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I. THE MISPLACED DELEGALIZATION DEBATE

Much contemporary debate on social and economic policy is based on a false dilemma. It is often assumed that we have two basic choices. The first is continued reliance on the existing costly and clumsy system of centralized regulatory directives to achieve national social and economic goals. The other is to deregulate and devolve authority to markets and states in order to promote decentralization, diversity, and innovation at the expense of national goals. This essay advocates greater reliance on a third approach: adoption by the federal government of new reconstitutive regulatory strategies that simultaneously promote national goals, decentralize decisionmaking, and allow states, localities, business enterprises, and non-profit institutions greater independence and flexibility.

During the past twenty years, efforts to achieve social and economic justice have relied heavily on rules and orders issued by federal administrators and judges. Greatly increased use of legal prescriptions to control the conduct of state and local officials and private actors has been thought necessary to prevent discrimination, control pollution, protect workers and consumers, and ensure that adequate social benefits are provided to the poor and disadvantaged.

Today, these ambitious efforts to direct, through the *Federal Register* and the *Federal Reports*, behavior throughout a vast nation are under attack. Federal controls have been challenged on the ground that they hinder productive investment and innovation, stifle diversity, over-centralize decisional responsibility, and spawn costly, divisive, and politically unrepresentative adversary litigation. The proposed solution to these ills is delegalization: deregulation of

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economic activity, devolution of political responsibility to state and local governments, and corresponding reduction in the use of legal directives to control institutions and social practices.

Delegalization is widely assumed to entail major sacrifices in the achievement of social and economic justice. Champions of federal rules and orders assert that such sacrifices are unacceptable. In response, advocates of delegalization stress the several virtues of decentralized private and public ordering.[1] The public appears unable or unwilling to embrace either position wholeheartedly. It complains of excessive regulation, but demands protection against the risks generated by unregulated markets. The public is hostile to bureaucratic centralization in Washington, but often concludes that state and local governments fail to provide adequate protection and services.

The dilemma of choice between centralized prescription and delegalization is a false one, created by two erroneous premises underlying the debate. The first erroneous premise is that social and economic justice can only be achieved through legal prescriptions. The second is that devolution and deregulation involve reduced reliance on law to resolve social and economic questions. As a result, the debate ignores a third approach that would effectively promote national goals but avoid many of the problems generated by centralized prescription. This third alternative is federal reconstruction of the decisional rules and structures that constitute the several institutional subsystems that make up the greater society.

The legal order, particularly in an advanced liberal society, consists of many institutional subsystems including, among others, national, state, and local political authorities; markets; public enterprises, corporations, partnerships, and labor unions; and universities, churches, and other non-profit associations. These subsystems are the building blocks of the institutional supersystem established by the Constitution and other general framework and boundary laws, such as antitrust law and the law of conflicts. The law attempts to ensure that subsystems are responsive to their constituents, to define subsystem jurisdictions and coordinate their activities, to harmonize subsystem decisions with national norms, and yet to preserve a large measure of subsystem independence and self-determination. Increasingly, we have relied on prescriptive rules

1. Some critics of centralized federal controls, however, claim that economic and social justice is better achieved by decentralization. *See, e.g.*, T. SOWELL, KNOWLEDGE AND DECISIONS 229-304 (1980).

and orders to harmonize subsystem decisions with national norms, a reliance that has undermined other goals, including subsystem independence and responsiveness to constituents.

Institutional subsystems, however, are created and behavior within them is also regulated by constitutive rules such as contract law, antitrust law, and the laws defining the jurisdiction and decisionmaking processes of state and local governments. Accordingly, deregulatory cutbacks in federal directives do not reduce the use of law to resolve social and economic problems. Rather, such reforms shift responsibility for dealing with those problems from central prescriptions to the law of the corresponding subsystems. Many deregulation proposals falsely suggest that somehow we can do without law or drastically reduce the total amount of law in society. This supposition is hopelessly unrealistic in an advanced liberal society that requires enormous amounts of law to structure and coordinate institutionally diverse activities.[2]

In many cases, the nation is well-served by transferring the governance of behavior from federal directives to the existing constitutive law of subsystems. For example, the shift from federal price and entry controls in transportation, finance, and communications to reliance on competitive markets policed by antitrust law has created enormous benefits for consumers.[3] In other contexts, however, current subsystem law fails to secure important societal values and goals. For example, the law of the marketplace fails to deal with pollution externalities, resulting in serious environmental degradation. Centralized directives have attempted to cure such gaps between subsystem behavior and national values and goals by prescribing specific conduct within subsystems. But there is an alternative means of achieving "strategic coupling" between subsystem decisions and national norms: Federal law can eliminate or reduce normative gaps by *re*constituting subsystem structures and procedures rather than dictating specific subsystem conduct.[4]

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2. *See* G. TEUBNER, AFTER LEGAL INSTRUMENTALISM? STRATEGIC MODELS OF POST-REGULATORY LAW (European University Institute Working Paper No. 100, 1984) (criticizing premise that deregulation involves reduced reliance on law); G. TEUBNER, LEGALIZATION—CONCEPTS, ASPECTS, LIMITS, SOLUTIONS (European University Colloquium Doc. IUE 37/85, 1985) (same).

3. *See generally* S. BREYER, REGULATION AND ITS REFORM 189-260 (1982) (discussing benefits of deregulation in particular industries); C. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION 94-99 (1983) (federal price controls are generally less effective regulatory techniques than market-based systems). For a critical view of deregulation, see S. TOLCHIN & M. TOLCHIN, DISMANTLING AMERICA (1983).

4. For development of the concept of "mismatch" between goals and institutional

This essay urges expanded use of such reconstitutive strategies as an antidote to the problems generated by excessive reliance on centralized prescription. To this end, the essay presents specific examples of reconstitutive strategies to protect health, safety, and the environment and to ensure adequate provision of services and assistance to the poor and disadvantaged. The reconstitutive approach does not call for federal withdrawal; in many areas, the national government must take bold steps to secure national goals and values within institutional subsystems. Instead, the reconstitutive strategy seeks to recast national initiatives through the use of different tools and strategies. The problem in many areas is not too much or too little federal regulation, but federal regulation of the wrong sort.

II. CONSTITUTIVE, PRESCRIPTIVE, AND RECONSTITUTIVE LAW

Constitutive law consists of rules that make legally recognized practices possible. Examples of such practices include the making of contracts, the holding of elections, and the adjudication of disputes. Legal and social institutions, such as the market or the federal structure of our political authority, are composed of such practices. Constitutive rules create institutions and regulate conduct within them by identifying institutional constituents, defining such constituents' powers or endowments within the institution, establishing authoritative decisionmaking procedures, and determining the substantive and jurisdictional competence of the resulting decisions. The Constitution of 1787, for example, consists largely of constitutive rules that established a new and complex polity.

Prescriptive rules specify conduct that is prohibited or required within the context of a given institution or practice. Examples include the prohibition of fraudulent misrepresentations in connection with sales and the prohibition of state excise taxes that discriminate against out-of-state products. Many provisions of the Bill of Rights are prescriptions directed against the national government.

Prescriptive and constitutive rules are interdependent. Constitutive rules depend upon prescriptions to define and protect constituent endowments, ensure compliance with rules for making decisions, and limit the jurisdictional authority of the institutional subsystem. For example, markets are constituted in important part

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tools, see S. BREYER, *supra* note 3, at 189-96. "Strategic coupling" is discussed in G. TEUBNER, *supra* note 2.

by bans on theft and duress, and are limited by prohibitions on the sale of votes. On the other hand, prescriptive rules are created by constitutive processes, such as those established by contract law or article I of the Constitution.

