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PINNING GULLIVER DOWN: AN ENVIRONMENTAL CASE STUDY ON THE PLACE OF DECENTRALIZED POWER IN FEDERAL ADMINISTRATIVE LAW DOCTRINE

COLIN CRAWFORD*

INTRODUCTION

However, in my thoughts I could not sufficiently wonder at the intrepidity of these diminutive mortals, who durst venture to mount and walk upon my body, while one of my hands was at liberty, without trembling at the very sight of so prodigious a creature as I must appear to them.¹

GULLIVER'S reflections upon meeting his Lilliputian captors offers a particularly suggestive image for Americans who perceive an urgent need to begin rethinking — and reshaping — the contours of American administrative law and its far-reaching influence in our lives. Indeed, the American administrative behemoth has grown so large, unwieldy, and controlling that it has come to resemble Gulliver untied among the Lilliputians.

Bound by the Lilliputians, Gulliver confessed that he “was often tempted, while they were passing backwards and forwards on my body, to seize forty or fifty of the first that came in my reach, and dash them to the ground.”² The discussion that follows assumes that the American legal and social structure routinely permits an administrative Gulliver to act on its impulses, and that the consequence of this situation is fundamentally undemocratic. A central purpose of this Article, therefore, is to indicate, at both a theoretical and doctrinal level, how to allow for an increased popular voice in the administrative process. To put it more prosaically, this Article asks how to start tying Gulliver down.

The strong sentiment for citizen democracy which contributed to the creation of our republic is now widely recognized.³ But, unlike Gulliver, who came by chance among the Lilliputians, the administrative law system is our own collective invention. Gulliver longed to be untied because he desired his liberty⁴ By contrast, it is our liberty that is consistently commandeered by the administrative law system. If one assumes that

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1. JONATHAN SWIFT, GULLIVER'S TRAVELS 24 (1954).

2. *Id.* at 23.

3. See, e.g., GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 226-37 (1969) (identifying arguments that a centralized power should exist in conjunction with democratic government).

4. SWIFT, *supra* note 1, at 24.

the governed should be actively involved in the process of governing, it is worth investigating ways in which the administrative law system can be restrained or directed to act for the people and to explore the possibilities of renewed democratic governance.

The argument of this Article proceeds on several fronts. First, using the example of transport of hazardous materials, and, occasionally, more general issues surrounding regulation of toxic substances, this Article will document the absence of a local voice in federal administrative law.⁵ Because of the dangers involved in the use of hazardous materials, they present a particularly troubling example of the risks and possible consequences involved in neglecting local initiatives. The analysis used here applies with force to most fields of administrative law, to everything from health and safety regulation and maintenance of police forces to highway location and the provision of public housing.

Second, the Article identifies the underlying assumptions which make possible this conspiracy of indifference to notions of decentralized power in administrative law. This is a plea for the virtues of inconsistency as against the often-muttered truisms about the regulatory value of consistency and uniformity.⁶ The case of hazardous materials starkly illustrates the necessity of engaging in decentralizing reform of administrative law and turning to local, broadly participatory forms of administrative control. Given the time it can take to remedy faulty federal administrative procedures and decisions, local procedural experimentation seems a promising means to help prevent the possibility of future environmental disasters - or worse. Endorsing a speculation of Richard B. Stewart, "[i]t may be persuasively argued that the ideal of a unitary theory of administrative law is untenable and is likely to distract us from the world's complexity and hinder the development of inventive solutions to the variety of problems that confront us."⁷

Third, this Article's examination of periodical literature on administrative law in the United States exposes the limited vision of the legal academic establishment with regard to the possibilities for decentralized administrative power. Fourth, the Article explores speculative, more idealistic proposals for localities desiring legal recognition of their administrative voices, in addition to proposing practical short-term solutions by

5. "Local" cannot be defined with precision in this context. "Local" sometimes means "state," as used here and in *National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819 (1st Cir. 1979), although states are sometimes the allies of federal regulators against municipalities and other local interests. *Board of Comm'rs v. Nuclear Assurance Corp.*, 588 F. Supp. 856 (N.D. Ohio 1984). Thus, although "local" most often will define a city or municipality, it need not. The larger organizing concept is a desire to put into practice the principle of self-determination at some level of popular government.

6. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978) ("What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.").

7. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1807 (1975).

which localities can begin to correct their relative administrative disempowerment. Finally, the Article concludes that for these proposals to be effective there needs to be flexibility in implementing these solutions.

I. THEORETICAL CLAIMS AND CONSEQUENCES OF A DECENTRALIZED ADMINISTRATIVE LAW REGIME

Conceptually, three theoretical claims buttress the argument that the administrative state must be re-oriented to allow greater citizen participation. The first is a perception that the desire to achieve regulatory uniformity and consistency is all too often at the core of federal administrative law and tends to stifle alternative notions of social action and arrangement. That is, in a desire for doctrinal tidiness, the law often sacrifices possibilities for enriching our individual and collective lives. Roberto Margabeira Unger argues that the "indeterminate fund of potentialities" suggests the folly of seeking uniform application of a single administrative law system:

the indeterminate fund of potentialities in which the individual as an abstract self participates is never just a mirror image of the species nature. The separateness of persons would be shallow were it not the case that each person represents in a limited and distinctive fashion the possibilities open to the entire species

The species nature advances through the development of the capacities of individuals. But no definable set of realized individual talents exhausts human nature, which is continuously changing in history. The universal good exists solely in particular goods, yet it is always capable of transcending them. The two aspects of the good are inseparable.⁸

In thinking about administrative law doctrine, dependence on federal doctrine stifles individual potentialities and capacities; just as no one can display the species nature in his life, neither can a single doctrinal system adequately reflect the range of effective responses to social problems. Tolerance of different responses to administrative problems could, therefore, only benefit a nation struggling adequately to cope with difficult and complicated issues like responsible management of hazardous waste transportation, treatment, storage and disposal. In practical terms, this Article proposes that one obvious way that Americans will be closer to realizing "the possibilities open to the entire species" is by tolerating more ideas and plans for administration and rulemaking.

The second theoretical claim is that a critical examination of the role of bureaucratic structures in our lives is of vital importance.⁹ Following Unger's warning, a "utopian socialist" vision must take bureaucracy seriously¹⁰ if a nation is to pursue successfully the task of achieving in-

8. ROBERTO MANGABEIRA UNGER, *KNOWLEDGE & POLITICS* 240 (1975).

9. See Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1984).

10. See Unger, *supra* note 8, at 251. See also STEVEN LUKES, *Alienation and Anomie*, in *PHILOSOPHY, POLITICS AND SOCIETY* at 134-56 (Peter Lalett & WG Runciman eds.

creased public participation in government.¹¹ At a general level, this claim questions one of the central assumptions fueling federal administrative law, namely that newer or bigger or more productive technologies routinely provide the most satisfactory means of ordering our lives.¹² More specifically, this questioning requires an analysis of the direction of legal energies — those of judges, regulators and other bureaucratic officials, litigators, legal scholars and others — in the service of large-scale bureaucratic organizations when given the opportunity to assist people in efforts to improve their situations at the local level.¹³

The third and final theoretical claim on which the argument depends is a belief that democracy, in the active, literal sense of that term, is invigorating and socially enriching.¹⁴ In this context, the work of several thinkers is useful. Unger again provides a helpful point of departure. In an effort to accurately define the phenomenon of “domination” in society, Unger considers a number of its manifestations, particularly the

1978) (examining the extent of our desires as social beings to conform to rules and bureaucratic structures in modern industrial society).

11. Since local concerns are consistently excluded from the doctrine of administrative law, this suggestion challenges some of the “rhetorical devices employed to assure us that bureaucratic organization can be consistent with human freedom.” Frug, *supra* note 9, at 1293.

12. See, e.g., Judge Higginbotham’s declaration that:

The transport and storage of ‘hazardous materials’ has generated increasing concern over the unpredictable risks presented to the public, while at the same time, it is recognized that our modern society depends upon the transformation of atomic power into energy and the ready availability of these fissionable materials for industrial, commercial and consumer use.

Higginbotham ends these comments with the odd conclusion that this dilemma “has led to rigorous federal, state and local regulation in the nuclear energy field.” The conclusion is odd insofar as he proceeds to find a local ordinance preempted by federal law, negating the possibility for local action in such matters. *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1104 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986). See *contra* SAMUEL BOWLES ET AL., *BEYOND THE WASTE LAND: A DEMOCRATIC ALTERNATIVE TO ECONOMIC DECLINE* 137 (1983) [hereinafter *BOWLES GROUP*] (on the need to challenge the “logic of profitability”).

13. Admittedly, this is an ambitious aim, perhaps hugely so. The presumption is that the resistance to local decisionmaking when there exists the alternative of resolution by a larger bureaucratic decisionmaker is profound, as for example the Second Circuit’s endorsement of Department of Transportation regulations for transporting hazardous substances, notwithstanding fears and local concerns about the statistical dangers posed by hazardous materials. *City of New York v. United States Dep’t of Transp.*, 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 466 U.S. 1055 (1984), *rev’g* 539 F. Supp. 1237, in which Judge Sofaer focused, *inter alia*, on the worries of the New York City population with transport of radioactive materials in a densely populated conurbation. The circuit court approved a situation in which safety precautions were left to regulators alone. For example, the circuit court approvingly cited this Department of Transportation (DOT) position: “[d]evelopment of the current DOT proposal [for transport of hazardous materials] reflects existing arrangements between DOT and [the Nuclear Regulatory Commission]” 715 F.2d at 750. At the district court level, this relegation of authority to federal agencies alone was exactly the sort of statement which seemed to trouble Judge Sofaer, who noted DOT’s “skepticism of the capacity of localities to adopt rules worthy of national, or even regional, respect.” 539 F. Supp. at 1249.

14. BENJAMIN R. BARBER, *STRONG DEMOCRACY* (1984).

attempt to resolve the "quandary of dominance and community."¹⁵ For Unger, a key aspect of the tension between these two notions is to identify "the range of social life that should be taken into account in determining the worth of shared ends as signs of man's species nature."¹⁶ This emphasis on the communal aspects of our social experience finds an echo, at a more practical level, in the work of the Bowles Group. A concern for easing the tension between authority and community is seen, for example, in their insistence upon "sustained popular mobilization for a democratic workplace."¹⁷ The centerpiece of their plan for industrial and economic recovery is, therefore, increased "worker commitment" by virtue of increased worker self-governance on a firm-by-firm basis. As the Bowles Group persistently argues, the result is likely to be increased productivity.¹⁸ Importantly, for the Bowles Group, "productivity" is not narrowly defined in terms of capital goods, work hour inputs and similar "purely" economic factors. That is, in Unger's terms, "social life" is defined by the Bowles Group by a wide range of factors, constituted of our shared values and ends as well as by our material needs. Indeed, their "social model of productivity" is flexible and democratically responsive.¹⁹ For example, they would admit, as "social gains," demands "for greater worker safety and health, for better consumer protection, for a pollution-free environment, [and] for less disruption of communities" into a productivity calculation despite the costs of such measures to revenue-making outputs.²⁰ Similarly, the Bowles Group advances an economic bill of rights in order to establish "popular control over investment priorities,"²¹ by means such as public control of banks and insurance companies at a community level.²²

The thinking of the Bowles Group is precisely the sort of theorizing which could beneficially be applied to the decentralizing reform of administrative law. The reworking of the administrative law system to effect expressions of community self-government is an ideal route for beginning to implement the kinds of democratic projects urged by them. The case law examined in these essays demonstrates that, at least since the early 1970's, citizen groups have turned to federal regulators for recognition of their local concerns.

