatory welfare state be dismantled through a combination of deregulation and devolution of responsibilities to state and local governments. Many forms of economic regulation are indeed unjustified. Greater reliance on market competition in many areas will enhance consumer welfare.[40] Much of the deregulation accomplished in the United States in recent years in fields such as energy, transportation, communica-

---

[37] See Harold H. Bruff and Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv L Rev 1369, 1433-37 (1977).

[38] 462 US 919 (1983).

[39] 478 US 714 (1986).

[40] See Breyer, *Regulation and Its Reform* ch 8 (cited in note 4).

tions, and financial services has been a success. But markets alone cannot be relied upon to resolve many of the environmental, health, safety, and consumer problems created by industrialization and mass marketing. Moreover, state and local governments cannot deal effectively with these problems of market failure in the face of economically integrated national markets, product and capital mobility, and the rise of large multi-state businesses. Similarly, the mobility of commodities, capital, and people, as well as disparities in resources, prevents states and localities from adequately meeting social welfare needs. National measures are thus required to deal with the problems generated by a national economy.

D. Reconstitutive Law

The most promising solution to Madison's Nightmare is not indiscriminate devolution and deregulation. Neither is it a constitutional counterrevolution by the courts, nor stiffer judicial controls on administrators through administrative law. The best solution is to adopt new strategies for achieving national goals in lieu of the centralizing command and control techniques relied upon so heavily in recent decades.

The ultimate goal of national measures is to ensure that decisions by state and local governments, individuals, businesses, and nonprofit organizations promote national norms and goals. Command and control regulation attempts to achieve such harmonization by dictating the precise outcome of specific decisions within these various institutional systems. Rather than dictating conduct within other institutions, the national government can instead use more indirect methods to achieve "strategic coupling" of the institutions' decisions with national norms and goals.[41] The laws governing these institutions can be reconstituted in order to steer the overall tendency of institutions' decisions in the desired direction without attempting to dictate particular outcomes in every situation. Reconstitutive law can in many areas replace command law as a means of promoting national goals.[42] For example, the National Labor Relations Act transformed the structure of decisionmaking in labor relations from a model of private employer-employee contract to one of collective bargaining, reconstituting the labor market to emphasize the collective and inframarginal voice of

---

[41] The concept of "strategic coupling" is developed in Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-Regulatory Law*, 12 Intl J Soc L 375 (1984).

[42] The notion of "reconstitutive law" is explained in Richard B. Stewart, *Reconstitutive Law*, 46 Md L Rev 86 (1986).

workers, and collective decisions by employers, rather than relying on the signals given by marginal worker mobility.[43] The "bubble" and other emissions trading innovations adopted by the Environmental Protection Agency allowed regulatory permissions to be bought and sold, creating a new form of market property and a reconstituted market.[44] Antitrust law reconstituted the terms of market competition. A related form of reconstitution is to substitute one form of regulatory structure for another: during the 1930s federal legislation adopted for many sectors of the economy a system of administrative price, quantity and service controls in lieu of a system of markets governed by antitrust. In the economic deregulation movement of the past fifteen years, this process was reversed.

Many of the social regulatory goals—including environmental, health, and worker and consumer protection—that have received priority in recent decades can also be promoted through reconstitutive measures. For example, the elaborate existing system of central regulatory controls on air and water pollution in the United States could be replaced by a system of transferable pollution permits that would simultaneously limit the total amounts of pollution permitted and allow authorizations to pollute to be freely bought and sold among polluters. The government would have to monitor emissions to ensure that no source was polluting in excess of its permit rights. But the national government would no longer attempt to dictate through uniform regulations how much each plant may emit, or what control technologies to employ. The total costs of pollution control—currently over $60 billion annually in the United States—would likely be reduced 50 percent or more because each plant could adopt the most cost-effective control method available to it, and plants that could control more cheaply would assume more of the clean-up burden and hold fewer permits. There would be a strong economic incentive for all firms to pollute less, conserve resources, develop innovative technologies, and sell excess permits. States or regional authorities could be

---

[43] See, for example, Richard Freeman and James Medoff, *What Do Unions Do?* (Basic Books, 1984); Paul Weiler, *Governing the Workplace* (Harvard, forthcoming 1990).

