Federalism in the Supreme Court

The Fall of the House of Usery

Grover Rees III

FEDERALISM—THE IDEA THAT our central government's powers are delegated to it by the states and are therefore limited—is a rare and delicate flower that blooms briefly in election years. Even as Americans have become accustomed to having more and more decisions about their lives made by an organization known to its admirers as "the public sector," they have also come to expect that virtually all of the really important decisions will be taken at the organization's home office in Washington, D.C. The notion that the fifty states are "sovereign," that real and inalienable powers reside in deliberative bodies that meet in Topeka, Honolulu, and Little Rock, seems increasingly quaint. And perhaps worse than quaint, since it raises the specter of Balkanization of the national economy. The ritual invocation of that specter has long been used to frighten young constitutional scholars around campfires —even though, in view of the effects of the postwar de-Balkanization of the Balkan states, it does not seem unreasonable to fear other things more than having a central government that is too weak.

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Many Americans, even those who are aware that there is now in progress a struggle for the soul of the U.S. Supreme Court, would be surprised to learn that the struggle is mostly about federalism. The Supreme Court, in fact, has always taken the position that the states are true sovereigns, in the sense that there are some decisions of state legislatures that Congress cannot overrule, no matter how much it wants to. One reason the Court has taken this position is that the Constitution clearly requires it: the Tenth Amendment states that "all powers not delegated to the United States by the Constitution . . . are reserved to the States." That amendment was proposed by the First Congress as part of the Bill of Rights. It was designed to address the principal objection of those who had opposed the Constitution and an important misgiving of many who had supported it: that the federal government, once established, might eventually exercise all power to the exclusion of the states.

As Justice Sandra O'Connor has recently observed, those who ratified the Constitution had several reasons for wishing to ensure that the states would continue to hold ultimate power on all matters other than those delegated to

the federal government. First, the recent unpleasantness with England had made them suspicious of all central governments, and they regarded diffusion of power as a way to protect individual freedom.[1] A closely related concern was that "federalism enhances the opportunity of all citizens to participate in representative government." O'Connor quoted Tocqueville's observation that the "republican spirit," the "manners and customs of a free people" are "engendered and nurtured in the different states" so that they can be "afterwards applied to the country at large." Finally, whether or not the framers of the Constitution foresaw it, state governments have "served as laboratories for the development of new social, economic and political ideas," and the nation has learned from the successes and failures of these experiments.

The justice's paean to federalism, unfortunately, was written in dissent (in *FERC* v. *Mississippi*, 1982). While the majority of the Court has always given notional assent to the Tenth Amendment's declaration that some powers are reserved to the states, it has sometimes been hard to identify any *particular* powers that the Court would place in the reserved category. For the last forty years or so, the concept of federalism has been more in evidence at the confirmation hearings of Supreme Court justices than in their decisions from the bench.

The Tenth Amendment Rediscovered

In 1976, consequently, most professional Court-watchers were startled (and many were offended) when the Court seemed rather abruptly to have rediscovered the Tenth Amendment as a rule of law. The holding in *National League of Cities* v. *Usery* was that Congress has no constitutional power to prescribe minimum wages and maximum hours for state employees. The Court reaffirmed its prior decisions that federal power over interstate commerce includes the power to regulate wages and hours for workers in private industry. But it went on to hold, for the first time in recent memory, that the federal commerce power was limited by the reserved powers of the states—in this case the right of a state government to structure its own internal operations. Justice William Rehnquist wrote the Court's opinion, and it was after *Usery* that commentators began to speak ominously of the emergence of a Rehnquist Court.

A Supreme Court decision of the recent term, however, suggests that reports of the fall of absolute federal power after *Usery* (and the rise of a majority bloc of justices committed to a "new federalism") were somewhat premature. In *Equal Employment Opportunity Commission* v. *Wyoming*, decided March 2, the Court held that the federal government has the power to prohibit the Wyoming Game and Fish Department from firing Warden Bill Crump merely because he has reached the statutory retirement age of fifty-five. In so holding, a new majority on the Court, consisting of the four dissenters in *Usery* plus Justice Harry Blackmun, has eviscerated *Usery*—without, however, formally overruling it. Before 1976 it was thought there might not be any limits on the federal commerce power; now the Court seems to be saying that such limits exist but are impossible to find.