A world more disposed to think like the Bowles Group, for instance, the Township of Lacey, New Jersey, which passed a 1985 ordinance prohibiting importation of spent nuclear waste for storage, would prove a more formidable opponent of courts and regulators. In *Jersey Central*

15. See UNGER, *supra* note 8, at 244-46.

16. See UNGER, *supra* note 8, at 244. See also *id.* at 64-67.

17. BOWLES GROUP, *supra* note 12, at 4.

18. *Id.* at 122-78.

19. *Id.* at 125.

20. *Id.* at 136-37.

21. *Id.* at 323-51.

22. *Id.* at 331.

Power & Light v. Township of Lacey,²³ the court struck down the ordinance, distinguishing a similar California case on the grounds that the California statute had an "avowedly economic purpose" and so was not preempted by federal law.²⁴

The worldview of the Bowles Group would raise other concerns, matters of personal health and safety, for instance, as subjects equally entitled to administrative attention. This is not to dismiss the significance of "avowedly economic" factors, but to insist that they be considered alongside a wide range of human concerns. This is to question, in the context of regulating hazardous substances, the wisdom of a musing like this:

[s]ure, we could avoid a lot of environmental problems by giving everybody 40 acres and a mule again. We can live on a level with nature alright. But we as consumers demand plastics, and newsprint with colors in the ink, and nylon stockings. We demand all sorts of things from industry and we'll pay a price for 'em.²⁵

A subsidiary aim of this Article is then to propose that the federalist character of administrative law doctrine permits a facile endorsement of views like that quoted above, views which on popular reflection might be amended considerably, and in any case merit public debate. That is, if people are encouraged to derive their own solutions to problems like the transport and storage of hazardous wastes, they might opt to use fewer plastics or to read newspapers in black and white.

II. THE LILLIPUTIANS TRY TO TAKE CHARGE

A. *Efforts to Enlarge the Significance of Choice*

Like the Bowles Group, Michael J. Piore and Charles F. Sabel provide an analysis of industrial society with the goal of imagining alternative ways of organizing American social and political life.²⁶ Drawing upon empirical research, they record their favorable impressions of individuals' adaptability and mobility in the workplace and the capacity of workers to perform both at a more productive and a more personally satisfying level when given the opportunity to seek out suitable skills and

23. 772 F.2d 1103 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986).

24. *Id.* at 1112 (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 216 (1983)). Concurring in part in *Pacific Gas*, Justice Blackmun expressed reservation with the Court's opinion "to the extent it suggests that a State may not prohibit the construction of nuclear power plants if the State is motivated by concerns about the safety of such plants." *Id.* at 223; *cf. id.* at 229.

25. Dick Russell, *Passing the Buck, Burning the Evidence*, IN THESE TIMES, Mar. 16-22, 1988, at 11 (quoting Arkansas State Representative Mike Wilson, also a member of the "first family" of the pesticide-polluted town of Jacksonville, Arkansas). See also Liane Clorfene Casten, *Agent Orange's Forgotten Victims*, THE NATION, Nov. 4, 1991, at 550 (detailing some of the medical problems besetting residents of Jacksonville, Arkansas in the wake of plans to commence incineration of toxic wastes there).

26. MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE*, 17, 251-308 (1984).

crafts.²⁷ Their endorsement of the socially transformative possibilities of variety, in industrial organizations, the workplace, and the community, offers a model of action for the administrative law reformer. Moreover, such a decentralized approach is ideally suited to correct imbalances in the structure of an industrial society that, on close examination, turns out to be socially and economically segmented and discontinuous.²⁸

The logical extension of this suggestion is continued in Berger and Piore's further instruction to the social critic. Specifically, they caution that the differences between two segments of a society are not necessarily "less significant and less durable than the similarities."²⁹ In terms of the legal effort to secure more democratic, decentralized units of administration, the import of this reasoning in an area like the transport of hazardous waste is to stress the need to explore local solutions to the dilemmas posed by the side effects of sophisticated modern technologies. If the composition of our society is indeed "discontinuous and segmented," citizen engagement in government and the systematic recognition of popular views expressed at the local level present obvious means by which to begin responding to heretofore neglected social segments. The suggestion here is that in view of the various "segments" composing our social order, it is necessary to expand the number of forums through which a social segment can communicate its desires for change.

In other words, society needs to aim for solutions to the reform of administrative law, and not for a solution.³⁰ In the language of Berger and Piore, "[i]n order to release both imagination and will from the constraints of false necessity" in search of "a vision of the diverse possibilities that can be realized within industrial societies."³¹ Potentially, the benefits of such flexibility and adaptability or of a willingness to experiment with the contours of administrative regulations are vast. In theory, decentralizing regulations could alter government priorities and lead to a redistribution of resources from projects in areas such as the proposed testing of biological weapons,³² the burial of nuclear waste³³ or the testing of AIDS drugs.³⁴ Indeed, the urgency of the issues adverted to here may force such administrative flexibility to become a practical necessity.

Of course, it is easy to mouth the rhetoric of decentralized, grass-roots power. Critics of decentralization are likely to ask what a more localized

27. *Id.*, at 5-9.

28. SUZANNE BERGER & MICHAEL J. PIORE, *DUALISM AND DISCONTINUITY IN INDUSTRIAL SOCIETIES* 2 (1980).

29. *Id.* at 9.

30. *Cf.* Stewart, *supra* note 7.

31. BERGER & PIORE, *supra* note 28.

32. John H. Cushman, Jr., *Army Rethinks Plan for a Utah Test Site*, N.Y. TIMES, Mar. 28, 1988, at A14 (Utah residents dispute federal plans to locate test site).

33. Keith Schneider, *U.S. Scales Back Plan for Burial of Atomic Waste*, N.Y. TIMES, Mar. 11, 1988, at A1 (New Mexico residents oppose citing of nuclear waste repository).

34. *See* Gina Kolata, *Doctors and Patients Take AIDS Drug Trial into their own Hands*, N.Y. TIMES, Mar. 15, 1988, at C3 (local testing of drugs to fight the fatal virus undertaken where federal drug approval practice is extremely protracted).

system of regulation would look like. In this regard, two qualifications are worth mentioning. First, since the task is to embrace variegation as a central tool of administrative reform, it would contradict the spirit of decentralizing regulation as envisaged here to specify the precise shape of the administrative future;³⁵ second, however, one record of local initiative in combating centralized federal administrative domination is preserved in the case law. At the very least, the local efforts documented there present a log of experiments in democratic self-rule which can be drawn upon in the process of rethinking American administrative law. It is, therefore, appropriate to examine that record.

B. *The Failure of Local Efforts to Regulate Hazardous Wastes*

From the viewpoint of cities, towns, unincorporated townships and even states, the recent history of local attempts at self-regulation in the area of hazardous waste transport is largely a story of failure. On the basis of the judicial record concerning this and related issues, the inhibiting effect of the administrative law system upon democratic participation is profound. Consider the example of Jacksonville, Arkansas. Jacksonville has been the site of pesticide production since 1948. In the decade after 1961, twenty percent of the herbicide Agent Orange was manufactured there. Since 1979, E.P.A. studies have shown unacceptably high levels of dioxin in Jacksonville's soil and water.³⁶

A dilatory campaign by state and federal officials to clear the site had been unsuccessful. This effort was largely conducted in the courts, where federal and state authorities have been seeking to have the manufacturer pay its own cleanup costs.³⁷ Simultaneously, federal and state authorities undertook to incinerate on-site hazardous materials. Fearing that this untested procedure would release yet more dioxin into the environment, Jacksonville citizens geared into action. Their response took two forms. First, the Jacksonville City Council passed an ordinance disallowing incineration of the waste. Second, the town's residents passed a referen-

35. Cf. Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553, 564-68 (1987) (In order to obtain autonomy, cities must agree among themselves rather than cede power to federal agencies.).

36. See Liane C. Casten, *While the E.P.A. Fiddles: A Town is being Poisoned*, THE NATION, Mar. 19, 1988.

In residential areas adjacent to the [chemical manufacture] site, soil samples contain as much dioxin as 111 parts per million (p.p.m.) and 200 parts per billion (p.p.b.). That's 200 times more concentrated than the dioxin levels in Times Beach, Missouri, which the E.P.A. ordered evacuated. The agency has said 1 p.p.b. of dioxin is a danger to humans.

Id. at 370.

37. The E.P.A. took action at Love Canal and Times Beach reluctantly, only after reports of death and damage had become too persistent to ignore. In Jacksonville, the E.P.A. approach is to go to the courts. Reluctant to spend the Superfund millions required to decontaminate [the sites], the E.P.A.'s enforcement branch has waited in vain for [the manufacturer] to do its own housekeeping.

Id. at 372. See also IN THESE TIMES, *supra* note 25.

dum against incineration.³⁸

Yet if legal doctrine and recent experience are any guide, the residents of Jacksonville will see their efforts to prohibit the incineration overturned by higher powers, by people who are unlikely to live in Jacksonville.³⁹ In contravention of their desires, they can expect federal (or state) law to defeat their wishes about how to handle an already disastrous situation, typically by the use of several techniques. They might see their democratic initiatives halted by the use of the preemption doctrine⁴⁰ by the invocation of a variety of standard constitutional arguments, notably commerce clause and supremacy claims,⁴¹ and even the suggestion that localities in and through which hazardous wastes are stored and transported lack standing to challenge federal regulations

38. See IN THESE TIMES, *supra* note 25.

39. Indeed, as this article goes to press, this is the unfortunate denouement of Jacksonville's incineration dispute. See, e.g., Keith Schneider, *In Arkansas Toxic Waste Cleanup, Highlights of New Environmental Debate*, N.Y. TIMES, Nov. 2, 1992, at B11 (Although Governor [and now President-elect] Clinton recently gave final approval to:

burn the chemical wastes in an incinerator in what would be the largest cleanup ever undertaken in the United States even as the burning began, a Federal district judge in nearby Batesville took control of the program and ordered the incineration stopped on Nov. 10 to give scientists time to review the results of safety tests.

Id. The article further notes that "the project has become typical of toxic waste cleanups around the country in which the costs escalate amid interminable delays caused by Federal rules aimed at gaining public trust."); Keith Schneider, *Judge to Oversee Burning in Arkansas*, N.Y. TIMES, Oct. 30, 1992, at A16 (reporting that Federal District Judge Stephen M. Reasoner had ordered incineration to cease until Nov. 9-10); Scott Bronstein, *Is Clinton Cleaner, Greener Than Bush, Arkansas Group Balks as Sierrans Back Governor*, THE ATLANTA CONSTITUTION, Nov. 2, 1992, at A8 (Clinton "[s]upported burning dioxin contaminated wastes at an abandoned herbicide factory in Jacksonville, where three contaminated Superfund sites have more than 28,000 leaking barrels of toxic wastes."); Paul Kemezis, *Dow Settles Dioxin Lawsuit*, CHEMICAL WEEK, Aug. 22, 1990, at 16 (Dow Chemical settled with 102 workers at the Vertac site who claimed, *inter alia*, that Dow officials knew of the chemical dangers at the site as early as 1965.)

Separately, Arkansas Gov. Bill Clinton (D) has announced that he will not try to stop incineration of dioxin waste at the Vertac site in Jacksonville [EPA's] plan to destroy the waste on-site later this year is strongly opposed by many community members, who have demanded that the state step in to block it.

