Optimal abuse of power*

Abuso de poder otimizado

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ABSTRACT

I will argue that in the administrative state, in contrast to classical constitutional theory, the abuse of government power is not something to be strictly minimized, but rather optimized. An administrative regime will tolerate a predictable level of misrule, even abuse of power, as the inevitable byproduct of attaining other ends that are desirable overall. There are three principal grounds for this claim. First, the architects of the modern administrative state were not only worried about misrule by governmental officials. They were equally worried about "private" misrule—misrule effected through the self-interested or self-serving behavior of economic actors wielding and abusing power under the rules of the 18th-century common law of property, tort, and contract. The administrative state thus trades off governmental and "private" misrule. Second, the rate of change in the policy environment, especially in the economy, is much greater than in the late 18th century—so much greater that

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the administrative state has been forced, willy-nilly, to speed up the rate of policy adjustment. The main speeding-up mechanism has been ever-greater delegation to the executive branch, accepting the resulting risks of error and abuse. Third, the costs of enforcing legal rules against executive officials are necessarily positive and plausibly large, in part because any institutional monitors created to detect and punish abuses must themselves be monitored for abuse. The architects of the administrative state believed that a government that always forms undistorted judgments, and that never abuses its power, will do too little, do it too amateurishly, and do it too slowly. In that sense, the administrative state constantly gropes towards an institutional package solution that embodies an optimal level of abuse of power.

KEYWORDS

Administrative regime — administrative state — abuse of power — abuse of government power — classical constitutional theory

RESUMO

Argumentarei que, no estado administrativo, ao contrário da teoria constitucional clássica, o abuso de poder do governo não é algo a ser estritamente minimizado, mas otimizado. Um regime administrativo tolerará um nível previsível de desgoverno, mesmo de abuso de poder, como subproduto inevitável para se atingir outros fins no geral desejáveis. Existem três fundamentos principais para essa alegação. Primeiro, os arquitetos do moderno estado administrativo estavam preocupados não apenas com os desgovernos dos representantes do poder público. Eles estavam igualmente preocupados com o desgoverno "privado" — o desgoverno, por meio de comportamento visando o interesse próprio ou o benefício próprio, de atores econômicos que controlam e abusam do poder segundo as regras do direito consuetudinário do século XVIII sobre propriedade, responsabilidade extracontratual e contratos. Assim, o estado administrativo tem diante de si a escolha entre o desgoverno público e o "privado". Segundo, a taxa de mudanças no ambiente político, especialmente na economia, é muito maior do que no final do século XVIII — tão maior que o estado administrativo foi forçado, por bem ou por mal, a acelerar o ritmo de ajuste nas políticas. O principal mecanismo de aceleração foi uma delegação cada vez maior ao Poder Executivo,

aceitando os riscos resultantes de erro e abuso. Terceiro, os custos de aplicação das regras legais contra representantes do Poder Executivo são necessariamente positivos e plausivelmente altos, em parte porque quaisquer monitores institucionais criados para detectar e punir abusos devem ser monitorados eles próprios quanto a abusos. Os arquitetos do estado administrativo acreditavam que um governo que sempre forma julgamentos imparciais e que jamais abusa de seu poder fará muito pouco, com excessivo amadorismo e extrema lentidão. Nesse sentido, o estado administrativo está constantemente à procura de uma solução institucional que incorpore um nível ideal de abuso de poder.

PALAVRAS-CHAVE

Regime administrativo — estado administrativo — abuso de poder — abuso de poder do governo — teoria constitucional clássica

[I]n every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused.

—James Madison[1]

[L]iberty may be endangered by the abuses of liberty as well as by the abuses of power.

—James Madison[2]

That power might be abused, was to persons of this opinion, a conclusive argument against its being bestowed; and they seemed firmly persuaded that the cradle of the constitution would be the grave of republican liberty.

—John Marshall[3]

1 The Federalist No. 41, at 252 (James Madison) (Signet Classic ed., 2003).
2 *Id.* No. 63, at 386 (James Madison).
3 5 John Marshall, *The life of George Washington* 131 (1807).

Introduction

I hope to restate, from a somewhat different angle, my objections to a particular way of looking at constitutional and institutional design.[4] On this view, which I call precautionary constitutionalism,[5] the master aim of constitutional design is to prevent the abuse of power. Precautionary constitutional theory is haunted by the prospect that some official somewhere might commit abuses. Different strands of precautionary constitutionalism define "abuse" differently. Abuse may be defined in legal terms as action that flagrantly transgresses the bounds of constitutional or statutory authorization, or in welfare-economic terms as action that produces welfare losses—either because officials have ill-formed beliefs[6] or because they act with self-interested motivations. My objections apply equally to all these versions, so I need not specify any one of them in particular.

In the modern administrative state, there are three major problems that undermine the precautionary view. The first and most obvious problem is that it is excessively costly to strictly minimize the abuse of power by government officials. Strict minimization is excessively costly both because it is expensive to set up the enforcement machinery to prevent abuse, such as inspectors general or criminal sanctions, and because the enforcement machinery will itself be staffed by officials who may abuse their power in turn. Given these costs, the optimal level of abuse of power will be greater than zero.

The second problem is that the goal of preventing official abuse trades off against the goal of producing the myriad of welfare goods that the administrative state supplies, such as poverty relief, health, safety, environmentalism, and consumer protection. Insofar as constitutionalism takes a precautionary approach to the design of institutions, it is exposed to the same problems—*mutatis mutandis*—that bedevil precautionary principles in first-order regulation of environmental, health, and safety risks. There are substitute risks, as well as tradeoffs across and among risks, on all sides of the relevant institutional questions.[7]

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4 The objections are set out in Adrian Vermeule, *The constitution of risk* (2014).