Furthermore, both prescriptive and constitutive rules may have intrinsic and instrumental aspects. Prescriptions are intrinsic insofar as they incorporate or express a moral duty owed to others: Do not kill. They are instrumental insofar as they seek to change conduct in order to advance some general social goal: Do not operate a powerplant so as to emit sulfur in stack gases in excess of x lbs/million btu energy input.[5] Similarly, constitutive rules, such as the "one-person one-vote" standard, are intrinsic insofar as they incorporate just principles of decision. But constitutive rules also may have instrumental effects and purposes, achieved by indirectly shaping behavior within the institutions that they create. Although the Constitution is not, as John Ely has reminded us, a recipe for specific outcomes,[6] it nonetheless is designed to promote certain goals, such as preventing factional capture of government, by establishing and structuring certain procedures and powers. Similarly, "one-person one-vote" rules may in part be instrumentally justified as promoting policies that enhance the general welfare.

There remains, however, a key difference between prescriptive and constitutive rules that is of great importance in the choice of strategies to harmonize subsystem performance and national norms. Prescriptive rules specify and dictate the conduct required. Accordingly, the use by federal authorities of prescriptive directives inevitably involves preemption of choice within subsystems. Subsystem decisionmakers must act as federal officials direct. Constitutive rules, by contrast, explicitly contemplate and allow subsystem actors a measure of discretion that permits incorporation of subsystem interests and values in decisions.

This distinction is not contradicted by the fact that congressional statutes that enact or authorize the issuance of prescriptive

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5. The difference between these intrinsic and instrumental prescriptions illustrates the difference between *malum in se* and *malum prohibitum*. Most prescriptions exhibit both aspects. For example, the pollution control regulation might be a particularized reformulation of the more general prescription against acting intentionally or unreasonably to the harm of others. These reformulations are necessary as a result of the complexities introduced by the collective generation and dissemination of harms in an industrialized society.

6. *See* J. ELY, DEMOCRACY AND DISTRUST (1980).

rules are often vague, general, or ambiguous.[7] Congress typically assigns responsibility to federal agencies or the courts to develop more specific prescriptions through regulations or judicial orders. In doing so, federal courts and agencies may take subsystem goals and interests into account, just as Congress may take them into account when it enacts the basic statute. But the federal judicial and administrative procedures for considering subsystem values and interests do not respect subsystem independence in the same degree or manner as do constitutive rules that explicitly vest discretion and responsibility directly in subsystem decisionmakers.

Subsystem actors nonetheless may enjoy considerable de facto discretion in complying with national prescriptions. If the sole remedy for violation of a prescriptive federal rule is the award of damages or monetary penalties, subsystem actors may decide that the benefits of non-compliance outweigh the costs. Even if specific relief is available, enforcement may result in compromises that accommodate subsystem interests and values. On the other hand, different constitutive rules allow subsystem actors a greater or lesser range of effective choice. At the extreme, for example, a complex system of pollution taxes might nominally leave sources free to determine appropriate emission levels but would in practice prompt each source to adopt a particular level selected and favored by the tax structure.

Thus, the de facto range of discretion enjoyed by subsystems under the two strategies represents a continuum. But this circumstance does not erase the fundamental difference between prescriptive and constitutive strategies of regulation. The former relies on centralized direction of conduct. The latter relies on processes of decision and agreement within subsystems—voting, contracting, negotiated consensus—established and mediated by rules only in part centrally determined.

Each strategy displays characteristic advantages and disadvantages associated with this distinction. Prescriptive strategies offer the advantages of certainty and efficacy. If prescriptions are adequately enforced, subsystem conduct will be changed to conform with national norms. Prescriptive strategies can also ensure that conduct in different subsystems and regions is uniform, preventing the destructive competition or demoralization that could result if different levels of compliance were permitted in different subsys-

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7. For an analysis of the various types of imprecision in regulatory statutes, see Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 98-101 (1983).

tems. Uniform prescriptions also affirm national unity and are well-suited to vindicate those individual rights deemed fundamental and universal, such as the right not to be discriminated against by reason of race or religion.

Prescriptive strategies, however, have the corresponding disadvantages of centralization and rigidity. They threaten subsystem independence, ignore relevant variations in subsystem conditions and values, and undermine decentralized self-determination and responsibility. Efforts to adjust national directives to local circumstances in order to reduce these consequences are likely to create severe information-processing overload at the center, overwhelming the national government's capacity to make responsible and timely decisions.

Reconstitutive strategies seek to avoid these disadvantages by restructuring the constitutive law of subsystems rather than simply preempting it through prescription. The goal is to reconstitute the subsystem rather than dictate conduct within it. This reconstitution may be achieved by altering definitions or allocations of endowments within the subsystem, changing decisionmaking rules, modifying jurisdictional competencies, or by a combination of these methods.

The first reconstructive strategy is to retain existing subsystem decisional procedures but modify constituent endowments. For example, property interests in innovation can be created through patent, copyright, and trade secret law, and then be owned and exchanged according to the general rules of market law. Alternatively, the national government might impose a tax on pollution or offer matching grants for specific local services. A second reconstitutive strategy is to modify subsystem decisional principles, for example, by imposing a "one-person one-vote" rule on state and local elections, requiring administrators to afford hearings to those affected before decisions are made, or by authorizing and encouraging collective bargaining. A final strategy is to alter subsystem jurisdictions. For example, the areas of economic life governed by markets policed by antitrust laws may be expanded or contracted in relation to competing regimes of regulation or collective agreement. These three reconstitutive strategies afford flexibility to accommodate diverse subsystem conditions and values, broaden decisional responsibility, and reduce costly and dysfunctional centralized decisionmaking.

The flexibility afforded by reconstitutive strategies, however, can also be a disadvantage. Because subsystem actors are allowed to

offset local interests against national norms, compliance with those norms is not assured. Flexibility presents a danger that national goals and values will be subverted or rendered impotent by dominant subsystem interests. Resulting variations in the extent of compliance with national norms may provoke destructive and demoralizing competition among subsystems, further frustrating the realization of national norms. Finally, the moral authority of national norms may be undermined by strategies that countenance, and indeed invite, trade-offs and variations in compliance.

The choice between prescriptive and reconstitutive strategies turns on assessment of these comparative advantages and disadvantages in particular contexts. The succeeding sections of this essay document the ascendancy in recent decades of prescriptive strategies of regulation, and urge greater use of reconstitutive strategies to restore strategic balance between prescriptive and constitutive law.

III. THE RISE OF PRESCRIPTIVE FEDERAL REGULATION

New federal law generally reflects judgments that institutional subsystems are performing contrary to important national values or goals and are incapable of self-adjustment. The growth of federal measures to promote economic development, secure civil rights, and provide regulatory protection has been an historically uneven but inexorable process, propelling and propelled by growing social and economic integration. No attempt will be made to summarize that entire history here.[8] Instead, this section focuses on the federal government's increasing reliance in recent decades on prescriptive strategies of social and economic regulation.

The growth since the late nineteenth century of federal administrative regulation of economic activity reflects successive judgments that subsystems have failed to secure important national goals. Market failure analyses explain why markets policed by antitrust laws are often incapable of dealing with problems generated by industrialization and mass marketing, including natural monopoly, imperfect consumer information, and environmental, health, and safety risks.[9] Effective state regulation of such risks is impaired by the interstate mobility of capital, state and local competition for business investment, the limited technical and administrative re-

8. Such an account is contained in R. STEWART, FEDERALISM, LAW AND ECONOMY IN THE GREAT REPUBLIC (to be published in 1987 by the University of Georgia Press).