Id., see also CHEMICAL WEEK, Jan. 22, 1992, at 13 ("Vertac Site Contractors (Jacksonville, AR) has received "dioxin certification" from the Arkansas Department of Pollution Control and Ecology for its Jacksonville hazardous waste incinerator, allowing it to process contaminated materials, some of which contain dioxin.").

40. See Board of Comm'rs v. Nuclear Assurance Corp., 588 F. Supp. 856 (N.D. Ohio 1984); Jersey Cent. Power & Light Co. v. Township of Lacey, 772 F.2d 1103 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986); Fossella v. Dinkins, 494 N.Y.S.2d 878 (2d Dept. 1985), *aff'd*, 485 N.E.2d 1017 (N.Y. 1985); Consolidated Rail Corp. v. City of Dover, 450 F. Supp. 966 (D. Del. 1978).

41. See National Tank Truck Carriers, Inc. v. Burke, 608 F.2d 819 (1st Cir. 1979); Washington State Bldg. & Constr. Trades Council AFL-CIO v. Spellman, 518 F. Supp. 928 (E.D. Wash. 1981), *aff'd*, 684 F.2d 627 (9th Cir. 1982); Browning-Ferris, Inc. v. Anne Arundel County, 438 A.2d 269 (Md. 1981); South Dakota Dep't of Pub. Safety v. Haddenham, 339 N.W.2d 786 (S.D. 1983).

under the "case or controversy" requirements of Article III.⁴²

To be sure, localities have on occasion avoided the fate of those referred to above. If, for example, Jacksonville frames its response to federal and state preemption arguments on particularly narrow grounds⁴³ or responds in such a way that federal law is found not to provide a clearcut answer,⁴⁴ the initiative to prevent incineration of the pesticide wastes may succeed. But this best case scenario depends upon luck, exceptional legal ingenuity, or a combination of both. If Jacksonville residents do not manage to propose such precisely focused, narrowly responsive arguments, they are likely to share the discouraging fates of the residents of Ridgefield, Connecticut, Anne Arundel County, Maryland, Cuyahoga County, Ohio, and the states of New Jersey, Rhode Island, South Dakota and Washington, as described in the cases adverted to above.

The record compiled by these and similar cases attests to the fact that democratic initiatives run an obstacle course of arguments when endeavoring to introduce local views into the administrative process. In cases of hazardous material transport and storage, the language and logic employed by courts reviewing administrative action or regulation suggests that almost any argument will do so long as it quiets expressions of local discontent. A few examples illustrate the degree to which the notion of federalism both molds interpretation of administrative law and also conveys something of the ingenuity expended in sustaining the command of federal doctrine over the business of regulation. *Washington State Building and Construction Trades Council AFL-CIO v. Spellman*⁴⁵ considered a state initiative to prohibit storage of nonmedical radioactive waste generated outside of Washington. The threat to federal nuclear waste "disposal"⁴⁶ efforts was undoubtedly serious. In 1980, Washington State

42. *Borough of Ridgefield v. New York Susquehanna & Western R.R.*, 810 F.2d 57 (3d Cir. 1987).

43. *E.g.*, *National Tank Truck Carriers Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982); *City of New York v. Ritter Transp. Inc.*, 515 F Supp. 663 (S.D.N.Y. 1981), *aff'd*, 677 F.2d 270 (2d Cir. 1982) (City Fire Department regulations limiting transport of hazardous gases held not preempted by federal law). It is worth remarking that these cases followed a dangerous gas spill on the George Washington Bridge. One unfortunate consequence of the present impoverishment of local power in administrative law is that the interpretation of administrative doctrine is often a matter of correcting a bad situation after the fact. By contrast, most of the cases discussed in this essay tell the story of prospective local efforts. Of course, in the case of hazardous wastes, other kinds of pollutants, highway location or even racial quotas in federally subsidized housing projects, retrospective solutions are often woefully late. This would be the case if a disaster occurred following the local efforts described in the cases that follow.

44. *E.g.*, *Southern Pac. Transp. Co. v. United States*, 462 F Supp. 1193, 1224 (E.D. Cal. 1978) (where boxcars containing hazardous materials exploded, state has the power to impose tort remedies since applicable federal statute did not do so).

45. 518 F Supp. 928 (E.D. Wash. 1981).

46. As pointed out by Judge Bazelon, *Natural Resources Defense Council v. United States Nuclear Energy Comm'n*, 547 F.2d 633, 647 n.41 (1976), *cert. granted and judgment vacated sub nom.*, *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 435 U.S. 964 (1978) [hereinafter NRDC v. USNEC], "waste disposal" is "a misnomer for what is more appropriately termed "waste storage and management," for the "con-

stored 27% of America's total radioactive waste.⁴⁷ Recognizing this fact, the court concluded that "[i]f the Initiative were permitted to stand it would aggravate an already critical situation."⁴⁸ The court's conclusion is indisputable. However, since regulatory interpretation of local effort tends to perceive aggravation of a situation as undesirable and requiring diffusion rather than as an opportunity to force discussion of political choices, the court held for the plaintiffs, using constitutional arguments.

Conceivably, this kind of "aggravation" was part of what the citizens of Washington State intended when they voted for the referendum. Curiously, the court justified this finding on the grounds that the Referendum Initiative did "not regulate evenhandedly,"⁴⁹ although it said nothing about the uneven burden of radioactive storage among states. In dicta indicating the court's ambivalence on the implications of its holding, it added that defendants failed to prove the threat to health and safety from radioactive waste, and that "the State's safety interest, assuming proper compliance with adequate regulation, is at least arguably illusory."⁵⁰ The court's ambivalent language is quite striking, given its firm repudiation of the choice made by the people of Washington State. The court's failure to explore its own ambivalence is suggested, moreover, by its acquiescence to federal decisionmaking. Because the Initiative "significantly impairs the federal interest in encouraging the peaceful use of radioactive material and in solving the radioactive waste problem,"⁵¹ it was struck down in an opinion in which the court seems needlessly defensive, reaching for every possible reason to justify its position. It is, after all, difficult to overcome federal preemption analysis. The coupling of the "peaceful use" of radioactive material with the waste storage problem therefore appears to be overly defensive. Indeed, from a purely legal point of view, this policymaking language is irrelevant and unnecessary.

Given the court's apparent discomfort, logic would ask why the doctrine cannot be bent to accommodate the views of people who live under the shadow of a regulatory action. That is, should not the affected citizenry be permitted more actively to balance the federal government's desire for expanded "peaceful uses" of radioactive material against the local problems raised by the waste such usage generates?

Similarly, in the *Jersey Central Power & Light* cases,⁵² the court con-

tainment of wastes during the long periods [viz. eons] necessary for them to decay naturally into non-toxic substances."

47. Spellman, 518 F Supp. at 931.

48. *Id.*

49. *Id.*

50. *Id.* at 935. As in most of these cases, the court interprets "safety" quite narrowly. For example, the psychological impact of such storage is seldom entertained as part of a "safety" calculus.

51. *Id.*

52. *Jersey Cent. Power & Light Co. v. New Jersey*, 772 F.2d 35 (3d Cir. 1985) (dispute over the transport route for radioactive waste); *Jersey Cent. Power & Light v. Town-*

sidered a series of actions arising out of a controversial shipping campaign of radioactive wastes from January 3 to July 9, 1985. By the time of decision, the shipping campaign had ended, raising significant mootness problems. The court dismissed two of the three actions in light of the campaign's conclusion, finding the Turnpike Authority's claims that transport of radioactive materials along its routes was unlikely to persist "merely because the Turnpike is traversed as a general matter,"⁵³ and questioning the assertion that the state would have a continuing interest in designating a Turnpike route for transport of radioactive waste.⁵⁴

The court's holding against the state agencies is also remarkable insofar as both the New Jersey Department of Transportation and State Police authorities, presumably experienced with the routes in question (and two of the agencies that would be forced to respond to any accident), advocated the use of an alternate, although non-NRC approved, route.⁵⁵ In short, the court's arguments were based on speculation about local practices which looked, not so much to the layout of state roads or residential and industrial use patterns, but to its preference for federal administrative control. The court proceeded, however, to entertain one action among the Jersey Central Power cases. The case concerned the smallest governmental unit involved in the controversy, namely the Township of Lacey. By comparison to its dismissal of the other claims on the grounds that they presented factual situations unlikely to be repeated, the court averred that "the constitutionality of the challenged ordinances and the degree of local authority to be retained by municipalities with respect to the regulation of nuclear reactors within their midst, give rise to vital legal issues of substantive merit despite the fact that JCP&L has completed its shipping campaign."⁵⁶ Although this was not the sole justification for the court's finding of an open "case or controversy" under Article III, it is noteworthy that the municipality's interest animated the court's desire to forestall future challenges where the issue of continued state involvement in the shipment of radioactive waste did not.⁵⁷ It seems reasonable to speculate, therefore, that the court was motivated to a significant degree by a fear of similar local ordinances. The

ship of Lacey, 772 F.2d 1103 (3d Cir. 1985) (township ordinance prohibiting importation of nuclear waste challenged); *New Jersey Turnpike Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25 (3d Cir. 1985) (conditions for transport of radioactive waste on state turnpike contested) [hereinafter the *Jersey Central Power cases*].

53. *New Jersey Turnpike Auth.*, 772 F.2d at 34.

54. *Jersey Cent. Power & Light Co.*, 772 F.2d at 39-42.

55. *Id.* at 38.

56. *Jersey Cent. Power & Light v. Township of Lacey*, 772 F.2d 1103, 1108 (3d Cir. 1985).

57. However, the court acknowledged that the mootness issue was a close one in all three cases, justifying its lengthy opinion in the state case despite the finding of mootness in anticipation of possible review on appeal. *Jersey Cent. Power & Light*, 772 F.2d at 41. This does not, however, mitigate the force of my analysis to the effect that the local action may have raised the most "vital issues of substantive merit" because it was seen most to challenge the integrity of the status quo.

court's response is typical of administrative rigidity when faced by local undertakings; by contrast, the state authorities were better integrated into the administrative process and their relations with the NRC for rate-setting purposes well established.

Why such apprehension? At their best, such local, democratic endeavors might be seen as a source of experimentation with solutions to perplexing social concerns. Indeed, the courts in *Spellman* and the Jersey Central Power cases might have taken instruction from Judge Bazelon who, in a related context over fifteen years ago, endorsed the view that "the problems involved are not merely technical, but involve basic philosophical issues concerning man's ability to make commitments which will require stable social structures for unprecedented periods."⁵⁸ Alternately, they could have drawn from Judge Sofaer's related recognition to this effect:

Public reaction is a manifestation of collective wisdom based on human experience. It should not be lightly dismissed as unscientific. But even if public fear were based purely on faith (or the lack of it), fear has real consequences, which are costs that must be analyzed and included in determining whether the proposed action will have a significant impact on the environment. Public anxiety disrupts social and political priorities, diverting the attention of public officials and courts from other necessary activities.⁵⁹

These perspectives take seriously public concerns about the transport and storage of hazardous materials. They are also both drawn from opinions that on balance favored local interests and that were overturned on appeal. Since then, however, the estimates of the likelihood of "worst-case" scenarios involving the use of hazardous substances have only increased.⁶⁰ Consequently, these expressions of support for public action appear to be increasingly warranted.