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Rehnquist's opinion for the Court in *Usery* has been the favorite exhibit of critics who accuse him of being a "judicial activist" who strikes down laws he finds ideologically unappealing. Indeed, such an accusation was clearly implicit in the dissenting opinion of Justice William Brennan, who expressed shock that "my

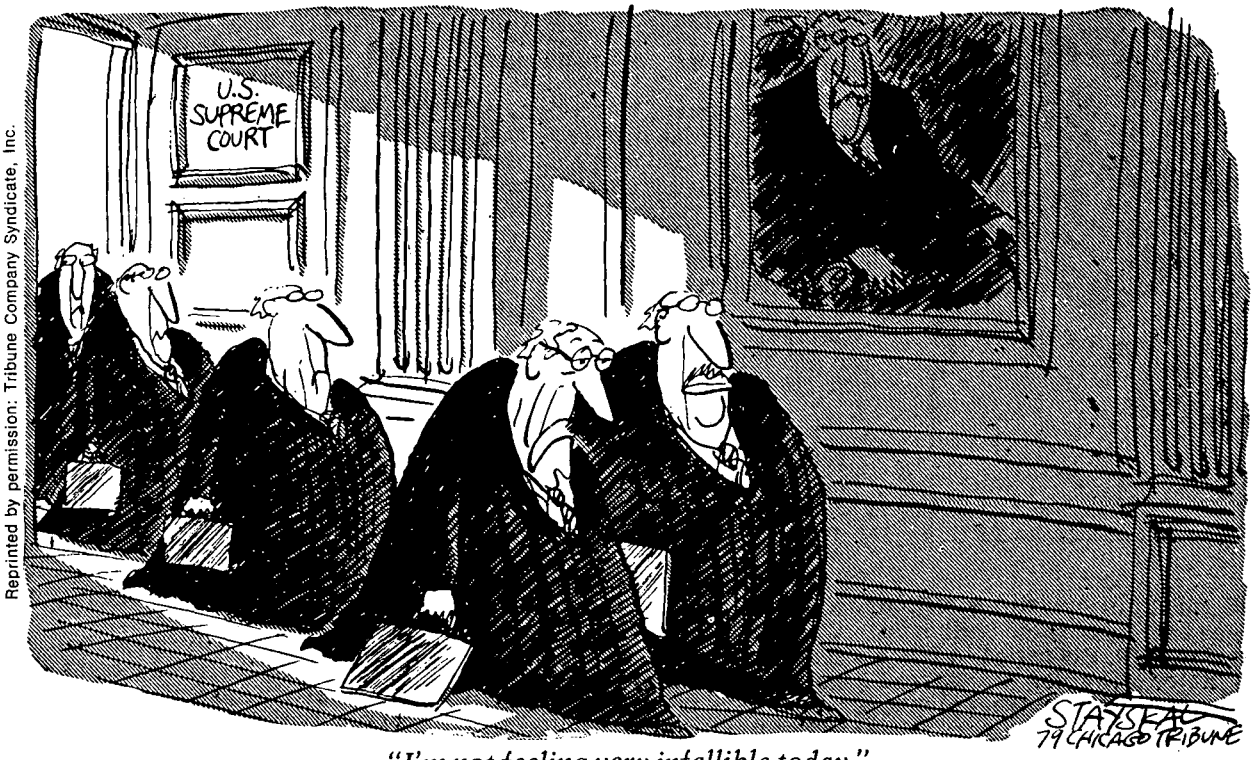
[1] Modern scholars have adduced other arguments for federalism as well. As Professor Lino Graglia has observed: "It can be shown arithmetically that if an issue is decided by larger units, involving more people, the likelihood increases that fewer people will obtain their preference and more will be disappointed. . . . As the power source is farther removed from the individuals affected, what might be called dissonance or interference in transmission—in communication and responsiveness—increases. . . . It is true, of course, . . . that the smaller unit, too, can tyrannize. . . . But at least fewer people will be tyrannized, and as long as we retain . . . a nationally enforced rule of free intra-state and inter-state movement . . . these people can leave." Thus, while local government probably does tend to be less threatening to freedom than central government, it is even clearer that the best protection of all is to prevent *any* government from monopolizing power.

Brethren should choose this Bicentennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Chief Justice John Marshall." The majority's decision that state sovereignty limits the federal power to regulate interstate commerce, said Brennan, was a "patent usurpation" of the power of Congress; inherent state sovereignty is an "abstraction without substance," mentioned nowhere in the Constitution and rejected by an unbroken line of judicial precedents. Quoting one of these precedents, Brennan insisted that the Tenth Amendment imposes no limits at all on federal power; rather, "the amendment states but a truism that all is retained which has not been surrendered."