9. *See* S. BREYER, *supra* note 3, at 189-96.

sources available to many states, and problems of coordinating fifty jurisdictions to resolve problems that transcend state lines.[10]

Many of the early federal regulatory programs relied to a considerable extent on reconstitutive strategies to correct subsystem deficiences. Some of the these earlier initiatives, including antitrust law and labor law, reconstituted markets throughout the national economy.[11] Others, including transportation, telecommunications, and securities regulation programs, sought to reconstitute particular industries. Federal labor law and securities law are particularly good examples of reconstitutive strategies. Although these regulatory programs contained important prescriptive elements, they attempted to advance national goals by promoting collective bargaining and self-regulatory practices rather than by comprehensive central prescription of conduct. To control abuses of power within subsystems, they fostered the growth of countervailing power.[12]

The federal regulatory programs developed during the past two decades in areas such as the environment, health, safety, consumer protection, and civil rights reflect a remarkable shift towards overwhelming reliance on prescriptive strategies. The remedy of choice has become central specification, through federal administrative rulemaking, of precise directives for business conduct. The *Federal Register* churns out detailed standards for pollution control, product design and performance, employment practices, and myriad other aspects of enterprise investment and operation. Deregulation, itself a reconstitutive strategy, generally has been limited to some of the older economic regulatory programs. It has slowed but hardly stopped the proliferation of central directives.

Over the past several decades the federal government also has developed a far-reaching array of regulatory prescriptions to control state and local government social service programs. The prescriptions are defined and enforced through direct regulatory controls but also through conditions imposed on federal grants-in-aid for education, medical care and public health, social assistance and insurance, housing, transportation, and environmental regulation.

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10. *See generally* E. REHBINDER & R. STEWART, INTEGRATION THROUGH LAW: ENVIRONMENTAL PROTECTION POLICY 3-11 (1985) (discussing structural factors favoring and disfavoring central regulation in a federal system).

11. *See* S. BREYER, *supra* note 3, at 156-57 ("The antitrust laws seek to create or maintain the *conditions* of a competitive marketplace rather than replicate the *results* of competition . . . .").

12. *See* J. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1952).

Federal money is used as the lever to promote compliance by state and local officials with detailed directives issued by federal administrators.[13] In recent years block grants and funding cutbacks have moderated, but not reversed, the growth of these federal controls.

What explains the federal government's rapidly expanding use of prescriptive strategies of regulation? The timing of this shift is surprising because the disadvantages of centralized prescription generally are magnified as subsystems become more complex, diverse, and interrelated. Increased use of prescriptive strategies at a time when the federal government's responsibilities have greatly expanded also makes centralized coordination of directives significantly more difficult.

One potential explanation for this expanded use of prescriptive strategies is the tutelage of great cases and the social causes associated with them. In our own era, the great case that symbolizes the aspirations and methods of the law is undoubtedly *Brown v. Board of Education*.[14] Its message, as interpreted in later decisions, is unabashedly prescriptive: the law, and in particular the federal government, should use specific directives to alter conduct and mandate particular outcomes in order to eradicate political and economic discrimination against blacks and other racial and ethnic minorities. Equality can only be secured through bold prescription. This vision, energized by strong elements of resurgent moralism in American society, has propelled extensions of the anti-discrimination principle to women, the handicapped, and the disadvantaged. The program of social reconstruction through legal prescription is also evident in institutional reform litigation involving prisons, mental hospitals, school systems, housing projects, and health care delivery.[15] Federal health, safety, and environmental protection regulation, and federal regulation of state and local social services also are built upon this same strategy of ambitious prescriptive con-

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13. *See* Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 951-59 (1985).

14. Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955); Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

15. Institutional reform litigation could reflect a reconstitutive strategy in which courts, on an ad hoc basis, redistribute power and revise procedures within malfunctioning institutions to make them more responsive to national norms and goals. *See* Chayes, *Public Law Litigation*, 89 HARV. L. REV. 1281, 1310-13 (1976). Although some institutional reform litigation has this character, much of it is directed at achieving specific changes in conduct within subsystems. The frequent use of short-term prescriptions rather than longer-run and more indeterminate reconstitutive strategies is apparent in the frequent modification of judicial decrees to achieve desired changes and specific responses from those whom the decree affects. *See* Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1288-1302.

trol. These new forms of regulation and the new public interest law associated with them have appropriated the rhetoric and strategies of the civil rights movement.[16] It is the logic of rights that they should be uniform,[17] and that law should prohibit their violation in absolute terms. This logic has encouraged the rapid expansion of centralized, nationally uniform directives to accomplish regulatory goals.

A second factor underlying the shift to prescriptive strategies is the changing nature of national politics. Between 1965 and 1980, a period during which Congress seized domestic policy initiative and a new form of media-based interest group politics flourished amidst the decay of presidential and congressional leadership, regulatory and spending programs based on prescriptive strategies mushroomed. Legislative entrepreneurs, allied with ideological or economic interest groups, launched a series of statutory initiatives to respond to highly publicized social and economic problems. In order to mobilize support from relatively poorly organized constituents concerned with the environment, consumer protection, and civil rights, these initiatives invoked the rhetoric of rights and assumed a bold prescriptive form. Condemning the behavior of the regulated as immoral and promising a swift, sure remedy, these programs excited popular attention and allowed congressional entrepreneurs immediate opportunities to claim credit for bold changes.

A general escalation in citizens' demands on and expectations of government may also explain the shift to prescriptive regulation. The Great Depression, World War II, the race problem, the space race, and the reinvigoration of democratic aspirations resulted in a major expansion of federal government resources and authority. The federal government's considerable successes in responding to those crises appear to have fostered unrealistic expectations about the capacities for rapid top-down change in a complex society.[18] Such expectations are not favorable to reconstitutive strategies, the

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16. *See* Stewart, *Federalism and Rights*, *supra* note 13, at 960.

17. *See* Karst, *Not One Law in Rome and Another in Athens: The Fourteenth Amendment in Nationwide Application*, 1972 WASH. U.L.Q. 383. Federal uniformity also has been imposed in order to eliminate competition among states in regulatory laxity and to avoid federal imposition of different regulatory burdens on businesses in different regions of the nation. *See* E. REHBINDER & R. STEWART, *supra* note 10.

18. A recent study of the politics of the space age has argued that the post-Sputnik space race and the successful United States moon mission generated a naive technocratic optimism that helped generate the social and regulatory programs of the late 1960s and the 1970s. *See* W. MCDOUGALL, . . . THE HEAVENS AND THE EARTH: A POLITICAL HISTORY OF THE SPACE AGE (1985).

results of which are indirect and accrue over a considerable time. Confronted with urgent social and moral problems, politicians and administrators understandably have sought to short-circuit complexity by resorting to prescriptions that promise direct and immediate changes.

IV. THE DYSFUNCTIONS OF CENTRALIZED COMMAND

The federal government's increasingly pervasive use of prescriptive strategies to control conduct within subsystems has won some significant advances in national goals, but has also created severely adverse side-effects. As our social and economic systems have become more complex, the reliance on relatively primitive prescriptive strategies has produced regulatory law that is rigid, unresponsive, ineffective, costly, and destructive of subsystem autonomy. In turn, these characteristics have undermined the law's normative power and discredited the effort to promote social and economic justice.[19]

Such adverse effects are typically more severe when prescriptions are defined and enforced through federal administrative rules and orders rather than by courts. The federal court system is substantially more decentralized than most federal administrative agencies. The federal judiciary generally fleshes out vague congressional directives through "retail" case-by-case adjudication rather than through "wholesale" rules. As a result, problems of information processing overload, excessive rigidity, and disregard of subsystem variations are typically less acute when prescriptive law is elaborated and enforced by courts rather than by federal administrative agencies.