Yet the tendency of agency action and that of the courts interpreting agency procedures is to downplay, if not entirely to disregard, the relevance of local concern. Inattention to local sentiment is typically justified by invoking doctrines and arguments in support of three central positions. The first such argument contends that localities or local citizens' groups are not the interests administrative regulations are designed to protect. By this logic, localities are too small; administrative agencies

58. NRDC v. USNEC, 547 F.2d at 652.

59. City of New York v. United States Dep't of Transp., 539 F. Supp. 1237, 1274; cf. Kris Cameron Rainey, Note, *City of New York v. United States Department of Transportation: Urban Radioactive Waste Transportation Gets Another Green Light*, 7 J. ENERGY L. & POL'Y 177, 186 (1986) (on inattention to "human concerns" in DOT rulemaking procedures).

60. *Id.* at 182. See also Todd Wallace, Comment, *Preemption of Local Laws by the Hazardous Materials Transportation Act*, 53 U. CHI. L. REV. 654, n.1 (1986) (discussing the alarming statistic that nearly one drum of hazardous material is lost for every three truckloads which take to the nation's roads); cf. Bradley M. Marten, *Regulation of the Transportation of Hazardous Materials: A Critique and a Proposal*, 5 HARV. ENVTL. L. REV. 345, 345-47 (1981) (containing similar statistics).

must answer to larger constituencies. The second position is one of retreat to legalistic deference to agency expertise and statutorily derived authority, as if individuals have no expertise about the damages facing them in their daily lives or should have no authority over their immediate environment. The third and final position, the argument to which nearly every defender of federal (or state) regulatory authority ultimately has recourse, and a notion which overlaps both of the first two positions, is the claim for consistent and uniform application of the law⁶¹

These arguments characteristically invoke the rhetoric of democratic fairness and participation. However, as demonstrated in the cases discussed below, the reality is that the arguments tend instead to forsake the possibility of actual democracy in favor of protecting the position of the federal administrative bureaucracy. It is, therefore, the unnecessarily anti-democratic consequences of the doctrines used to buttress federal administrative dominance that must now be examined.

C. *The Aftermath of Vermont Yankee: Whose Interest Should be Made Public?*

The exclusion of local interests from matters involving hazardous substances is widespread but has perhaps been given no more resounding expression than by then Justice Rehnquist in the culmination of the *Vermont Yankee* litigation.⁶² *Vermont Yankee* involved contested rulemaking procedures for the licensing of a nuclear power plant. At issue was the Licensing Board's alleged refusal to consider relevant environmental issues.⁶³ Speaking for a unanimous Court,⁶⁴ Rehnquist delivered a sternly worded disquisition on the importance of respecting agency authority to fashion its own procedures,⁶⁵ arguing for the integrity of agency procedures following state or Congressional delegations of authority.⁶⁶ To this end, Rehnquist inveighed against "unjustified obstructionism" of agency proceedings,⁶⁷ by which he apparently meant intervention into the licensing procedure by public interest groups.⁶⁸

61. This third category is akin to the "formal equality" offered to justify pluralist interest group models of politics, as identified by Frug, *supra* note 9, at 1372-77.

62. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1977), *rev'g*, *Aeschliman v. United States Nuclear Reg'y Comm'n*, 547 F.2d 622 (D.C. Cir. 1976) and *NRDC v. USNEC*, 547 F.2d 633 (D.C. Cir. 1976).

63. *See, e.g.*, *Vermont Yankee*, 435 U.S. at 531 n.10.

64. *Id.* at 521 (Justices Blackmun and Powell did not take part in the decision).

65. *Id.* at 543-44.

66. *Id.* at 558. Rehnquist's invocation of state power in this context is disingenuous inasmuch as twenty-four states urged affirmance. *Id.* at 522-23; *cf.* Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1804, 1809 n.19 (1978).

67. *Vermont Yankee*, 435 U.S. at 553-54.

68. Commentators on this issue often use inverted commas when referring to "public interest" groups, as if to question their representatives. *See, e.g.*, Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1218-19 n.100 (1982); Neil K. Komisar, *Lawyering Versus Continuing Relations in the Administrative Setting*, 1985 WIS. L. REV. 751, 754 (1985). Although this is undoubtedly an

The intervening public groups in the *Vermont Yankee* litigation urged the "colorable alternative" of energy conservation. Energy conservation was arguably an alternative to construction of the nuclear facility, which, it was hoped, would meet the "threshold test" for judging the comprehensiveness of agency procedures.⁶⁹ This alternative could be raised, however, only after the licensing proceedings had already begun, due to a Court of Appeals decision handed down contemporaneously with the licensing proceedings requiring consideration of environmental issues.⁷⁰ Despite this procedural impediment to the opposition of citizen groups, the Court proceeded to dismiss the energy conservation alternative on the grounds that it had not been sufficiently considered and constituted but "a single alleged oversight on a peripheral issue, urged by parties who never fully cooperated or indeed raised the issue below . . ." ⁷¹

For the advocate of citizen participation with the goal of constraining the administrative Gulliver, the evident paradox here is that the issue was "peripheral" and not fully considered below because it could not be raised until a late stage in the licensing proceedings. In other words, the Court's interpretation forces the citizen intervenors into the catch-22 of unavoidably having done too little and too late.

Regrettably, this move carefully to squeeze the demos out of agency action has subsequently been formalized in other ways. For instance, in *Borough of Ridgefield v. New York Susquehanna & Western Railroad*,⁷² the third circuit affirmed the view that there is no private right of action available under the Hazardous Materials Transportation Act (HMTA).⁷³ The action involved the claim by two contiguous incorporated towns that the handling of liquid butane within their borders was unsafe, in violation of the HMTA. For the purposes of the HMTA, the circuit court observed, the municipalities in question were private parties, members of the "public at large."⁷⁴ This was true despite the collective, corporate character of local governments.⁷⁵

Consider the opposite scenario. If the towns passed an ordinance

important question in a society espousing egalitarian principles, it is hardly surprising given the doctrinal resistance to expressions of local feeling that citizen groups, however unrepresentative of the population at large, should seek a route of expression for some form of the "public interest." Thus, to refer skeptically to the "public interest" may confuse cause and effect, failing to ask why this form of democratic participation occurs. See also Stewart, *supra* note 7, at 1766-71, where he questions the public accountability of public interest lawyers.

69. Aeschliman, 547 F.2d at 628-29, *rev'd*, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 511 (1978).

70. *Vermont Yankee*, 435 U.S. at 531-32 n.10.

71. *Id.* at 558.

72. 810 F.2d 57 (3d Cir. 1987).

73. 49 U.S.C. §§ 1801-1819 (1992).

74. *Borough of Ridgefield*, 810 F.2d at 60 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 690-92 n.13 (1979)). See also *Clark v. Velsicol Chem. Corp.*, 944 F.2d 196, 197 (4th Cir. 1991).

75. Cf. Gerald E. Frug, *The City as a Legal Concept* 93 HARV. L. REV. 1059 (1980) (on the disabling consequences for municipalities of the public/private distinction).

against the railroads for improper handling of hazardous materials and the railroads sued to declare the ordinances invalid, they would presumably have been found to have standing to sue under the HMTA.⁷⁶ By contrast, in *Borough of Ridgefield*, the court interpreted the HMTA's injunction that it was designed "to protect the Nation"⁷⁷ as an indication that "Congress has not enacted a statute 'with an unmistakable focus on [a] benefitted class' but instead has framed the HMTA as a general command to a federal agency All residents of the United States are the HMTA's intended beneficiaries."⁷⁸ Again, the court's support of administrative process appears to be circular. The HMTA exists to protect all Americans, but it is unlikely that all Americans will rise up and assert "our" interest on behalf of the Borough of Ridgefield. The administrative decision therefore reverts to the federal authority, which in theory will act on our behalf. Expressions of local interest are thus neatly set aside. The HMTA's aims to protect our health and safety might more fully be served if local anxiety were allowed to be balanced against interstate commercial considerations. It then would become hard to explain why federal regulators are in a better position to carry out the statute's general command than those affected by the statute on a daily basis.

As a result, one can speculate with some confidence that the *Borough of Ridgefield* courts shared some of the fears of their peers interpreting *Spellman* and the Jersey Central Power cases. The *Borough of Ridgefield* cases evidence similar apprehensions that permitting such actions would unleash a wave of democratic intervention in the administrative process. If the aim is to minimize public dispute over already hotly contested matters, this is unmistakably a wise course. But the *Borough of Ridgefield* decisions also raise the issue of where and at what level of government decisions affecting local lives and surroundings should be made. Should the people of Ridgefield be precluded from having a say in administering the way in which hazardous waste is handled by private carriers in transit through their borders?⁷⁹ One hypothesis advanced in this Article is that the answer as to what level of government should regulate activities need not be the same with respect to every issue and situation. At the very minimum, however, what is suggested here is that localities should be placed on an even footing with the branches of state and federal government to decide how, when and to what extent local regulatory initiatives are to be respected.

*Board of Comm'r v. Nuclear Assurance Corp.*⁸⁰ presents an analogous

76. This is usually achieved by invoking 49 U.S.C. § 1811, which allows for preemption in the event of an inconsistent non-federal state or local "requirement." The broadness of the term "requirement" is a testament to the possible reach of federal control in this area.

77. 49 U.S.C. § 1801.

78. *Borough of Ridgefield*, 810 F.2d at 59 (citation omitted).

79. See Frug, *supra* note 75, at 1144-46 (examining arguments for securing legal rights by virtue of geographic ties instead of large property interests).

80. 588 F Supp. 856 (N.D. Ohio 1984).

situation. In that case, the court denied plaintiff's request for declaratory and injunctive relief to prevent shipment of spent nuclear fuel through Cuyahoga County until local safety forces were adequately trained to respond to an accident involving radioactive material. Notably, the Cuyahoga County municipalities banded together in seeking this relief, not only against the public utility shipper of the waste, but also against the State of Ohio and Wisconsin Electrical, Ohio having agreed to Wisconsin Electrical's shipment of spent fuel through Cuyahoga County⁸¹

The Cuyahoga towns' show of solidarity was rejected by the court. The court's holding against them illustrates the present incompatibility between administrative law doctrine and notions of decentralized power. The court held that the plaintiffs lacked standing to sue under Article III, reasoning that the likelihood of a nuclear transportation disaster was so small as to render "the injury of unpreparedness to be too speculative and remote to support standing."⁸² One of the "minimal and crucial elements of standing" used to evaluate the plaintiff's claim was the test that plaintiff "personally suffered some actual or threatened injury."⁸³

The harms identified by the plaintiffs included fear and anxiety caused by unpreparedness to assist in a disaster and the assertion of economic loss from having to support training of their own safety forces in the eventuality of a nuclear accident. The court was unpersuaded. Dismissing the town's suggestion that it was forced to carry a double burden (the social/psychological and the economic) as the result of decisions executed by larger governmental authorities, the court reasoned that local safety forces were under no compulsion to deal with accidents on the Ohio State Turnpike (the road in question). With this argument, the court made a doctrinal move typical in such situations, rejecting a higher standard of care in an especially volatile area of social policymaking in order to protect the integrity of federal administrative interests. This is paradoxical, as noted below, since the usual fear of state and local government power was that smaller units of authority would observe too low a standard of care.

Ignoring the fatal possibilities of a radioactive transport accident, the court disposed of the municipalities' position with a formalistic separation of powers argument. It nearly goes without saying that in the event of an accident, the delegation of authority would become quite insignificant. It is also disquieting in the area of hazardous materials transport to observe the imposition of a requirement of "actual or threatened injury,"

81. *Id.* at 858.

82. *Id.* at 860 (relying on the tripartite standing argument established in *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982)).