[44] See, for example, Bruce A. Ackerman and Richard B. Stewart, *Reforming Environmental Law*, 37 Stan L Rev 1333 (1985); Robert W. Hahn and Gordon L. Hester, *Marketable Permits: Lessons for Theory and Practice*, 16 Ecol L Q 361 (1989); James T.B. Tripp and Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 Yale J Reg 369 (1989); U.S. Environmental Protection Agency, *Emissions Trading Policy Statement*, 51 Fed Reg 43814 (1986).

given a major role in the initial allocation of permits and the subsequent management of the pollution permits market.[45]

In other areas of regulation, different reconstitutive strategies could be used. For example, the current reliance on central administrative commands to promote occupational health and safety in the United States could be significantly reduced if measures were taken to promote greater efforts by employers and employees to address health and safety problems. Such measures could include disclosure of information about workplace hazards, joint employer-employee selection of occupational hazard officers, and steps to promote resolution of health and safety issues through collective bargaining. This approach would substitute flexibility and innovation for the current system of rigid and relatively ineffective central commands.[46]

The problem of ensuring adequate provisions of social services to the needy by states and localities could be resolved by adopting a general system of horizontal income transfers among states and localities in place of the existing overgrown and fragmented system of federal conditional rights. The federal tax system would be used to transfer resources from states with strong revenue bases or few needy persons to states and localities with few revenue bases and many needy persons. States and localities receiving these transfers would enjoy wide discretion on how the monies would be spent. Such a system would reduce disparities among states and localities in the resources available to meet social needs. It would also help avoid the frustrating combination of exiting wealth and entering needy individuals that threatens state efforts to increase benefits through higher taxes.[47]

Wider adoption of such reconstitutive strategies would go far towards curing Madison's Nightmare. Renunciation of efforts to centrally mandate the decisions of states, localities, businesses, and nonprofit organizations would promote federalism values by restoring decisionmaking responsibility and flexibility to these institutions. The operational overload imposed on all branches of the federal government by the current command and control strategy would be greatly eased. The national government would focus on the general plan of reconstitution, foregoing detailed central planning of social and economic life.

---

[45] See Ackerman and Stewart, 37 Stan L Rev at 1355-59 (cited in note 44).

[46] See W. Kip Viscusi, *Risk by Choice* 156-62 (Harvard, 1983).

[47] See Richard B. Stewart, *Federalism and Rights*, 19 Ga L Rev 917, 975-79 (1985) for further development of this proposal.

Eliminating central overload would also help restore political responsibility to the center. The main goals and measures of reconstitution could be debated and resolved by Congress and the President, reducing the delegation of vast decisionmaking responsibility to unelected bureaucrats and judges. The political safeguards of federalism and separation of powers principles would both be reinvigorated. And the current system of faction dominated, legal-bureaucratic micropolitics would be gradually transformed into one closer to Madison's vision of a politics of the national good.

Such change cannot be accomplished through constitutional adjudication by judges. In an integrated federal system of many states, it is not possible to achieve social and economic justice, restore federalism values, and promote a more responsible politics of the national good by simply cutting back on the role of the central government and reintroducing other structural limitations on national authority. What is needed is not a reduction in national authority, but its affirmative exercise in new ways. What is needed is not judicial limitations on national authority, but the replacement of command law with reconstitutive law. The courts are powerless to dictate such a change to Congress and the President. This change can only be accomplished through political initiatives.

What reason is there to expect that a new politics, one more favorable to reconstitutive strategies, will arise? It can hardly be expected that the factions that have entrenched themselves in the congressional and bureaucratic subsystems of centralized power will lightly yield place. Current conditions, however, seem favorable to the emergence of a new politics. The public has not abandoned its aversion to centralized controls—an aversion that propelled Ronald Reagan into the White House. The deregulatory and decentralizing initiatives of the Reagan presidency were a necessary and salutary check on the growth of Madison's Nightmare. Those initiatives that have succeeded enjoy continued support and are unlikely to be reversed to any great extent. But at the same time, the public is committed to national goals of social and economic justice, public health and safety, and the protection of the environment. Reconstitutive strategies can respond to these public sentiments and create a third course between indiscriminate deregulation and devolution on the one hand, and attempted government by central decree on the other.

Moreover, there are two powerful external constraints that will force the United States to develop less cumbersome, more cost-effective alternatives to the dominant command and control form of regulation. The first is the political constraint on increased federal

spending. The current system of command regulation, which requires tremendous centralization of information and decisionmaking, is generally far more costly for the government to administer than alternatives that place greater reliance on market incentives. In addition, command and control regulation typically gives away valuable public resources and privileges for free, including use of the air and water to emit industrial residuals, radio and television frequencies, and airport landing slots. Regulatory programs that use market-based approaches are far more likely to generate appropriate revenues for the government.[48]

The second invigorating constraint is international competitiveness. The command and control approach penalizes investment and innovation because of high compliance costs, the restrictions imposed by uniform, inflexible directives, and the delay and uncertainty created by protracted litigation and administrative licensing and standard-setting proceedings. As it strives to restore the international vitality of its key industries, the United States can no longer afford to maintain a regulatory system that puts it at a severe disadvantage in competing with other developed nations. Greater use of market-based and other reconstitutive strategies will be needed in order to reduce compliance burdens and encourage diversity, flexibility, and innovation on the part of businesses, consumers, nonprofit organizations, and state and local governments. Such strategies will permit the United States to meet social goals that it deservedly holds important, without compromising the nation's productivity and its economic standing in the world community.

[48] See Ackerman and Stewart, 37 Stan L Rev at 1343-44 (cited in note 44).