Many of the goals of the new federal social regulation were first articulated in and promoted through adjudication in federal courts.[20] Under the tutelage of *Brown*, these goals often were con-

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19. Alternative views about the evolution of legal institutions in relation to changes in social and economic systems are presented in Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises*, 94 HARV. L. REV. 561 (1981); Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J. L. & ECON. 461 (1974); Krier & Montgomery, *Resource Allocation, Information Cost and the Form of Government Intervention*, 13 NAT. RESOURCES J. 89 (1973).

20. Federal courts' relaxation of standing, reviewability, and ripeness doctrines and expansion of various procedural rights invited litigation of developing social issues before political momentum could generate congressional legislation to create new programs of administrative regulation. *See, e.g.*, Scenic Hudson Preservation Conference v. Fed. Power Comm., 354 F.2d 608 (2d Cir. 1965) (extending standing to environmental groups to challenge energy project), *cert. denied*, 384 U.S. 941 (1966).

ceptualized in terms of individual rights, which were themselves defined and enforced through injunctive prescriptions directed against state and local governments and business firms.[21] Judicial directives, formulated and adjusted on a largely decentralized basis, were accordingly the dominant initial strategy for regulating subsystem conduct in order to achieve the new social goals.

Although adjudication has the comparative advantage of flexibility, it is ill-suited for achieving rapid, extensive system-wide change. In order to achieve such change, Congress created centralized administrative programs and authorities to define and enforce federal prescriptions. Rather than relying on "retail" case-by-case adjudication, agencies began in the early 1970s to rely increasingly on "wholesale" rulemaking techniques to adopt general regulations. This shift, mandated in some cases by Congress, permitted agencies to economize on administrative costs despite vastly expanded agency responsibilities. At the same time, however, the shift from retail to wholesale prescription magnified the disadvantages of prescriptive regulatory strategies.[22]

The Clean Air Act is a good example of the new centralized administrative prescriptions that have been adopted in the areas of environmental, health, safety, and consumer protection regulation.[23] First, the federal Evironmental Protection Agency (EPA) must adopt national standards defining permitted concentrations of pollution in the air—the result to be attained.[24] To achieve this result, EPA then must issue regulatory prescriptions controlling in exquisite detail the operation of over 100,000 industrial facilities and millions of automobiles.[25] Because the implementation and enforcement of such a vast scheme would exceed EPA's capacities, the

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21. Judicial decrees, however, have sometimes achieved reconstitutive change in subsystems. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (procedural regularity in state welfare administration); Reynolds v. Sims, 377 U.S. 533 (1964) (reapportionment to achieve equal voting opportunity in state elections); Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d Cir. 1968) (rational standards required for state allocation of public housing).

22. *See generally* Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655 (discussing the disadvantages of uniform social regulations) [hereinafter Stewart, *Interest Group Relations*].

23. *See* Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982 & Supp. III 1985). A few of the newer regulatory programs rely on reconstitutive strategies. For example, as judicially interpreted, the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1982 & Supp. III 1985), relies on information gathering, consultation, and disclosure procedures to steer federal administrative decisionmaking in favor of environmental values.

24. 42 U.S.C. § 7409.

25. *See, e.g., id.* at §§ 7410, 7411, 7472-7478, 7491, 7502-7508, 7521. The states are

Act and its implementing regulations also conscript state governments to aid in the task of implementation and enforcement.[26] Thus, federal officials exercise detailed legal control over conduct within both private and public subsystems in order to mandate a given outcome.

Formulating centralized directives to control complex industrial and governmental subsystems involves exhorbitant information and decisionmaking costs. Enormous amounts of data must be centrally accumulated and analyzed in order to determine desired results and formulate the specific commands needed to achieve them.[27] These problems are far more severe in the newer environmental, health, safety, and antidiscriminatory "social" regulation, which seeks to change conduct in many or all industries, than in earlier "economic" regulation, which often was limited to particular industries such as banking, transportation, or communications.[28]

Federal officials responsible for implementing the newer social regulatory programs have attempted to reduce the high costs of centralized decisionmaking by adopting relatively crude and uniform prescriptions through the rulemaking process. But the use of standardized, inflexible prescriptions creates other problems. Such prescriptions are bound to be excessively burdensome, outdated, or simply irrational in many particular applications.[29] They also tend to discourage or penalize innovation, which would threaten to destabilize the regulatory system,[30] and to increase the likelihood of conflicts among directives. Similar problems plague federal conditional grant programs, which contain over one thousand different sets of prescriptive rules and orders governing the conduct of state and local governments.[31] In addition, the expanded use of centralized prescriptions has made it difficult to coordinate different regulatory programs and to avoid conflicts among them.

The strategy of centralized prescription, moreover, often fails

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given a role in allocating the burden of abatement among existing sources. *Id.* at § 7410.

26. *E.g.*, *id.* at §§ 7410, 7413, 7502(b), 7505(b).

27. *See generally* K. ARROW, THE LIMITS OF ORGANIZATION (1974) (discussing the costs of centralized information gathering); E. BARDACH & R. KAGAN, GOING BY THE BOOK 93-119 (1982) (discussing the perverse effects of legalism); T. SOWELL, *supra* note 1, at 21-44 (discussing the decisionmaking process).

28. *See* Stewart, *Interest Group Relations*, *supra* note 22.

29. *See* E. BARDACH & R. KAGAN, *supra* note 27.

30. *See* Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1259 (1981).

31. *See* 2 R. CAPPALLI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS § 11:16 (1982).

to deliver the swift and sure changes in conduct that it promises. A prescriptive regulation is a blueprint for achieving specific results under certain assumed conditions. Due to the errors and distortions associated with centralized information processing, however, the blueprint is often seriously defective. Because of changes in conditions, the blueprint also is likely to become rapidly obsolete. In order to economize on decisionmaking costs, administrators tend to adopt a static model of behavior. They assume that regulated entities will continue to act as they did before regulation, except for the particular changes mandated by the regulation. But as the world changes and those regulated react strategically rather than passively, serious implementation gaps arise.[32]

The complex structure of a highly differentiated liberal society nurtures diversity, flexibility, and decentralized initiative and responsibility. Centralized administrative prescriptions undermine these values by diminishing subsystem independence and variety.[33] Administrative efforts to centrally plan the detailed conduct of hundreds of thousands of firms in a dynamic market economy increase the costs of achieving social goals and retard socially beneficial investment, innovation, and change.[34] The conscription of state and local governments in the implementation and enforcement effort short-circuits political self-determination by requiring state and local officials to act under uniform rules and orders drafted in Washington. Efforts to ameliorate these problems by adjusting central directives to the particular circumstances of each subsystem actor would impose intolerable information-gathering and decisionmaking burdens on central administrators and undermine prescriptive rights-based norms of uniformity.

Excessive reliance on prescriptive regulation also tends to overload the political capacities of the center. To be sure, decentralization and diversity must be balanced by central measures to preserve the integrity of the general political and economic order and the

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32. *See* E. BARDACH & R. KAGAN, *supra* note 27; *see also* R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983) (analyzing the judiciary's role in creating the implementation gap in air pollution regulation).