83. *Id.* at 859. It should be acknowledged that the facts of this case are not perfectly supportive of my argument in that, as noted by the court, the County did not exhaust every possible means to protect its citizens from the eventuality of an accident. Nonetheless, it is worth asking why they felt so disempowered and/or fearful as to bypass other theoretical possibilities and bring the suit in the first place.

defined as the occurrence of an accident and nothing less. It understates the realities of this situation to note that this is an undemocratic, if not an anti-democratic way to articulate social policy, when democracy is taken to mean government by people where they live. This is to say nothing of the judicially-rejected but continuing, harder-to-measure impact of widespread public anxiety about the transport of hazardous waste.

It is further troubling to compare the decision in *Nuclear Assurance Corp.* with *National Tank Truck Carriers, Inc. v. City of New York*.⁸⁴ In *National Tank Truck* the Second Circuit affirmed the district court finding that local fire regulations prohibiting the unauthorized transport of propane gases were not preempted by the purpose of federal regulations "to protect against risks to life and property from the transportation of hazardous materials."⁸⁵ As a victory of local sentiment in the federal regulatory process, this decision is to be celebrated. But by comparison to *Nuclear Assurance Corp.*, this case reveals a disturbing difference in the facts. Specifically, the incident which gave rise to the *National Tank Truck* litigation was a gas leak by defendant's truck on the George Washington Bridge, presenting a condition of significant danger where "[i]t was necessary to clear the bridge, and block all traffic from using it. The incident lasted for nearly eight hours. There was a long delay in remedying the leak because of [the defendant's] inadequate emergency equipment."⁸⁶ The likelihood of human error and any number of contingencies conceivable in a hazardous substances transport accident, an eventuality made real by the illustration of *National Tank Truck*, suggests that the highest possible prospective standard of care deserves sustained consideration. This is what the plaintiffs in *Nuclear Assurance Corp.* endeavored to achieve. At the very least, *National Tank Truck* suggests the need to consider seriously non-federal solutions to claims like those raised by the citizens of Cuyahoga County, Ohio, or Jacksonville, Arkansas. In light of the facts of *National Tank Truck* it becomes difficult to appreciate the legalistic logic of a case like *Nuclear Assurance Corp.*, which locked out expressed local interests, giving little attention to the substantive social choices involved.

The second ground used by the court in *Nuclear Assurance Corp.*, to quash local attempts to intervene in the direction of a federally-mandated nuclear regulatory policy as it affected their communities, was the finding that it was not required to address such concerns inasmuch as:

proponents and opponents of specific legislation or regulation may make their positions heard by contacting the public officials involved in

84. 677 F.2d 270 (2d Cir. 1982).

85. *Id.* at 274-75. See also *City of New York v. Ritter Transp., Inc.*, 515 F. Supp. 663, 671 (S.D.N.Y. 1981), *aff'd*, 677 F.2d 270 (2d Cir. 1982) ("The obvious reason for according deference to local safety regulation is that the local authorities are generally in the best position to consider problems unique to their area and to tailor their rules accordingly.")

86. 515 F. Supp. at 665, *aff'd sub nom.*, *National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982).

the legislative or administrative process, or by appearing at the public hearings required during the administrative agency rule-making process.⁸⁷

The rhetoric here is striking on several levels. Most notably, the image of government it conjures up is profoundly democratic. As indicated already, however, this image of democratic participation in the regulatory process can easily be stifled by devices such as restrictive agency procedural requirements established by virtue of its rulemaking authority. In addition, in the excerpt quoted above, the court ironically urges the airing of opinions to the relevant "public officials," when in *Nuclear Assurance Corp.* it was in fact public officials, if not the "relevant" ones, who brought suit on behalf of area residents. What this suggests is that the administrative rhetoric of democratic participation may be profoundly out of sync with the reality of administrative decisionmaking.

D. *The Agency Knows Best: City of New York and the Refusal to Recognize Local Concerns*

After the suggestion that localities are not "affected interests" for the purposes of this form of administrative regulation, the second group of arguments typically used to defend inattention to municipal concern about federal administrative matters is the retreat to explanations of agency expertise. The flipside of this argument is also frequently invoked to a similar end, pointing to the limitations of administrative power under the delegation doctrine. The consequence is a tendency for courts and agencies to retreat from discussion of policy concerns in a democratic fashion, hiding instead behind the veil of knowing better or, alternately, of incapacity to act.⁸⁸

The controversial case of *City of New York v. United States Dep't of Transp.*⁸⁹ amply reveals the extent to which local interests are compromised by federal administrative prerogatives with this sort of argument. The case involved a New York City suit to invalidate a Department of Transportation (DOT) rule permitting transport of radioactive waste on the City's highways. The City's proposed alternative was to have the waste barged across the Long Island Sound on the grounds that this mode of transport was both less expensive and safer.⁹⁰ Reversing the earlier decision, the circuit court observed that "[t]he District Court's construction of HMTA would place tremendous, if not insuperable, constraints on the [DOT's] rulemaking power . . . [I]n the absence of explicit statutory direction . . . courts should not strain to infer from vague statu-

87. *Nuclear Assurance Corp.*, 588 F Supp. at 864.

88. For a theoretical investigation of the way these notions are developed, see Frug, *supra* note 9, at 1297-1334. The examples offered here suggest that in some fashion the expertise and formalist models are still very much alive, by contrast to Frug's speculation. *Id.* at 1297.

89. 539 F Supp. 1237 (S.D.N.Y. 1982).

90. *Id.* at 1246.

tory language or legislative committee rhetoric a goal of maximizing a particular public policy”⁹¹

From a municipality’s point of view, however, this sort of reasoning has the consequence of effectively locking the “public” out of the policy, since administrative agencies end up determining public policy through their bureaucratic, regulatory power. The reasons for this have been touched upon already in the examples discussed in this Article, but the problematic consequences of an intransigently federal administrative doctrine in the face of local pressure is seen with special clarity in *City of New York*. Not only were the City’s reasons for barging compelling, but the locale seeking to have its voice heard was also one of the nation’s most densely populated conurbations. Moreover, the court at least recognized the possible force of arguments for local authorities to determine alternative routes.⁹²

Nonetheless, the circuit court resolutely refused to endorse the district court’s finding of a significant role for nonfederal authorities under the HMTA.⁹³ Instead, it retreated to the suggestion that its hands were tied in light of the “consolidated federal regulatory control” Congress gave the DOT under the HMTA, concluding that the finding of a “requirement” to compare modes of transportation (e.g. barging versus trucking) “would constitute a radical shift in regulatory policy with serious ramifications for the transportation industry”⁹⁴ Possibly this is true. Yet the court’s reasoning reveals an anti-democratic rationale identifiable time and again in federal administrative law doctrine. To be exact, the doctrine allows little room to ask questions of public choice. In this context, an appropriate, possible question might be to wonder whether, for example, it is the transportation industry that regulatory policy should protect at the possible expense of a city’s population.⁹⁵

The answer to such a query may be yes, but for the democratic theorist it is discouraging that the municipality’s voice is excluded on such formalistic grounds before an opportunity to discuss and consider other options was even entertained. This is especially true on the facts presented in *City of New York* where there was no municipal disagreement with the administrative bureaucracy’s view that the spent fuel was going to con-

91. *City of New York v. United States Dep’t of Transp.*, 715 F.2d 732, 740 (2d Cir. 1983), *cert. denied.*, 463 U.S. 1055 (1984).

92. *Id.* at 738.

93. *Id.* at 752; *but cf.* *City of New York*, 539 F Supp. at 1293 (where the lower court offered a broad reading of the HMTA. “HMTA forbids DOT to choose the less safe of two alternatives without any legitimate reason for doing so”); *see also* Ritter, 515 F Supp. at 668 (“there is no *requirement* that a local government seek the approval of the Secretary in advance of putting into effect local regulations about the transportation of hazardous materials.”) These readings of the HMTA suggest that the exclusion of local interests need not occur as a routine matter.

94. *City of New York*, 715 F.2d at 741.

95. It is notable that the court’s language seems to exclude “barging” from the “transportation industry.” In other words, “transportation” appears to mean “trucking.”

tinue to be produced and had to be transported somewhere. That is, *City of New York* provides an ideal example of an instance where political interests need not have been compromised by accommodating the local government position. In short, *City of New York* thus can be read to stand for the proposition that federal administrative law doctrine is resolutely uninterested in the utility of local, democratic participation in the administrative process.

In view of this situation, two further points are relevant. First, as mirrored in the *City of New York* court's concern for the fate of the transportation industry, the regulated industry is too often situated so as to be unusually persuasive in shaping regulatory policy. One commentator explains:

DOT does not know the total number, size or location of firms that transport hazardous materials, the kind of materials transported by these carriers, or the volume of hazardous materials being shipped. DOT also seriously underestimates the number of accidents that occur, because it relies on voluntary reporting by the transportation industry and generally does not question the reports it receives.⁹⁶

That regulated industries, the interests typically held to be the parties "affected" by regulation, are largely self-policing only further reinforces the perception that local concerns are arbitrarily excluded from a valuable, needed role in the administrative process.

Second, in *City of New York*, as in *Vermont Yankee* and the Jersey Central Power cases, scientific data on the possibilities of disasters involving hazardous waste are taken as dispositive; the statistics are used to quiet "human concerns."⁹⁷ Yet as Judge Oakes, dissenting in *City of New York* declared, such quantifications are "absurd on their face . . . Extrapolation on the basis of limited time-place experience is notoriously misleading; I note that the [statistics] were compiled before the near-catastrophic occurrence at Three Mile Island with its sordid tale of human and mechanical error."⁹⁸

The mock assurances provided by such data all too easily become devices to forestall discussion of democratic priorities. In this instance, for example, it renders moot the opportunity to allow the people of the City of New York (or Cuyahoga County, Ohio, or Ridgefield, Connecticut, or Jacksonville, Arkansas) to assess for themselves the importance of competing priorities, to balance nuclear energy or other hazardous waste producing technology against statistical improbabilities or against living without the anxiety of a nuclear disaster. Instead, to use the Bowles

96. Marten, *supra* note 60, at 357; *cf.* Stewart, *supra* note 7, at 1714-15.

97. Rainey, *supra* note 59, at 186; *but cf.* *City of New York*, 715 F.2d at 746-51 (the favorable discussion of the use of statistical evidence). An uncritical acceptance of statistics is sadly common in the legal literature on this subject. *See, e.g.*, Stephen Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1835-45 (1978).

98. *City of New York*, 715 F.2d at 753-54 (Oakes, J., dissenting).

Group's phrase, an administrative "logic of profitability" prevails.⁹⁹

E. *Preemption: An Agency's Ultimate Doctrinal Defense*

In Judge Sofaer's reversed opinion in *City of New York*, he offered a reading of the HMTA to the effect that "Congress provided for preemption on the reasonable ground that state and local regulations might otherwise lessen the degree of safety provided by uniform federal rules, or might interfere unreasonably with the unimpeded and safe flow of commerce."¹⁰⁰ Sofaer's analysis directs attention to the third general set of arguments most often invoked against the routine inclusion of local interests into administrative law, namely preemption doctrines.