One essential quality of a truism, however, is truth. The *Usery* dissent was surely right in observing that the Tenth Amendment's statement that "powers not delegated to the United States by the Constitution . . . are reserved to the States" does not help to determine how much power is delegated and how much is reserved. The majority, however, was just as surely right in regarding the Tenth Amendment as evidence that the Constitution must reserve *some* powers to the states. Any construction of the interstate commerce clause that would seem to delegate *all* power to Congress must therefore be erroneous. If an unbroken chain of Supreme Court decisions really stands for a clearly erroneous construction of the Constitution, it is the duty of the Court—as Brennan has been quick to recognize in other contexts—to break the chain.

The constitutional tradition from which *Usery* departed combined an extremely broad "structural" interpretation of the federal government's delegated powers with a "strict constructionist" approach toward the reservation of powers to the states. Only *after* drawing every conceivable inference and resolving every doubt in favor of a challenged exercise of federal power would the Court turn to the Tenth Amendment; at that point, of course, it would be too late in the analysis for the reservation to the states of "all powers not delegated" to have any effect on the case, since a delegation would already have been inferred.

The guiding principle of *Usery*, on the other hand, was that the standards for interpretation of state and federal powers should be symmetrical: limits on federal power would henceforth be inferred from the reservation of power to the states, just as limits on state power had



"I'm not feeling very infallible today."

long been found to be implied by constitutional grants of power to the federal government. As the dissent in *Usery* pointed out, this idea was inconsistent with many of the Court's decisions on the scope of federal power under the commerce clause; but it was almost certainly the idea behind the Tenth Amendment. Thus the dissenters' chief indictment of the *Usery* Court's constitutional vision of American federalism was that the vision was 200 years old.

Court Precedents

The view of state sovereignty espoused by the majority in *Usery*, moreover, had more support in the Court's earlier jurisprudence than the dissenters were willing to concede. Most of the decisions cited by Brennan, in fact, involved federal regulation of individuals and business associations, not federal regulation of the states themselves. When Congress uses its interstate commerce power to regulate private conduct, it thereby preempts any conflicting state laws. As the complexity of economic life in the United States has increased, the constitutional grant of power to Congress to do everything "necessary and proper" to regulate interstate commerce has been construed to encompass many activities that were traditionally regulated only by state and local governments. Despite intermittent attempts to define the boundaries of a state "police power" that can never be preempted by the federal government, the Supreme Court has more or less come around to the view that it cannot be done. Congress can regulate private activities and enterprises not only when they are "in" interstate commerce, but also when they "affect" interstate commerce or use "instrumentalities of commerce." Since everything is linked to everything else in the economy, and since everyone uses at least the "instrumentality of commerce" known as the telephone, it follows that the Tenth Amendment must reserve to the states something *other* than a state "police power" over certain types of private conduct. Unwilling to demote the amendment from a truism into an illusion, the *Usery* majority drew the line at federal regulation of the essential functions of the state governments themselves.

This distinction between laws that govern individuals and those that govern other governments was not without illustrious precedents. Indeed, the decision that gave life to the idea that constitutional grants of power to Congress should be broadly construed—Chief Justice Marshall's opinion in *McCulloch* v. *Maryland*—also spawned a line of cases holding that sovereignty implies a measure of immunity from the power of other sovereigns. Although the Constitution nowhere explicitly prohibits the states from taxing the activities of the federal government within their respective borders, Marshall held that Maryland could not tax the notes issued by the Baltimore branch of the Bank of the United States. Since "the power to tax involves a power to destroy," Maryland could exercise this power (and its other powers, including the power to regulate) only over that which "exists by its own authority, or is introduced by its permission."

Marshall based his argument for an implied limitation on state power not only on the independent sovereignty of the federal government but also on its supremacy; he attempted to distinguish federal taxation of state banks from the converse on the ground that the states were represented in Congress and could look after their own interests. But the Court soon rejected this distinction, holding that "the State is as sovereign and independent as the general government" and thus could not be taxed. For a while, during the late nineteenth and early twentieth centuries, the scope of the intergovernmental tax immunity doctrine was construed so broadly that it was held unconstitutional for the federal government to assess income taxes against the salaries of state employees. By 1946, however, the doctrine had evolved to a point where the Court, in *New York* v. *United States*, held that the federal government could tax some state-owned enterprises, such as New York's mineral water business. Certain other objects and activities, however—such as the state capitol building, public schools and parks, and the state's revenue receipts—were held to "partake of uniqueness from the point of view of intergovernmental relations," so that a federal power to tax them would "interfere unduly with the State's performance of its sovereign functions of government."