33. *See* H. LASKI, AUTHORITY IN THE MODERN STATE 78 (1919). For discussion of these values in the context of political federalism, see R. STEWART, FEDERALISM, LAW AND ECONOMY IN THE GREAT REPUBLIC, *supra* note 8.

In later life, however, Laski came to the view that strong central controls were required in order to prevent economic and political domination by large corporations. *See* H. DEANE, THE POLITICAL IDEAS OF HAROLD J. LASKI 293-98 (1954).

34. *See generally* Ackerman & Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1335 (1985) (use of centralized prescriptions to control pollution involves many billions of dollars in excessive control costs).

allegiance of subsystems to society-wide values and goals. As Madison pointed out and our history painfully reminds us, central authority is often a needed antidote to factional domination within subsystems. But the constitutional mechanisms of central political authority have a limited capacity. Neither the Congress nor the institutional Presidency is capable of responsibly making the thousands of detailed but important decisions that centralized prescriptive strategies demand of them. These decisions are accordingly delegated to myriad congressional subcommittees and federal bureaucracies. These subsystems within the federal government, however, are subject to only weak mechanisms of political accountability and responsibility, and are accordingly prone to parochial bias and domination by faction.[35]

These several characteristics of centralized direction depreciate the normative authority of prescriptive regulation. Uniform measures that are unresponsive to diverse subsystem conditions and values become regarded as little more than commands, obeyed solely by reason of the superior position and sanctioning powers of the central authority issuing those commands. Compliance tends to become a function of calculations about detection and sanctions, a phenomenon that further undermines the efficacy of the prescriptive strategy. Such compliance problems compound the inherent difficulties in using uniform directives to achieve particular changes in conduct within a complex, rapidly-changing social system, and contribute to increasingly serious "implementation gaps."

These several forms of normative depreciation ultimately provoke demoralization and antiregulatory backlash. For good reason, the prevailing federal system of regulation is widely referred to as "command and control" regulation, an epithet that reflects the normative depreciation that infects it.[36] The mass of centralized commands must be adjusted constantly in order to appease subsystem resistance and limit obsolescence in the face of changing circumstances. We are left with a disordered heap of ever-changing orders. Anyone condemned to read the *Federal Register* on a regular basis knows that it represents a jurisprudential wasteland, littered with legal pollution.

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35. *See* B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR 1-21 (1981); T. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 107-113 (2d ed. 1979).

36. In extreme cases of normative depreciation, centralized command and control regulation may function as "repressive law." *See* P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 29-46 (1978).

Demoralization and antiregulatory backlash are understandable and in some respects healthy responses to the pathologies of centralized prescription. But there is danger that the backlash will be indiscriminate, discrediting all federal government efforts to advance environmental protection, health, safety, education, housing, and other societal goals.

V. ADMINISTRATIVE LAW AS ATTEMPTED ANTIDOTE

Federal administrative law has experienced major changes during the past twenty years. These changes in large part reflect efforts by the federal courts to rectify the dysfunctions and normative depreciation caused by the expanded use of prescriptive regulation. This expansion has required delegation of vast power and discretion to federal administrators responsible for specifying and enforcing those prescriptions. Courts have attempted to control this discretion and correct perceived deficiencies in the administrative process in order to achieve two different and potentially contradictory goals: first, to promote more zealous and effective implementation and enforcement of national values and goals, and second, to make administrative decisions more responsive to the various subsystem values and interests threatened by central measures.[37]

This reconstruction of administrative law has involved two basic steps. One step has been to extend rights of participation and judicial review to most of the various interests affected by federal regulation. The other has been to impose on federal administrators demanding procedural requirements and standards of judicial review designed to ensure that administrators take action to achieve statutory goals while also giving adequate consideration to affected interests.[38]

Although these efforts at reconstruction have achieved some success, they have created new and serious problems as well. As a

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37. For a discussion of the tensions between these two goals, see Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985).

38. *See* Stewart, *Interest Group Relations*, *supra* note 22. Both statutes and judicial decisions have given private litigants the authority to remedy implementation gaps by bringing private actions to enforce federal prescriptions when federal administrators fail to do so. The opportunity to enlist private enforcement resources is another reason for the use of prescriptive strategies. When regulations or orders specify in detail the conduct required of firms or state and local governments, private enforcement actions may redress violations and supplement limited federal enforcement resources. *See, e.g.*, King v. Smith, 392 U.S. 309 (1968) (recognizing private cause of action to enforce federal grant conditions against states); Clean Air Act, 42 U.S.C. § 7604 (1982) (authorizing citizen suits to enforce regulatory mandates).

result, federal administrative law has itself been infected by the central overload created by excessive use of prescriptive strategies.

Attempting to use the adversary process as both an accelerator and a brake on regulatory prescription is bound to complicate and prolong the already difficult process of centralized information gathering and decisionmaking. Because courts often lack the specialized experience and resources necessary to diagnose and cure the dysfunctions of centralized prescription, they tend to emphasize procedural solutions, including remands of apparently defective regulations for further administrative proceedings. As a result, judicial efforts to cure the legal pollution found in the *Federal Register* have created legal pollution of a different sort: the gargantuan records and mammoth opinions generated by protracted adversary proceedings before agencies and courts. Moreover, the already limited capacity of the federal government to coordinate central directives in pursuit of a common goal or plan is further impaired by the tendency of the litigation system to treat each controverted administrative decision as an independent case to be decided on the basis of its particular record.[39] Thus, judicial efforts to correct the dysfunctions of centralized prescription through adjudication produce a self-contradictory system of attempted central planning through piecemeal litigation.

The effort to harmonize national goals and subsystem values through expanded use of and access to litigation also creates severe problems of political accountability and responsibility.[40] The goal of making federal directives simultaneously more faithful to national norms and more responsive to subsystem values is a worthy one. But reliance on adversary procedures to achieve this goal simply shifts power from federal administrators to litigants and judges whose representational credentials are often even more dubious. Adversary litigation is an implausible solution to the problems of political legitimacy created by overload at the center. It also fails to

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39. For example, a study of the implementation of the Clean Air Act has documented this problem. Environmentalists successfully brought judicial review proceedings in the United States Court of Appeals for the D.C. Circuit to force the Environmental Protection Agency to adopt sweeping and ambitious standards and policies under the Act. But when EPA eventually brought enforcement actions in district courts around the country to implement these policies, local judges, concerned about shutdowns and unemployment, often refused to enforce these ambitious policies. This lack of coordination generated a large gap between goals and results, a gap that undermined the credibility of the Act. *See* R. MELNICK, *supra* note 32, at 235-38.

40. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1802-05 (1975).

restore decisional independence to subsystems. Shifting decisional responsibility around the several branches of an overloaded center will do little to nurture subsystem diversity, innovation, and decentralized responsibility.

VI. RECONSTITUTIVE STRATEGIES OF REGULATION

Contrary to the premises that currently dominate the delegalization debate, centralized prescription is not the only means of harmonizing subsystem conduct with national goals and norms. The alternative is to reconstitute subsystems by changing their endowments, decisionmaking procedures, or jurisdictions.

Reconstitutive strategies have a number of important advantages. They reduce centralized information processing overload. Once reconstitution is achieved, most of the relevant decisions are made within subsystems rather than at the center. Avoiding the dysfunctional rigidities and uniformities of centralized prescription, reconstitutive strategies promote flexibility and innovation and broaden decisional responsibility. Although reconstitutive strategies achieve social goals by less direct means than prescriptions that prohibit or mandate specified conduct, directness is not necessarily synonymous with efficacy. As noted, prescriptive strategies often produce implementation gaps and normative depreciation. Although reconstitutive strategies are indirect, they are potentially powerful methods for "steering" subsystem behavior.