In this, as in most areas of administrative law involving federal-local disputes, preemption is the doctrinal trump card. In fact, in such confrontations, avatars of the doctrine appear with such frequency that it is unnecessary to document their appearance at length. Even when courts find no inconsistency with the intentions of federal regulation, preemption is the single issue which, at a minimum, must be addressed.¹⁰¹ It is the second half of Sofaer's analysis, the commercial concern, of preemption which, however, is given the greatest play in federal-local administrative disputes. In fact, Sofaer's ruling in *City of New York* is one of the few decisions considered in this Article which balanced the issue of more stringent local regulation against the concern to minimize burdens on

99. Anticipating the frequent rejoinder to this sort of argument that such "utopian" views, in addition to being unworkable from a practical point of view, are also the luxury of the educated and well-to-do, one need only attend to the circumstances of the citizenry of Jacksonville, Arkansas. Despite the impoverishment of that community by comparison to national averages and the dependable employment provided for several generations by the polluting pesticide producers, residents are not hesitating to mobilize against further contamination. See *IN THESE TIMES*, *supra* note 23, at 11. *Contra* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *YALE L.J.* 1196, 1221-23 (1977) (articulating standard arguments against decentralized environmental regulation).

100. 539 F. Supp. at 1253 (construing S. Rep. No. 1192, 93rd Cong., 2d Sess. 6-9, 37-38 (1974)). The HMTA preemption section is 49 U.S.C. § 1811. It is notoriously ambiguous, see generally Wallace, *supra* note 60.

101. See, e.g., *Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824 (6th Cir. 1986), *rev'g*, 628 F. Supp. 623 (N.D. Ohio, 1986), *cert. denied*, 484 U.S. 801 (1987) (Despite Congress' failure explicitly to preempt local health and safety regulation when it authorized the federal Occupational Safety and Health Administration (OSHA) to regulate federal worker and health and safety standards, City of Akron's "right to know" ordinance was preempted by OSHA regulations. This ordinance required employers, *inter alia*:

[T]o provide information to their employees and designated representatives about hazardous chemicals to which the employees may be exposed; and to protect public health officials, and the public in general, by requiring employers to provide information to the City's Fire Division and Health Department about the hazardous chemicals manufactured, used or stored inside the workplace or stored as chemical waste.

801 F.2d at 825; see also *New Hampshire v. Flynn*, 751 F.2d 43 (1st Cir. 1984) (under 49 U.S.C. § 1811 a state is not prohibited from charging either a \$25 annual fee or a \$15 single-trip fee for the transportation of hazardous materials even when the total cost of the trip is \$25); see Stewart, *supra* note 99, at 1226-32.

interstate commerce and came out endorsing the former.¹⁰²

As the nation becomes evermore crowded, congested and simultaneously, more technologically sophisticated, local demands challenging commercial and jurisdictional interests asserted by federal administrative authorities will increase. Certainly this is the trend indicated by the case law discussed in this Article. It then becomes urgent to ask how and where this local voice can expect to receive a hearing.

III. LEGAL SCHOLARSHIP AND THE REJECTION OF THE LILLIPUTIAN VOICE

A. *Richard Stewart and Cass Sunstein*

Unfortunately, academic legal writing on administrative law reform has not to date been the forum in which local alternatives have received thorough consideration. Where local efforts are, typically, actively resisted by federal administrators, the treatment received by local initiative in the administrative law literature is usually one of benign neglect. The presence of this lacuna in legal writing on administrative reform is, moreover, something of a paradox. The federal administrative law system lacks specific constitutional authority;¹⁰³ in theory, there is no reason that local administration could not be given a comparable delegation of authority

Arguably, dioxin-poisoned residents of Jacksonville, Arkansas should be able just as easily to choose administrative support and redress from decentralized administrative law units as from federal E.P.A. authorities. Moreover, the fact that administrative agencies have been delegated wide-ranging power remains of concern (if it is not deeply troubling) to most administrative law scholars.¹⁰⁴ Despite this concern, curiously, local government options are scarcely mentioned by legal scholars.

Stewart is the most eloquent academic spokesman for the seldom contested view that agency power must be curtailed, or at least integrated more fully into the federal structure. To this end, he wishes to see the source and limits of agency authority clearly identified.¹⁰⁵ This is not to say that Stewart and Sunstein, his sometime collaborator, insist upon

102. The cases considered here which successfully argued this position, carefully distinguished the local interests on extremely narrow grounds. See *supra* note 98 and accompanying text. The more typical decision is to overturn the safety concern in favor of ensuring commerce. See, e.g., *National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819 (1st Cir. 1979).

103. See, e.g., Stewart, *supra* note 7, at 1672; Stewart & Sunstein, *supra* note 68, at 1212.

104. See, e.g., the variety of opinions offered on the subject in the symposium collected in 72 VA. L. REV. (1986).

105. See *supra* notes 7, 66, 68 and 99; see also Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655 (1985); cf. William H. Clune, *Unreasonableness and Alienation in the Continuing Relationships of Welfare State Bureaucracy*, 1985 WIS. L. REV. 707 (1985); Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363 (1986).

what they label "the formalist thesis," meaning the view that "federal courts must have some textual warrant, constitutional or statutory, for adding new remedies to administrative systems."¹⁰⁶ Indeed, they ardently advocate an interventionist judiciary, eager to identify new solutions for administrative reform. In addition, they promote the use, and urge the development, of non-judicial controls to remedy the problems of an administrative law system seriously requiring reform.¹⁰⁷

For some time, Stewart has devoted himself with considerable ingenuity to make sense of and suggest a wide range of corrective measures. Importantly, he has consistently proceeded in this task with the willingness to admit a "dense complexity" in trying to assess the place and role of the American system of administrative law.¹⁰⁸ Thus, democratic reformers of the administrative law system find themselves, paradoxically, in agreement with Stewart. That is, like Stewart, the democratic reformer emphasizes the need for flexibility in seeking administrative reform through novel assignments of regulatory authority. But the democratic reformer looks for that flexibility and the object of delegation at a grass roots level, working from the bottom up. At a theoretical level, these are possibilities scarcely entertained by Stewart, or, for that matter, in most mainstream writing on the reform of administrative law.

Instead, Stewart has, over nearly two decades, proposed a number of radical measures for regulatory reform. These have ranged from an exploration of the possible forms of expanded interest group representation,¹⁰⁹ such as popular election of agency bureaucrats or the selection of administrators by interest groups,¹¹⁰ to a system of government-issued permits (in the context of environmental regulation) which could be traded freely among polluters in an area in order to reduce the burden on the regulatory authority and promote free market choices.¹¹¹

This free market option is characteristic of Stewart's conception of decentralization. In 1975, he explored the virtues of a libertarian form of

106. Stewart & Sunstein, *supra* note 68, at 1199; cf. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 620 (1984). The traditional view of agency integrity and self-autonomy within the limits of its congressionally delegated authority can be seen in Clark Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV L. REV. 1823, 1826 (1978) ("[I]t is the responsibility of the agency, not the reviewing court, to decide how the agency shall conduct its business and allocate its resources.").

107. Stewart & Sunstein, *supra* note 68, at 1319; cf. Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271 (1986). A less critical view of an active, interventionist judiciary working in support of agency decisions as long as they are "reasonable" is articulated by Breyer, *supra* note 97.

108. Stewart, *supra* note 7, at 1813.

109. *Id.* at 1805-06.

110. *Id.* at 1790-97.

111. Stewart, *supra* note 105, at 682-85. Although environmental policy is a particular concern of Stewart's, his use of the example seems to suggest that in his view free market solutions such as that described above could be implemented throughout the regulatory system.

deregulation,¹¹² and in 1986 offered a decentralized alternative in the form of regulatory "delegalization," both in the courts and within the administrative apparatus itself. He further reflected that "devolving regulatory decisions to state and local administrators might reduce the number of parties, simplify the issues, and thereby promote negotiated agreements." Stewart surmised nonetheless that "this alternative is likely to increase industry bargaining power substantially because the resources of state and local regulators and of local advocacy groups are often inferior to those of industry. Also, industry might deter state and local administrators from adopting stringent standards by threatening to 'exit' to another jurisdiction."¹¹³ In view of the appealing but for him unrealistically utopian route of regulatory delegalization, Stewart concluded with an endorsement of "economic-based incentive systems" like his voucher plan.¹¹⁴

From the perspective of the local administrative reformer, Stewart's emphasis on economic paths to decentralized power is striking because it avoids entirely the possibility of local government involvement in the administrative process. This is not, it should be stressed, because Stewart is in any way anti-democratic.¹¹⁵ With Sunstein, he has gone to great lengths, in fact, to celebrate the participatory effects possible with an expansion of private remedies in administrative matters.¹¹⁶ A careful reading of Stewart's work suggests that, as with a majority of administrative law scholars, local government exists for him not as an option for enriching civic life through administrative law, but as an impediment to its successful implementation. Thus, for instance, at least with regard to national environmental policy,

[t]he success of federal programs has been gravely compromised by

112. Stewart, *supra* note 7, at 1689-93.

113. Stewart, *supra* note 105, at 683. Stewart provides no empirical evidence in support of his claim that industry bargaining power would be greater at a local level, citing only an article of his own. The referenced pages in that article point, moreover, to the relative cost/benefit advantages of environmental public interest litigation, and not to local government initiative in environmental matters. Furthermore, the cases discussed in this Article can be read as richly illustrative of the proposition that in an evermore densely populated and technology-dependent society, municipalities are forced to broaden their view beyond purely economic factors, balancing health and safety requirements, for example, against industrial interests. City of New York and the Jersey Central Power cases suggest an increasing awareness of the imperative to make such compromises; even then, at a federal level, local interests were ultimately overturned to promote interstate commercial concerns. As for the suggestion of the danger of "exit," this seems something of a perfunctory, straw man argument. At least the Jacksonville, Arkansas dioxin example indicates that municipalities may choose non-economic interests even when they are not prosperous. The claim may be further disingenuous in a crowded world: utilities, for example, cannot simply "exit" when they find a regulatory environment too rigid.

114. *Id.* at 683-85.

115. *But see*, Stewart & Sunstein, *supra* note 68, at 1277 n.353.

116. *See generally*, *id.* at 1246-1316. For a specific instance of what they have in mind, *see id.* at 1279; *cf.* Stewart, *supra* note 7, at 1770-76 (expressing Stewart's earlier concern for unorganized or poorly organized interests).

dependence upon state and local governments, whose generally poor record in controlling environmental deterioration triggered the initial resort to federal legislation, and whose subsequent performance in the context of federal programs has in many instances remained inadequate.¹¹⁷

For Stewart, important measures of the inadequacy of local programs are local resistance to federal demands and limited federal enforcement resources.¹¹⁸ In short, Stewart evidences a deep suspicion of the role of local interests in being able to contribute to the successful search for a collective goal like a national clean air policy.

It would require empirical study properly to respond to Stewart's arguments about local responses to federal environmental policy. This discussion can only hope, therefore, to document and question his assumption of local government incapacity. This is an assumption evident throughout his writing. Over a decade ago, Stewart observed "until the improbable arrival of the day of radical transformation in the nature of bureaucracy, one must probably rely upon outside, general-purpose institutions to check agencies' tunnel vision and ensure that important affected interests are not totally ignored."¹¹⁹ More recently, Stewart and Sunstein analyzed the possibilities for an elaborate system of judicial restraints on administrative power, relying upon an appreciation by courts of the "background understandings" of "basic government functions."¹²⁰ These "background understandings" are located by Stewart and Sunstein in three conceptions of government, specifically the ideals of entitlement, production and public values.¹²¹ By identifying these three conceptions, Stewart and Sunstein strive broadly to make the businesses of administration and regulation more accessible to all sectors of our society.

What emerges from this summary is that Stewart and Sunstein's motives are democratic; this makes their inattention to participatory local government solutions all the more surprising. For example, rather than crafting ingenious (if wholly theoretical) administrative reform solutions, such as outside, general-purpose institutions or expanded judicial activism requiring a high degree of individual sophistication from every decisionmaker, Stewart and Sunstein might have advocated the use of existing, organized local efforts as a means to restrain federal administrative dominance. Would it not be simpler to release the pent-up energies of local governments and citizens' groups rather than to rely upon vaguely articulated notions of general, all-purpose checks?