Nor did this state immunity extend only to federal *taxation* of sovereign functions; it extended to some federal *regulation* as well. In *Coyle* v. *Smith*, for instance, the Court declared

unconstitutional a condition on Oklahoma's admission to the Union requiring that the state capital be located until 1913 at a place called Guthrie. The power to move the seat of government to Oklahoma City and the power to appropriate state funds for that purpose were held to be "essentially and peculiarly state powers." Not even in the course of exercising its otherwise "plenary" constitutional power to grant or deny applications for statehood could Congress regulate the "functions essential to separate and independent existence" of a state.

Coyle and the tax immunity cases also cited the 1868 case of *Lane County* v. *Oregon*, where the Court said that states had the right to insist on the payment of state taxes in gold and silver notwithstanding a federal statute decreeing that paper money should be legal tender for the payment of all debts. Although neither the law nor any particular provision of the Constitution expressly contained such an exemption, the Court observed that "in many articles of the Constitution the necessary existence of the states and, within their proper spheres, the independent authority of the States, is distinctly recognized." The power to tax is "indispensable" to the very "existence" of the states, and there is "nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation"—even the seemingly minor abridgement at issue in the Oregon case.

The idea that federal power stops when it reaches a state government's essential attributes of sovereignty can be applied to the commerce power just as easily as to the powers of taxation, regulation of money, and admission of new states. No less than the power to tax, the power to regulate involves a power to destroy. Nor is the scope of the commerce power any more "plenary" than that of any other federal power; indeed, the Court has sometimes treated the taxing power with even more deference than the commerce power. This is partly because the language of the Constitution lends itself more easily to a restrictive definition of the latter than of the former: a regulation of state government operations is arguably not a regulation of commerce at all, whereas a tax on state governments is clearly a tax.

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More Recent Cases

Not until 1968, when it handed down *Maryland* v. *Wirtz*, did the Court decide to allow federal regulation in a case involving essential attributes of state sovereignty. Over a strong dissent by Justice William Douglas, who pointed out the illogic of treating the commerce power differently from the taxing power, the Court upheld the application of federal minimum wage legislation to certain state employees. Despite the Court's reassurance in *Wirtz* that it reserved the right to prevent the actual *destruction* of a state government, the opinion effectively held the federal commerce power over state government operations to be unlimited.

Stripped to its essentials, the *Usery* majority's alleged disruption of the Bicentennial consisted in overruling *Wirtz*. Yet *Usery* was not the first case in which the Court called the *Wirtz* doctrine into question. In *Fry* v. *United States*, decided in 1975, the Court said that the Economic Stabilization Act, which decreed a "temporary emergency" during which employers would not raise employee wages by more than 7 percent, could be applied to state employee salaries. Justice Thurgood Marshall's opinion for the Court implied, however, that federal commerce power over the states might not be as broad as the corresponding power over private conduct. Marshall's opinion quoted the truism that the Tenth Amendment is a truism, but responded that the amendment "is not without significance," since it "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Although the *Fry* majority held that the wage ceiling passed this Tenth Amendment test, that a test was applied at all was a departure from the *Wirtz* doctrine of absolute federal power in commerce cases.

Rehnquist dissented in *Fry*. Although he agreed with the majority that the wage controls did not threaten the imminent destruction of the state governments, he argued that federal power to determine the salaries of state employees necessarily included the power to make decisions that would impair the effective functioning of the states. It was the very *assertion* of such a federal power, and not the empirically observable effects of its use in any particular case, that Rehnquist believed to be an unconstitutional impairment of the integrity of the states. Echoing *McCulloch*, Rehnquist contended that legal immunity from the power to destroy—and not just the happy circumstance that destruction has not so far occurred—is the test of sovereignty. Although "it is not the Tenth Amendment by its terms that prohibits congressional action" impairing any particular aspect of state sovereignty, the amendment and other constitutional provisions recognizing state integrity must be regarded as conclusive *evidence* that those who drafted and ratified the Constitution had an "understanding" that Congress "was not free to deal with a State as if it were just another individual or business enterprise subject to regulation." Rehnquist's dissent in *Fry*—or, more precisely, his dissenting application of the doctrine of state sovereignty announced in Marshall's majority opinion—was the analytic basis for the Court's opinion the following year in *Usery*.[2]