The advantages of reconstitutive strategies have been convincingly demonstrated in the context of business organization, as documented and analyzed by the historian Alfred Chandler, Jr. and the economist Oliver Williamson.[41] The original structure of the modern corporation took the unitary or "U" form, with corporate departments organized along functional lines such as manufacturing and marketing. With the growth in the size of corporations, it became increasingly difficult for corporate management to coordinate the activities of different functional divisions through prescriptive commands issued from the center. Transaction costs mushroomed and agency problems of securing divisional fidelity to overall corpo-

41. *See* A. CHANDLER, STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE INDUSTRIAL ENTERPRISE (1962); A. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977); O. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 273-97 (1985); Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON. LIT. 1537 (1981). *Cf.* Clark, *supra* note 19, at 567-68 (analyzing changes in investment organization and decisionmaking that broadens participation in capitalist profits).

rate goals became acute. During the 1920s, General Motors and DuPont took the lead in responding to these problems by reconstituting the internal organization of the corporation. They eventually developed a multidivisional or "M" form structure, in which each division operated as an independent profit center, responsible for manufacturing, marketing, and all other aspects of producing and selling a distinct product or group of products. The central management limited its functions to making long-term plans and major changes in corporate strategy, monitoring divisional performance, allocating capital among the divisions, and furnishing financial, legal, and other staff services to them. Those divisions earning a higher return on capital were rewarded with more capital and higher manager compensation. Transaction costs were reduced and incentives for profitability strengthened. Large firms adopting this organization strategy have enjoyed significant competitive advantages, both in product and capital markets, over firms of comparable size using prescriptive strategies. Accordingly, the M form structure has been widely adopted by very large business firms.

Analogous reconstitutive strategies could be adopted by the federal government to harmonize subsystem decisions with national goals and norms. One version of such a strategy preserves existing subsystem decisionmaking procedures but uses economic incentives to shift the vector of outcomes. Such incentives can be designed to encourage decisions that advance national goals while affording individual businesses and state and local governments flexibility in responding to those incentives.

For example, current federal command and control regulation of air and water pollution could be replaced in large part by a system of transferable pollution permits.[42] The current system relies on uniform federal rules and implementing orders to dictate the degree of pollution control required of hundreds of thousands of individual pollution sources. An alternative strategy would be for the federal government to determine the maximum amount of pollution permitted in a given region or state. Permits to discharge pollution would be issued in numbers equal to this amount and allocated among pollution sources by auction or otherwise.[43] Thereafter, permits could be freely bought and sold. By making the air and water property interests created by the existing prescriptive system transferable, this alternative would harness the mechanisms of the

42. *See* Ackerman & Stewart, *supra* note 34, at 1341-51.

43. For example, permits might simply be given to existing sources in amounts equal to the pollution that they are permitted to discharge under existing regulations.

market to serve national goals. Each source would be free to decide how much to clean up and how many permits to buy.[44] This flexibility would allow sources that can clean up more cheaply to assume more of the abatement burden, saving society tens of billions of dollars over the existing system of uniform prescription. In addition, the fact that sources would have to pay for the pollution that they emit would provide a continuing incentive to develop environmentally superior production and control technologies. Limiting the number of permits issued would ensure that the aggregate pollution emitted by all firms does not exceed the chosen maximum. Future decreases in pollution could be achieved by amortizing the permits on a fixed schedule.

Similar programs could be developed to address other environmental harms, such as the risks created by pesticides, toxic chemicals, and toxic wastes. Other economic incentive systems, relying either on the creation of new forms of transferable property interests or on taxes or subsidies, might be developed to replace prescriptive controls over commercial activities in such areas as waste treatment and recycling, land and water resource use, unemployment, and inflation.[45]

Economic transfers could be used as a substitute for existing federal controls over state and local decisionmaking. The current system of central regulation of state and local social services through federal conditional grant programs is an inherently clumsy method of remedying the local social service problems created by competition for investment and resource disparities among states in an integrated national economy.[46] Not only does the federal grant

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44. The government, of course, would have to prohibit a source from discharging pollution in excess of the amount for which the source holds permits. As previously noted, such prescriptions are usually a necessary ingredient in reconstitutive strategies.

45. *See, e.g.*, M. WEITZMAN, THE SHARE ECONOMY: CONQUERING STAGFLATION (1984); W. VISCUSI, RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE 156-68 (1983); Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENVTL. L. REV. 1 (1985).

46. Federal regulation of state and local services through conditional grant programs and direct regulation has been justified on two grounds. First, the mobility of individuals and business investment within a federal system deters states and localities from raising taxes to provide generous benefits and services to the poor and disadvantaged. Second, many poor or disadvantaged persons are located in poor jurisdictions that lack the fiscal resources to provide more generous benefits. *See* Stewart, *Federalism and Rights*, *supra* note 13. In some instances these problems can be overcome, at some sacrifice of federalism values, by substituting direct federal grants to individuals for state and local assistance programs. But in the case of state and local services such as education or police and fire protection, a federal takeover would be infeasible and highly undesirable. In this area, federal matching grants with regulatory conditions have been

system short-circuit state and local political self-determination, but it also fails in practice to provide any significant redistribution of resources to needier jurisdictions.[47] A more effective and less intrusive strategy would reconstitute the existing system of fiscal federalism by using the federal tax system to transfer money from wealthier states and localities or those with fewer needy residents, to jurisdictions with less fiscal resources or more fiscal demands. Such a system of horizontal redistribution, which has functioned successfully in other federal systems including Canada and West Germany,[48] would provide states and localities with insurance against the consequences of interjurisdictional competition and reduce jurisdictional disparities in fiscal resources and needs.[49]

These examples illustrate some of the reconstitutive initiatives that might be developed to replace the current system of centralized command and control. Other possibilities include expanded use of taxes or liability to discourage socially undesirable conduct, such as the operation of unsafe workplaces, and the expanded use of vouchers to promote diversity, innovation, and efficiency in housing, education, health care, and other social service programs.[50]

Economic exchange and transfer systems have important advantages over prescriptive strategies. Economists have long favored such systems because they are more likely to promote economic welfare than centralized prescriptions.[51] But it is also important to emphasize the noneconomic advantages of such systems. By delegating decisionmaking to state and local governments, business firms, and other subsystem decisionmaking units, reconstitutive strategies lessen the current concentration of decisionmaking power

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used to ensure that states and localities provide services in accordance with federal requirements.

47. *See, e.g.*, Davis & Luckes, *The Rich-State-Poor-State Problem in a Federal System*, 35 NAT'L TAX J. 337 (1982); Ladd & Doolittle, *What Level of Government Should Assist the Poor?*, 35 NAT'L TAX J. 323 (1982).

48. *See* U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STUDIES IN COOPERATIVE FEDERALISM: CANADA (1981) (discussing natural system of horizontal transfers among Canadian provinces); U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STUDIES IN COOPERATIVE FEDERALISM: WEST GERMANY (1981) (same discussion focusing on German *Länder*).

49. *See* Stewart, *Federalism and Rights*, *supra* note 13.

50. *See* Rose-Ackerman, *Social Services and the Market*, 83 COLUM. L. REV. 1405 (1983). Professor Rose-Ackerman has also proposed use of economic incentives to replace prescriptive strategies for controlling administrative decisionmaking. *See* Rose-Ackerman, *Reforming Public Bureaucracy Through Economic Incentives?* 2 J. L. ECON. & ORGANIZATION 131 (1986).