Additionally, it is worth asking not only what can be done to correct

117. Stewart, *supra* note 99, at 1196.

118. *Id.* at 1203-04 (on EPA efforts to secure implementation of federal controls on motor vehicle use).

119. Stewart, *supra* note 7, at 1808.

120. Stewart & Sunstein, *supra* note 68, at 1231.

121. For Stewart and Sunstein, these notions are equally compelling. My fundamental difference of approach from them begins at this point with a belief that the entitlement and production conceptions are subordinate to their conception of public values.

the flaws of the traditional model of administrative agencies in order to improve regulatory performance, but also to ask why that model has been unsatisfactory. For instance, Stewart recognizes the paradox of vague agency charters and unclear statutory language upon which agencies rely in executing their duties¹²² and notes the complex problems raised by influence over agencies by industry representatives.¹²³ But in acknowledging these issues, he does not question the basic premises of federal administrative law. A central proposition advanced in this Article has been the suggestion that structural problems like these may largely be the result of ineptly distributed authority. At minimum, it seems worthwhile to consider increased democratic participation in the control of the regulatory process. As it stands, the peculiar dissatisfaction expressed by Stewart and Sunstein as to the current shape of federal administration is typical of academic legal theorists. On the one hand, they reason that “[p]rivate lawsuits are poor forums for reconciling the various social norms involved in regulatory programs.” Yet on the other, while they recognize “the limitations of courts and of the forms of actions they create[,]” they “conclude that courts have authority to create” various private rights in administrative matters. Stewart and Sunstein further view these expanded private rights “as legitimate and useful corrections for deficient administrative performance.”¹²⁴ Thus, Stewart and Sunstein show a remarkable acquiescence to the notion of a uniform administrative law system (if not a uniform theory of administrative law) and a willingness to patch up the current arrangement as need be so long as its essentially federal character can be preserved.

To plead for the systematic integration of local interests into administrative lawmaking, by contrast, is only to endorse one aspect of Stewart’s “dense complexity” and the probable unavailability of a unitary theory of administrative law.¹²⁵ However, it is characteristic of administrative law scholarship to seek improved regulatory performance with uniform theories because agency power is perceived to be insufficiently constrained.¹²⁶ It is worth examining the variety of these theories, noting, once again, their marked disregard of local solutions.

B. *Other Administrative Law Scholars*

Theories similar to Stewart and Sunstein’s notions of judicial flexibility of response are especially popular.¹²⁷ Judicial flexibility with respect to

122. Stewart, *supra* note 7, at 1676-77. Vagueness has been recognized as a feature of the HMTA. See Wallace, *supra* note 60, at 657-58; See *National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 822 (1st Cir. 1979).

123. Stewart, *supra* note 7, at 1714-15.

124. Stewart & Sunstein, *supra* note 68, at 1320-21.

125. See Stewart, *supra* note 7, at 1813.

126. See Cass, *supra* note 105.

127. See James V DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 424 (1986). DeLong’s “broad vision of administrative behavior” recognizes that agencies may need to take municipal concerns into account but

administrative law has been urged as a means to secure a number of ends, from the expansion of private remedies under state common law¹²⁸ to "a lesser degree of judicial deference to federal agency action."¹²⁹ Looking to Congress, other commentators favor increased legislative control of agencies,¹³⁰ while still others would prefer to see the agencies themselves employ a "synoptic paradigm of decisionmaking" drawing upon several policymaking models, averring that on balance the agencies are "best equipped to make" public policy choices.¹³¹ Still other commentators put absolute faith in neither the agencies nor the courts in an effort "to reemphasize the political, discretionary, incremental nature of rulemaking"¹³² or resort to the conclusion that administrative law reflects multiple competing, normative traditions in our liberal legal-political order which are inevitably in tension with one another.¹³³

Some administrative law theorists favor more explicitly participatory reforms.¹³⁴ Joel F. Handler uses the example of "cooperative decision-making" in the Madison, Wisconsin public schools where parents work with the schools in shaping special education policy.¹³⁵ For Handler, this is an undertaking to insure open recognition of alternative choices, or, as he puts it, "*communicative conflict* rather than *adversarial conflict*."¹³⁶ Another commentator claims a "long tradition of federal deference to more limited regulations unless they discriminate against outside

fails to broach the possibility of local control as an element of his "broad vision." *Id.* at 433.

128. See, e.g., Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 171-223 (1985).

129. Rainey, *supra* note 60, at 188 (the quoted section continues: "with respect to the volatile and unpredictable areas of hazardous waste transportation."); cf. DeLong, *supra* note 127, at 445 ("The courts are and will remain the primary institutions for controlling agency behavior, but they are not the only ones. Congress, the President and the agencies themselves all play important roles in guaranteeing that agency performance conform to society's expectations.").

130. E.g., Wesley A. Magat and Christopher H. Schroeder, *Administrative Process Reform in a Discretionary Age: The Role of Social Consequences*, 1984 DUKE L.J. 301 (1984).

131. Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 433 (1981). Diver wants to see the courts do the "finetuning" of these policy choices.

132. Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 491 and *passim* (1986). See generally, *id.* for an argument for the overhaul of established rulemaking procedures in order to achieve greater predictability in light of the political character of administrative processes.

133. Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385 (1984).

134. *Id.* at 425-31. Sargentich celebrates the virtues of participatory democracy but concludes that "institutional realities" prevent realization of this goal.

135. Joel F. Handler, *Continuing Relationships and the Administrative Process: Social Welfare*, 1985 WIS. L. REV. 687 (1985). Handler's choice of example is criticized as unrepresentative by Komesar, *supra* note 68, at 755-57.

136. *Id.* at 696 (emphasis in original).

industries or produce no safety benefits."¹³⁷

Another group of theorists imagine more radical alternatives. Troubled by the phenomenon of unaccountable administrative bureaucracies, Robert B. Reich approvingly cites "the potential for public administrators to enhance social learning" demonstrated by the case of *Asarco*, in which a job-producing but polluting arsenic manufacturer in the Tacoma, Washington area faced the alternative of closing if forced to comply with EPA regulations.¹³⁸ In a dramatic gesture, the then EPA Administrator, William Ruckelshaus, flew to Tacoma in the summer of 1983 and conducted three public "workshops" in search of a local response to this dilemma.¹³⁹

In a particularly novel, imaginative effort to answer the democratic concerns of reformers advocating decentralization, Clune hypothesizes the shape of a new economic democracy, distinguished by the creation of a National House of Commons composed of members elected by lower income, non-managerial persons representing "chapters of universal labor and welfare unions" and similar innovations.¹⁴⁰ Clune's proposals are unquestionably more in the spirit of the reforms advocated by the Bowles Group than any others examined here. Yet it is consistently striking that these and similar proposals are, in the final analysis, thoroughly federal solutions. To quote Reich: "[a] critical challenge for the public administrator responsible for federal regulation will be to foster social learning at the national level where standard-making must ultimately take place. Local experiences like the Tacoma experiment, however, can be integral, if not essential, to national civic discovery"¹⁴¹

This Article has endeavored to evaluate why Stewart and Sunstein and other administrative law scholars routinely conclude that federal solutions to administrative reform need not make local experience essential as well as integral. The Article has undertaken to demonstrate the neglect of a local voice in American administrative law and also to document some of the sources of that neglect. The transport of hazardous waste examples indicate that standard setting may fruitfully take place at the local level, with local government initiatives fostering social learning, playing both an integral and an essential role in the process of "civic discovery," national and otherwise.

Returning to the question that opened this discussion, how exactly is this "civic discovery" of increased democratic participation in the administrative process to proceed? Where does the reshaping the contours of federal administrative law begin? Stated otherwise, by what means can

137. Wallace, *supra* note 60, at 656. Despite this statement, the author does not name a case which conclusively demonstrates his point.

138. Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1632-37 (1985).

139. *Id.* at 1634. Reich adds that the *Asarco* case ended in an anticlimactic fashion.

140. Clune, *supra* note 105, at 727; see generally *id.* at 723-35 for full exposition of his proposals.

141. Reich, *supra* note 138, at 1638.

society force discussion of democratic choices, an option generally precluded to localities by regulatory and judicial interventions? The facts of *City of New York* again provide an informative point of departure. The New York City health regulation which gave rise to the controversy was adopted on January 15, 1976. Thereafter, the Brookhaven National Laboratories was compelled to ship spent nuclear fuel from Long Island across the Long Island Sound to New London, Connecticut.¹⁴² On August 21, 1978, however, New London passed an ordinance banning the transport of spent fuel from Brookhaven through its borders. Although the New London ordinance was subsequently repealed by a Connecticut statute,¹⁴³ the New London response is a model of the rich potential for inter-local decisionmaking which localities could consistently contribute to American public life.

This remarkable inter-local instance of the power of municipalities to bond together and shape a consensus on larger policy concerns, furthermore, promises to achieve more truly democratic results than a highly self-conscious court can be expected to provide in staving off "the potentially devastating consequences of narrowminded incremental decisions," as Diver would have it. Similarly, the New York-New London example suggests the possibility for a higher valuation of democratic choice than could be accomplished by Stewart and Sunstein's judges, eagerly analyzing the "background understandings" in each case. More explicit, preplanned inter-local cooperation on matters of civic concern would presumably yield even broader democratic results than seen in the New York-New London illustration.

The instance of *City of Philadelphia v. New Jersey*¹⁴⁴ evidences further possibilities for cross-local cooperation. In that case, Philadelphia and other plaintiffs challenged a New Jersey statute closing its borders to waste "which originated or was collected outside the State," with certain narrow exceptions.¹⁴⁵ New Jersey apparently aimed thereby to safeguard the health and safety of its residents, and to prevent New Jersey from becoming a landfill dump for all other states.¹⁴⁶ In so doing, New Jersey "[i]mmediately affected . . . the operators of private landfills in New Jersey, and several cities in other States that had agreements with these operators for waste disposal."¹⁴⁷ Although the New Jersey Supreme Court endorsed this action as a legitimate case in which to exclude the primacy of Commerce Clause considerations, the United States Supreme Court firmly rejected that court's rationale.¹⁴⁸ In terms of the

142. 539 F Supp. at 1243-44.

143. *Id.* at 1244 n.2.

144. 437 U.S. 617 (1978).

145. *Id.* at 618.

146. *Id.* at 620-23.

147. *Id.* at 619.

148. *Id.* at 628.

argument advanced in this Article, the Supreme Court erred in viewing New Jersey's statute as a purely defensive, isolating measure.