It is in the nature of landmark opinions to raise more questions than they answer. Rehnquist's opinion in *Usery* found that the federal minimum wage for state employees operated directly on "functions essential to separate and independent existence" of the states and also that the law had a "significant impact on the functioning" of the state governments. It was unclear whether one of these findings standing alone would have been sufficient to invalidate the law. Even Marshall's majority opinion in *Fry* had suggested that a law would be unconstitutional if it impaired *either* a state's "integrity" *or* its "ability" to "function." This disjunction was consistent with the Court's earlier statements on the federal tax power, to the effect that a tax would be unconstitutional if it either applied directly to the state capitol building or threatened to put the state government out of business. Yet the *Usery* Court's refusal to disapprove the actual result in *Fry*—which was to permit the application of wage and price controls to states—suggested that some federal regulation of essential state functions was still permissible. The Court distinguished *Fry* from *Usery* on several grounds, among them that the federal wage ceiling had tended not to impoverish the states but to enrich them, and also that the ceiling had been enacted pursuant to a "temporary emergency." Blackmun's concurring opinion in *Usery* added to the uncertainty by characterizing the majority opinion as a "balancing approach" that would not threaten really important federal laws, such as those protecting the environment. Under this approach even a strong state interest might be overwhelmed by a slightly stronger federal one. Although Blackmun might have been the only person who read the opinion that way, his status as an essential member of the five-vote majority made his views important.

Had the Court pursued the logic of Rehnquist's opinion, it would eventually have limited the federal commerce power to the same extent that earlier opinions had limited the taxing power. That would probably have meant disallowing any "emergency" exceptions to state immunity from federal power. If the Court had really been intent on exploring the structural implications of state sovereignty, it might someday even have rediscovered a minimal core of exclusive state authority over private conduct.

Two decisions handed down in the years after *Usery*, however, suggested that Blackmun's balancing approach was much more likely to determine the outcome of the current Court's decisions. The facts in these cases, however, were so far afield that they provided little

[2] In his *Fry* and *Usery* opinions Rehnquist employed a style of constitutional analysis for which Chief Justice John Marshall has been much admired—what Professor Charles Black has called "the method of inference from the structures and relationships created by the constitution in all its parts." Black has observed that both holdings of *McCulloch*—that the United States had the power to charter a bank and that Maryland had no power to tax that bank—were grounded not so much in exegesis of particular clauses of the Constitution as in what Marshall conceived to be "the warranted relational properties between the national government and the government of the states" implicit in the whole structure of the Constitution. In insisting that there must be some "powers not delegated to the United States by the Constitution," Rehnquist was not only refusing to call the Tenth Amendment a liar to its face; he was also redressing an imbalance created by Marshall's failure to apply to *state* powers and immunities the same structural analysis he had applied to *federal* powers and immunities in *McCulloch*.

general guidance: one decision upheld a federal law that regulated private business enterprise and only incidentally affected a state government, and the other upheld a law enacted to deal with the "energy crisis" and thus arguably falling within a narrow exception for emergency legislation.

EEOC: Retreat from Federalism

With *EEOC* v. *Wyoming*, the Court was finally presented with a clear opportunity to reread *Usery*. The facts of the case provided no important ground for distinguishing it from *Usery*. Nor did the language of the decision offer a basis for distinguishing it from future cases to which the *Usery* doctrine might otherwise have applied. The five-justice majority in *EEOC* v. *Wyoming* included the four *Usery* dissenters and Blackmun. A concurring opinion by Justice John Paul Stevens suggested that *Usery* should be overruled, but the opinion for the Court by Brennan (whose *Usery* dissent had severely chastised the majority for claiming to distinguish *Usery* from earlier cases that it effectively overruled) asserted that *EEOC* could be distinguished from *Usery* and did not overrule it.

Brennan begins by making it clear that federal regulation of state governments can be invalidated only if it *both* regulates an essential attribute of state sovereignty and threatens to impair the state's ability to function. The latter prong of this test, moreover, means that the state must *prove* a "wide-ranging and profound threat to the structure of State governance." Since any effects of the federal retirement law on the cost of state government are "speculative," and since Wyoming remains free to retire Bill Crump if it can prove to the satisfaction of the federal judiciary that his age really disqualifies him, the state cannot carry its burden of proving that there is no way for it to structure its essential functions unless Crump retires.