51. *See, e.g.*, A. KNEESE & C. SCHULTZE, POLLUTION, PRICES, AND PUBLIC POLICY 85-111 (1975).

within central bureaucracies and promote decentralization, flexibility, and diversity. For example, a transferable pollution permit system could allow not only business firms but also state or regional authorities a far greater role in environmental and economic policy choices than the current system of centralized directives allows. Although the federal government would establish a maximum number of pollution permits, state and local governments or new regional airbasin or riverbasin authorities could establish and manage permit markets. They could issue fewer permits than the maximum and determine how permits would be allocated and exchanged. Similarly, if federal grant programs were replaced by a horizontal system of fiscal redistribution, states and localities would decide what social needs command the highest priority and how best to meet those needs.

Using economic incentive systems, however, does not mean that the national policies underlying those systems should be set by an economic cost-benefit analysis. For example, the number of air pollution permits could be tightly restricted in order to promote noncommodity values, including health and preservation of exceptionally scenic areas.[52] Nor should such incentive systems necessarily be viewed solely as mere instruments to achieve a specific goal such as clean air. Economic incentive systems can incorporate and promote intrinsic process values. Transferable pollution rights socialize the market by making firms responsible for the externalities that they generate. Income transfers from rich to needy jurisdictions reflect and promote solidarity values of mutual concern and aid.

Economic incentives and transfers, moreover, are but one form of reconstitutive strategy. An alternative approach is to require or encourage new decisionmaking procedures and structures. Occupational risks provide a case in point. Occupational safety and health regulation by the federal government has been justified on the grounds that workers are often poorly informed about occupational hazards and may lack the collective resources and bargaining power to deal effectively with them.[53] But centralized Occupational Health

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52. *See* Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1576-87 (1983) [hereinafter Stewart, *Regulation in a Liberal State*].

53. Wage structures provide some compensation for differences in the risk of death or injury among different occupations or industries, but the importance of these compensating wage differentials is reduced by employee ignorance of risk (particularly the risk of disease) and the power exercised by firms against older employees with limited mobility. In addition, there is concern that workers may fail to give adequate weight to low probabilities of severe harms. The significance of these factors is diminished (and

and Safety Act (OSHA) directives are not the only means of addressing this problem. The current system of labor law, for example, could be reconstituted to promote unionization.[54] The federal government could either disclose information about occupational hazards itself or require employers to do so. Employers could be required to hire occupational health and safety professionals, chosen jointly by employers and employees, to monitor risks and correct hazards. Occupational health and safety could be made a mandatory subject of collective bargaining or employment contracts.[55] These steps might reduce workplace hazards more effectively than the current patchwork and inherently clumsy system of centralized regulation.[56] They would shift decisionmaking responsibility to those most directly affected, enabling employers to choose the most cost-effective means of dealing with hazards, and giving workers a direct voice in determining acceptable levels of risk in their workplace.[57]

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the extent of compensating wage differentials increased) by unionization. The relevant literature is summarized and reviewed in W. VISCUSI, EMPLOYMENT HAZARDS (1979); W. VISCUSI, RISK BY CHOICE (1983); P. WEILER, PROTECTING THE WORKER FROM DISABILITY: CHALLENGES FOR THE EIGHTIES 87-100 (1983); Smith, *Compensating Wage Differentials and Public Policy: A Review*, 32 INDUS. & LAB. REL. REV. 339 (1979); R. EHRENBERG, WORKERS' COMPENSATION, WAGES, AND THE RISK OF INJURY, (National Bureau of Economic Research Working Paper No. 1538, 1985).

54. *See generally* Weiler, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984) (advocating modifications in existing law to encourage unionization). Unionization could help disparities in information and bargaining power. *See supra* note 53.

55. *See* L. BACOW, BARGAINING FOR JOB SAFETY AND HEALTH 103-121 (1980); W. VISCUSI, *supra* note 45, at 71-73.

56. Initial studies of regulation under OSHA found that it had no effect in reducing the overall injury rate in the economy generally or in selected high-risk manufacturing industries which were subjected to the Labor Department's Target Inspection Program. *See* J. MENDELOFF, REGULATING SAFETY 98-105 (1979); R. SMITH, THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ACHIEVEMENTS 67-70 & app. C (1976) (AEI study); W. VISCUSI, RISK BY CHOICE (1983) ; Smith, *The Impact of OSHA Inspections on Manufacturing Injury Rates*, 14 J. HUM. RESOURCES 145 (1979) (studies of OSHA's effects in 1973 and 1974); Viscusi, *The Impact of Occupational Safety and Health Regulation*, 10 BELL J. ECON. 117 (1979). Later and more sophisticated studies found that OSHA regulation does have a positive impact, but only for the limited subset of occupational injury risks amenable to command and control regulation. The program achieved only a modest reduction in injuries (10% or less) at relatively high cost. *See* Bartel & Thomas, *The Costs and Benefits of OSHA-Induced Investments in Employee Safety and Health*, in WORKERS' COMPENSATION BENEFITS: ADEQUACY, EQUITY AND EFFICIENCY 41-56 (1986); Bartel & Thomas, *Direct and Indirect Effects of Regulation: A New Look at OSHA's Impact*, 28 J. L. & ECON. 1 (1986).

57. Nothing, of course, requires us to rely exclusively on either a reconstitutive or a prescriptive strategy. Occupational health and safety may well be one area where a mixed approach, relying on a combination of markets, collective bargaining, experience-

A third reconstitutive approach to harmonizing subsystem conduct and national goals and norms is to alter the jurisdictional competence of different constitutive legal systems. Deregulation is one example of this approach. It replaces administrative governance of particular sectors of the economy with governance by market laws. Straightforward deregulation is an appropriate and desirable form of reconstitution in some sectors. But in others, scale economies and other considerations dictate more complex forms of restructuring. For example, deregulation of banking should take into account the potential desirability of retaining dual federal-state bank licensing and the problems raised by bank affiliate access to the payments system.[58] Deregulation of the electricity industry could involve a restructuring of the generating, transmission, and local distribution sectors of the industry along quite different models.[59]

Substituting different structures of market law for regulatory administration is but one form of jurisdictional reconstruction. A different approach is followed by the proposed system of horizontal fiscal redistribution, which would shift reponsibility for decisions about social service policies from the federal government to states and localities. Scholar-advocates on the left have proposed more radical forms of reconstruction, including a greatly increased economic role for cities[60] and new systems of capital allocation aimed at creating novel economic and social subsystems.[61]

Greater use of reconstitutive strategies would alleviate overload at the center. Because reconstitutive strategies renounce comprehensive, detailed control of subsystem conduct, information gathering and decisionmaking burdens at the center would be greatly reduced. Rather than delegating power within the center to courts and bureaucracies, Congress would delegate decisional authority

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rated workers' compensation, and prescriptive regulation, is most appropriate. *See* P. WEILER, *supra* note 53.

58. *See* Scott, *Deregulation and Access to the Payment System*, 23 HARV. J. ON LEGIS. 331 (1986).

59. *See* Pierce, *A Proposal to Deregulate the Market for Bulk Power*, 72 VA. L. REV. 1183 (1986).

60. *See* Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1150 (1980).

61. *See* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). Other left-oriented reconstitutive strategies are proposed in B. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984), and M. PIORE & C. SABEL, THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY (1984).

The program proposed in this essay, although moderately ambitious, is essentially reformist in that it seeks better means for simultaneously achieving important national goals and values and strengthening subsystem diversity and independence while maintaining the essential features of a liberal capitalist polity.

outwards to the subsystems. Because delegation outwards would lessen the control that Congress currently exercises over implementation by federal administrators, such a shift might inspire Congress to specify more clearly the goals to be achieved and the means for achieving them.