IV POLICY ALTERNATIVES

A. *Reform Possibilities*

In order to further the cause of a decentralized jurisprudence of administrative law, the Supreme Court might have opted to evaluate New Jersey's statute as offensive, as an act designed to bring to a head public discussion of an issue of pressing national concern. First, this would agree with then Justice Rehnquist, dissenting in *City of Philadelphia*, who asserted that:

The physical fact of life that New Jersey must somehow dispose of its own noxious items does not mean that it must serve as a depository for those of every other State. Similarly, New Jersey should be free under our past precedents to prohibit the importation of solid waste because of the health and safety problems that such waste poses to its citizens. The fact that New Jersey continues to, and indeed must continue to, dispose of its own solid waste does not mean that New Jersey may not prohibit the importation of even more solid waste into the State.¹⁴⁹

The views articulated in this Article presume the potential for securing even more than the degree of local autonomy Rehnquist would permit. Instead, and second, it is worth speculating on the possible effects of an administrative law jurisprudence which encouraged and even celebrated the example of New Jersey passing a statute like this one. This would be a jurisprudence which would allow a state to make such a choice as an explicit means to wait and see how others will respond, thereby slowly to formulate new national solutions to problems like waste transport and disposal on an incremental, locality-by-locality basis. To be sure, there would be a definite place for federal monitoring of such a process. It is quite possible, for example, that local statutes could be used to effect economic protectionism, racially discriminatory housing patterns or any number of undesirable results if left unchecked. But it is also true that democratic participation in governing is a value which deserves more than lip service and has been severely undermined by the regulatory values of the administrative bureaucracy

City of New York, *City of Philadelphia* and the other cases considered here demonstrably support the usefulness of introducing notions of decentralized administrative law. But what forms would this revised jurisprudence of administrative procedure take? It is possible to imagine several possibilities.

149. *Id.* at 632 (Rehnquist, J., dissenting).

1. A Revised Constitutional Jurisprudence in Regulatory Matters

a. Commerce Clause

As demonstrated in *City of Philadelphia* and elsewhere, Commerce Clause attacks on local efforts at self-government typically act as perfunctory, absolute bars to democratic participation. It is not enough to respond that citizens can participate in the rulemaking process if and when federal agency representatives hold hearings in their locality. The vision of democratic participation encouraged here conceives of citizen involvement in the long term, on a continuing basis. A revised approach to Commerce Clause and other preemption claims in the administrative law context would encourage courts mediating issues of pressing local concern to expand the exceptions to doctrines favoring national commercial, purely economic interests.¹⁵⁰

b. Other Constitutional Grounds

Local challenges to federal administrative control would do well to press increasingly for resolution of claims under the Ninth and Tenth Amendments, demanding the full articulation of these largely neglected amendments.¹⁵¹ Similarly, a reworking of local interests in terms of the Eleventh Amendment may be in order. Dissenting in *Ex Parte Young*, Justice Harlan noted the need to “assume — a decent respect for the States requires us to assume — that the state courts will enforce every right secured by the Constitution.”¹⁵² Harlan’s admonition merits reevaluation and application not only to state courts but to all levels of local government. His words urge in particular a fresh examination of the chimerical rhetoric of consistency and uniformity in a legal system which derives its ultimate authority from a deliberately terse document.

2. A General Tolerance for Local Experiment

A revised administrative law jurisprudence would begin to think of local regulatory measures as experiments, viewing localities as laboratories for tests in democratic government. This is again to question the ability to achieve consistency and uniformity in administration; it is also to seek democratic intervention in the regulatory process. For example:

a. Action/reaction

As seen in *City of New York*, this revised jurisprudence would permit a local decision to stand and wait for the regulatory reaction by affected

150. Although the Court in *City of Philadelphia* rejected New Jersey’s argument, certain Commerce Clause cases are precedents for such interpretation. *See id.* at 622, (referring to *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465, 489 (1888)).

151. That this will not be an easy task is demonstrated by excerpts of Justice Brennan’s majority opinion in *South Carolina v. Baker*, 485 U.S. 505, 512-13 (1988); *but see id.* at 530 (O’Connor, J., dissenting).

152. 209 U.S. 123, 176 (1908).

localities. My assumption is that in short order a pattern of decision would emerge permitting a more truly consensual determination of the preferable policy to implement.

b. *Cross-local Coordination*

Presumably, the action/reaction model outlined above could quickly lead to overt policy coordination between several localities. Thus, in *City of New York*, New York could conceivably have passed its ordinance and then explicitly appealed to New London and other nearby localities probably affected by the ordinance (or it might not pass the law at all, and simply appeal for regional action). This might be to seek notice and comment from all immediately concerned. A clear problem with this particular option would be that of the unequal bargaining positions of the parties. Yet this criticism presents no convincing argument against the systematic implementation of such an approach. Rather, it points to the proper use of federal, state, or extra-regional legal and administrative checks on decisions by decentralized administrative units. It may be that such a model poses problems for more isolated and less populous, or poorer, communities. Small or poor communities might be neglected, with the "ripple effect" of the cross-local coordination envisioned here touching them last of all. This would again present a moment where federal administrative intervention would be appropriate.

This model of cross-local coordination further suggests that "cross-local" need not be narrowly defined. Localities could initially define their shared interests and publicly act upon them at a national level through extant structures like the National League of Cities and national mayors and governors conferences. For instance, local elected officials could make it a practice to go to such conferences with instructions from their electorate (e.g., given to them through referenda) and invite similar actions from other localities. Similar views could thus gain strength by association.

c. *Nonviolent Municipal Civil Disobedience*

At first glance, the suggestion that a municipality engage in civil disobedience seems an impossibility, or, at best, a contradiction in terms. However, the enfeeblement of localities in their attempts at self-regulation justifies such an approach. Imagine the governor of New Jersey, acting in furtherance of the state statute prohibiting foreign waste transport and disposal, in collaboration with mayors and city councils across the state, instructing state employees and other citizens involved in landfill projects not to participate in handling out of state wastes. This would be not only a powerful political symbol; it would also seriously burden interstate commerce as citizens from out of state bore disposal costs under aggravating conditions of nonviolent noncooperation. Ideally, a prolonged national reevaluation of such policies (and the technologies

necessitating them) would result.¹⁵³

Behind all of these suggestions is the assumption that we can only benefit from forcing democratic discussion of crucial issues by making the constituent members of our democracy its central, animating force. This would correct the irony, noted by Stewart, whereby the Founders would find themselves "bewildered to hear the courtroom touted as the cockpit of democracy" as the judiciary labors to check administrative agency oversights.¹⁵⁴ If this is to happen, however, issues of import cannot consistently be brushed aside when they involve local initiatives. Moreover, sustained attention to local democratic efforts may eventually affect a change in our perceptions of local boundaries. It may be that the frequent artificiality of state and local lines should be freely redrawn in order better to facilitate shared but shifting interests. This is to remark, for example, on the peculiarity of Philadelphia versus New Jersey, when the southern half of New Jersey is closely tied to the Philadelphia area. Philadelphia's interests may lie with Camden more than Bethlehem in many instances (and this may change again in a generation or two). It is worth asking how an antagonistic relationship could be abandoned when possibilities exist for shaping cooperative relations.

As noted already, such decentralizing reforms of the regulatory system will present obstacles. Arguably, the problems of demagoguery and insular, local prejudices are greater at the local than at the national level, where increased exposure dilutes the impact of political extremists. But while the recognition of these and similar concerns suggests the role for federal administrators in a revised, more decentralized system of regulation, they do not militate against it. The false necessity of agency expertise, impartiality, fairness or ability uniformly to enforce regulations allows uncritical endorsement of an administrative status quo inhibiting democratic engagement in government.

CONCLUSION

It must again be stressed that these suggestions should not be misunderstood as endorsing a unitary theory of local control over administration. On the contrary, the dangers of unbridled local power could threaten social gains made in other fields, such as the preservation of wetlands and coastal areas¹⁵⁵ and in providing public housing irrespective of race.¹⁵⁶ What is suggested here is, rather, that the regular inclusion of local interests in administrative law could only help advance the identification of optimal civic responses to policy decisions. The argu-

153. This would be quite unlike the efforts by southern officials to prevent racial integration during the civil rights movement by virtue of its nonviolent character.

154. Stewart, *supra* note 7, at 1761 n.437.

155. Stewart, *supra* note 99, at 1202.

156. Allen R. Gold, N.Y. TIMES, Feb. 26, 1988, at A10 (federal order for Boston Housing Authority to integrate mostly white projects causes fear of renewed racial violence).

ment set forth here seeks not to invalidate the substantial gains marked in federal regulation of matters such as employment discrimination and occupational safety but rather to build upon them by enriching opportunities for democratic choice.

In lieu of nationwide acceptance of the kind of inter-local action briefly evidenced in the circumstances surrounding the *City of New York* litigation, there are stopgap measures which local governments could use to secure their positions against federal administrative dominance. With regard to transport of hazardous substances, states or municipalities could pass strict liability laws, for which there is no current provision in the HMTA,¹⁵⁷ or rulemaking procedures could be formally expanded to recognize the special interests of local authorities.¹⁵⁸ But these and similar measures would be short-term solutions only, and probably, would quickly be overturned by the clever arguments of well-paid lawyers.

What is needed, therefore, is a thorough rethinking of the character of our administrative law system and in particular, resolution of the issue of where best to locate its power. At present, one possibility raised by the legal materials reviewed in this Article is that the federal administrative structure and the branches of government which serve to validate its power are afraid of the unknown consequences of participatory democracy. In a discussion of *Vermont Yankee*, Diver's comments are apposite:

More fundamentally, *Vermont Yankee* expresses the Court's unease, not with lower court efforts to rationalize policymaking, but with their attempts to democratize it in ways incompatible with the synoptic paradigm. It was th[e] emphasis that "public concern be quieted" that seems to have troubled the Supreme Court most deeply. The Court's quarrel is thus not with synoptic analysis, but rather with one of its most consistent camp followers: broadened public participation.¹⁵⁹

If this is indeed the case, it is, to say the least, regrettable. To quote Judge Bazelon again, the import of issues like those involved in *Vermont Yankee* extends beyond the present, involving "basic philosophical issues concerning man's ability to make commitments which will require stable social structures for unprecedented periods."¹⁶⁰

Of course, unlike hazardous technologies and the wastes they produce, not all public issues and policy concerns require analysis in terms of "unprecedented periods." But Bazelon's recognition cautions us to always consider long-term changes in the character of our social institutions. As

157. Marten, *supra* note 60, at 376.

158. Wallace, *supra* note 60, at 662; *cf.* the revision of the appropriation section of the HMTA at 49 U.S.C. § 1812(1)(1984), which includes federal evaluation of programs properly to train federal, state and local agencies and private organizations in the correct handling of hazardous substances. The rhetoric of cooperation between several levels of government and the citizenry is at least encouraging.

159. Diver, *supra* note 131, at 423 (footnotes omitted).

160. NRDC v. USNEC, 547 F.2d at 652.

documented in the transport of hazardous substances cases, society may already act on this advice and start to effect actual democratic decisions through decentralized administration, reflecting more open public recognition of "the significance of choice" (in Piore and Sabel's apt phrase) and simultaneously arrive at more satisfactory solutions to difficult issues.

The historian Robert Frykenberg once documented the vicissitudes of British Imperial authorities in India during the nineteenth century as they struggled to implement a Western-style court system.¹⁶¹ While the British successfully constructed a Western-style legal apparatus, Frykenberg explains, there remained considerable discontinuity in the administration of Indian law, by virtue of the continued preference at a local level for time-honored village traditions of the administration of justice. Frykenberg thus documents how "[m]uch more like Gulliver than like Leviathan, the district administration became tied down, silently, by one tiny strand after another. A slumbering central authority would be pegged to earth by countless threads of local influence."¹⁶² Paradoxically, in America today, where we have the power to direct the shape of our legal structures by contrast to the experience of traditional India under a colonizing power, the citizenry finds itself surprisingly powerless in the face of centralized administrative legal authority. It is time, therefore, that American localities be allowed to help correct this paradox. We need to begin to let local Lilliputians do their part to tie the administrative Gulliver down.

161. ROBERT ERIC FRYKENBERG, *LAND CONTROL AND SOCIAL STRUCTURE IN INDIAN HISTORY* (1979).

162. *Id.* at 264.