In the unlikely event that a state should ever succeed in proving the requisite universal negatives, the Court would then proceed to a balancing test. A "well-defined federal interest in the legislation" could be held to "justif[y] state submission" even when state sovereignty is essentially and irremediably impaired. Well-defined federal interests will be easy to find. Brennan suggests that the federal interest in preventing age discrimination, for instance, might have been strong enough to override any state sovereignty interests, even though the federal government exempted some of its own operations from the prohibition against age discrimination: "Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decision making a conclusion that Congress was insincere." The upshot is that Brennan's dissent in *Usery*, characterizing the implied limitation of federal power by state sovereignty as an "abstraction without substance," has proven to be prophetic. The Tenth Amendment has indeed been restored to its former status as a bit of Fourth of July rhetoric posing no real obstacle to central government ambitions.

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All new federal regulations of commerce can presumably be distinguished on their facts from *Usery* just as easily as the facts of *EEOC* v. *Wyoming*. One interesting question left unanswered by *EEOC* v. *Wyoming*, in fact, is what the Court would do if Congress were to reenact the very statute that was struck down in *Usery*. Another is whether the rise and fall of *Usery* will force a reexamination of Tenth Amendment limitations on other federal powers. No bills have been offered in the current session of Congress to tax state capitol buildings or to move them closer to Washington in order to facilitate federal inspection. Pending a change in the membership of the Court or in the philosophy of one or more justices, however, the constitutionality of any such legislation will presumably depend on Justice Blackmun's relative assessment of the competing state and federal interests.

Until future Court decisions resolve this uncertainty, sovereign states are advised to obey the fifty-five-mile speed limit and to observe all other applicable federal regulations. It is best not to provoke those who possess the power to destroy. ■

A Review Essay

On the Neoliberal Frontier

William Kristol

WRITING A YEAR AGO on the subject of neoliberalism, Morton Kondracke noted, perhaps a bit ruefully, that "the closest thing there is to a neoliberal manifesto" was *The Road from Here* by Paul Tsongas. Senator Tsongas's work must now yield pride of place to Robert Reich's new book, *The Next American Frontier* (Times Books, 1983, 324 pages, $16.60).

Reich, a lecturer at the Kennedy School of Government at Harvard, does not claim to provide a comprehensive agenda for the 1980s. Rather, he is primarily concerned with the topic of economic growth. But his economic prescriptions involve (as Reich emphasizes) broad-gauged social and political prescriptions as well. The reception given this book—laudatory prepublication statements by no fewer than four Democratic presidential contenders—may help lay to rest Kondracke's concern that "neoliberalism may lack a future." The question is whether we want the neoliberal future to be America's.

The Next American Frontier argues that the type of American industrial organization dominant for most of this century is no longer viable—and neither are the social and political structures it has spawned. The form of organization is the familiar modern industrial corporation, designed to turn out relatively simple, standardized products in large quantities, using long production lines demanding the repeated performance of routine tasks. This system is failing because other countries have learned to imitate it at lower cost and now can undersell our mass-produced goods on world markets. "The same factor that previously brought prosperity—the way the nation organizes itself for production—now threatens decline." We ought to face up to this fact and alter our underlying mode of production. But instead we have tried various "ploys" ranging from "paper entrepreneurialism" to protectionism, which at best divert us from the task of reversing our economic decline, and at worst accelerate the process.

Fortunately the Japanese and Europeans have already scouted the territory on the other side of the new frontier. The new world is a world of "flexible-system" production "based not on huge volume and standardization, but on producing relatively smaller batches of more specialized, higher-value products—goods that are precision-engineered, that are custom-tailored to serve individual markets, or that embody rapidly evolving technologies." The United States can have a comparative advantage in the production of such goods, but only if it leaves behind the premises of the old mass-production system and takes on the characteristics of the flexible system.

Reich's main concern is not to describe the mechanics of either the old or the new system of production, but rather to explicate what might be called their intellectual and sociological underpinnings. He explains that the mass-production system brought with it the "era of management," during which management grew as a profession and the "managerial imagination" came increasingly to dominate politics and society as a whole. Improvement in economic efficiency was viewed as the engine for improving the quality of life; social policies were peripheral, the "means of tidying up industrialization—responding to its unfortunate side effects, rendering it slightly more humane."

By contrast, the crucial characteristic of the new system of flexible production is that it depends on "human capital," on skilled employees' working closely together and exercising initiative, responsibility, and discretion to a far greater degree than in mass production. This requires a "new organization of work" that is "more collaborative, participatory, and egalitarian." And the new organization of work in turn

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