By reducing centralized decisionmaking overload, reconstitutive strategies also would lessen the current reliance on administrative law to control the discretion of federal administrators. Prescriptive strategies inevitably create such discretion even though they are adopted in part to limit it.[62] Reconstitutive strategies transform the problem of discretion by reallocating decisional responsibility to subsystems. Those decisions will still be structured by law—the laws of the various subsystems. These subsystem laws are often better able to foster cooperative solutions and reduce conflict without the inordinate legal pollution generated by our currently overloaded system of federal administrative law.[63] Decentralizing responsibility can take advantage of subsystem resilience and responsiveness, relieving federal administrative law of the strains imposed by overuse of prescriptive strategies.[64] If chosen wisely, reconstitutive strategies can secure these advantages without sacrificing national goals and values. Nationalism, as Herbert Croly pointed out, does not necessarily mean centralization.[65]

VII. STRATEGIC BALANCE

This essay does not advocate that prescriptive strategies be abandoned in favor of reconstitutive ones. As noted earlier,[66] reconstitutive strategies have significant drawbacks, and prescriptive

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62. *See* Nonet, *The Legitimation of Purposive Decisions*, 68 CALIF L. REV. 263, 275 (1980).

63. For example, under a system of marketable pollution rights, decisions about control levels will be made through individual firms' decisions and contractual agreements rather than through federal administrative and judicial review proceedings. This shift of governing legal rules is likely to reduce transaction costs and promote cooperative, productive methods of decisionmaking. *See* Stewart, *Interest Group Relations*, *supra* note 22. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984), makes a persuasive case that lawyers' activities in structuring transactions enhance economic welfare. No such case has been made for centralized administrative litigation.

64. The notion of resilience is explained in Wildavsky, *Foreword: If Regulation Is Right, Is It Also Safe?*, in RIGHTS AND REGULATION xv (1983). The concept of "responsive law" is developed in P. NONET & P. SELZNIK, *supra* note 36. Greater use of reconstitutive strategies can alleviate what some observers regard as a crisis of legitimation in administrative law. *See* Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984).

65. *See* H. CROLY, THE PROMISE OF AMERICAN LIFE (1909) (discussing how achieving national goals requires strengthening state and local governments).

66. *See supra* pp. 91-93.

law has important strengths. Because reconstitutive strategies are indirect, their effect on conduct is subject to considerable variation and uncertainty. If specific results must be achieved or avoided, prescription is often a more reliable form of regulation. Thus, we rely on detailed prescriptions and inspections to promote the safety of airplanes and nuclear reactors.[67] Reconstitutive strategies, particularly those that rely heavily on taxes, transfers, and exchanges, are also less suitable than prescriptive ones for securing certain types of norms. Uniform prescriptions affirm and enforce basic individual rights as universal and absolute, whereas economic incentive systems explicitly allow tradeoffs that may be inconsistent with rights-based norms of entitlement and duty.[68] We would be unwilling to replace existing prescriptions against racial discrimination with a "discrimination tax" even if such a tax were more effective in reducing the incidence of discrimination, for such a tax would affirm that discrimination was legally and morally permissible so long as one paid a tax on its exercise. Also, by shifting discretion and responsibility away from the center, reconstitutive strategies run the risk that national goals and norms will be subverted by factional interests that dominate particular subsystems.

These considerations suggest a division of labor between prescriptive and reconstitutive strategies. Prescriptive strategies should presumptively be used to enforce basic civil liberties and rights. Reconstitutive strategies should presumptively be used to promote productive efficiency and innovation. Programs to promote various other public values[69] may use either strategy or a combination of both,[70] depending on the values at stake and the context in which they are sought to be nurtured.

Even in the areas in which they hold greatest promise, reconstitutive strategies may be difficult to devise and implement. For ex-

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67. *See generally* Roberts, *Environmental Protection: The Complexities of Real Policy Choice*, in MANAGING THE WATER ENVIRONMENT 157 (1976) (analyzing combinations of reconstitutive and prescriptive strategies); Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 368-71 (1984) (comparing regulation and liability as means of reducing social risks). The relationship between reconstitutive and prescriptive strategies is often highly complex. For example, deregulation of airlines, a form of reconstitution, may require an increase in federal enforcement of airline safety prescriptions as greater competitive pressures tempt airlines to trim costs by reducing safety inspection and maintenance. *See* Thayer, *The Emerging Dangers of Deregulation*, N.Y. Times, Feb. 23, 1986, at F3, col. 1.

68. *See generally* S. KELMAN, WHAT PRICE INCENTIVES? (1981) (asserting that use of economic incentives to achieve enviromental goals depreciates environmental values).

69. *See* Stewart, *Regulation in a Liberal State*, *supra* note 52.

70. *See supra* note 57.

ample, given current knowledge and implementation problems, it would be extremely difficult to devise and enforce a system of transferable risk rights for pesticides or other chemical products. There are also political impediments to adoption of reconstitutive strategies. The reconstitutive systems proposed here will not emerge through spontaneous "invisible-hand" processes. They will require far-reaching and controversial federal legislation that can only be achieved through political leadership and effort. As existing prescriptive systems "mature," important economic and political interests that have invested in those systems oppose their replacement. There will be strong pressures to deal with the dysfunctions of prescriptive systems by incremental modification of those systems rather than by adoption of a fundamentally different strategy.[71] Moreover, reconstitutive strategies are not themselves immune from manipulation. As federal labor law demonstrates, the process of implementing a reconstitutive strategy may generate enormous amounts of legal pollution as interest groups use litigation to adjust the rules of the game to favor outcomes that they prefer.[72] The Internal Revenue Code illustrates how systems of incentives and transfers can be exploited by factions that dominate micropolitical subsystems within Congress.[73]

On the other hand, the success of deregulation initiatives and the limited experimentation with transfers of air pollution rights under existing law[74] demonstrates the potential for reconstitutive initiatives. Expanded use of reconstitutive strategies does not deny the value and importance of the prescriptive approach, and indeed may strengthen it. The normative depreciation currently associated with the prescriptive approach is caused in large part by excessive use of prescriptions. The moral capital of prescriptive regulation must be economized; if centralized prescription were abandoned or reduced in areas such as pollution control and local service delivery,

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71. *See, e.g.*, M. DERTHICK & P. QUIRK, THE POLITICS OF DEREGULATION (1985); R. NOLL & B. OWEN, THE POLITICAL ECONOMY OF DEREGULATION (1983); Ackerman & Stewart, *supra* note 34; Goldberg, *supra* note 19.

The adoption of deregulatory legislation in several areas shows, however, that successful reconstitution is politically feasible.

72. *See generally* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (discussing the effects of successful employer resistance to unionization).

73. *See* Surrey, *The Congress and the Tax Lobbyist - How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145 (1957).

74. *See generally* M. DERTHICK & P. QUIRK, *supra* note 71 (discussing deregulation); Ackerman & Stewart, *supra* note 34 (discussing cost savings and innovations achieved by EPA "bubble" and "tradeoff" policies under Clean Air Act).

its normative authority in other areas, such as civil rights, could be enhanced. Reconstitutive strategies can appropriately assume greater regulatory burdens in those areas in which subsystem values of flexibility, efficiency, diversity, and decentralization are entitled to greater weight. Expanded use of reconstitutive strategies in these areas is needed to restore strategic balance between prescriptive and constitutive law.