5 *Id.* at 27-51.

6 By an "ill-formed belief," I mean those beliefs that are either biased or that are of low quality, i.e., resting on insufficient information.

7 *See* Vermeule, *supra* note 1, at 58-72.

Put in general terms that cut across these policy areas, the largest tradeoff is that abuses of power can occur on both sides of the divide between "public" and "private" actions. The architects of the modern administrative state were not only worried about abuse of power by governmental officials; they were equally worried about "private" abuses[8]—abuses effected through the self-interested behavior of economic actors wielding delegated state power under the rules of the common law of property, tort, and contract, and under corporate law.[9] The administrative state thus trades off governmental and "private" abuse; it accepts increased risks of official abuse and distorted decisionmaking to give governmental officials more power to suppress "private" abuses, to increase the activity level of the government as a whole, and to give administrators sufficient information to combat the evils that arise in complex sectors of the economy.

The third and final problem is that the great flowering of constitutional theory in the late eighteenth century addressed classical institutions, such as elected legislatures and constituent assemblies, whose importance has diminished over time.[10] Our governments are, to a first approximation, essentially bureaucracies. The elaborate body of classical constitutional theory simply has little to say about bureaucracy in any form recognizable to us today.

The main reason for the transformation of our government into an administrative state is that the rate of change in the policy environment, especially in the economy, is much greater than in the eighteenth and nineteenth centuries—so much greater that the state has been forced, willy-nilly, to speed up the rate of policy adjustment. And the main speeding-up mechanism[11] has

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8 *See infra* Part II.

9 "Private" abuse is misleading in a familiar sense: the common law judges who make the relevant rules are themselves public actors, and the corporations and other economic actors who wield power under the rules may be seen as exercising delegated public power themselves. *See, e.g.*, Barbara H. Fried, *The progressive assault on laissez faire*: Robert Hale and the first law and economics movement 212 (1998); Robert L. Hale, Coercion and distribution in a supposedly non-coercive state, 38 *Pol. Sci. Q.* 470 (1923). So put, the tradeoff is between abuse by government officials *eo nomine* on the one hand, and on the other actors exercising delegated power under the common law regime—a more cumbrous formulation, which I will take to be summarized by the contrast between "public" and "private" abuse.

10 Jon Elster, *Securities against misrule*: juries, assemblies, elections 13 (2013).

11 For the distinction between speeding-up mechanisms and slowing-down mechanisms in institutional design, see Jon Elster, Comments on the paper by Ferejohn and Pasquino, 2 *Int'l J. Const. L.* 240, 240 (2004), which notes that slowing-down mechanisms "are illustrated by devices such as bicameralism and time-consuming amendment procedures," whereas speeding-up mechanisms are illustrated "by emergency procedures."

been ever-greater delegation to the executive branch, accepting the resulting risks of error and abuse. We inhabit a different environment, indeed a different world, than the classical constitutional theorists. One of the main differences is that, for us, time is always of the essence, so institutions are forced to trade off the quality of policy against its timeliness.

I will put these three points together and suggest that the modern administrative state, centered on a bureaucratic system whose scope was unimaginable in the eighteenth century, has sharply qualified the very goal of minimizing abuses of power. In the administrative state, abuse of power is not something to be minimized, but rather optimized. An administrative regime will tolerate a predictable level of abuse of power as part of an optimal package solution—as the inevitable byproduct of attaining other ends that are desirable overall.

Institutional design must consider margins beyond or in addition to the quality of beliefs that officials form and the quality of the actions officials choose. The architects of the administrative state believed that a government that always forms undistorted judgments and always acts from welfare-maximizing motives, and that therefore never abuses its power, will do too little, do it too amateurishly, and do it too slowly. Institutional design in the administrative state therefore must consider the pervasive tradeoff between impartiality and expertise, such that more informed bureaucrats systematically tend to have agendas or stakes that threaten their impartiality; must consider the activity level or output level of governmental institutions; and must consider the rate of policy adjustment. Hence, administrative law constantly trades off the ideal of undistorted decisionmaking against the activity level, expertise, and speed of the bureaucracy. Moreover, the sheer costs of constitutional enforcement ensure that some positive rate of abuse is inevitable, at least in the practical sense that it would be unthinkable to spend the resources or to create the institutional structures needed to reduce official abuses to zero. Given these reasons, the administrative state constantly gropes toward arrangements that embody an optimal abuse of power.

Part I addresses enforcement costs, Part II addresses the threat of private abuse of power, and Part III addresses the rate of policy adjustment. Part IV examines an important recent attempt by Jeremy Waldron to justify a classical version of the separation of powers; however, I will suggest that the justification must fail in the administrative state. Finally, in Part V, I suggest—perhaps contrary to an ambiguous discussion by Jon Elster—that

the goal of optimizing abuse of power is a coherent one, despite our inevitable uncertainty about where the optimum lies.

I. Enforcement costs

Whatever the constitutional and institutional rules, the costs of enforcement—of preventing official abuses—will inevitably be positive. The problem is twofold. First and more obviously, the costs necessary to produce full enforcement of constitutional rules might simply not be worth paying, in light of other possible uses for those resources. It might take a large percentage of GDP to eliminate all official abuses whatsoever, leaving too little for the actual functioning of government and for the welfare goods that government supplies. I return to that issue shortly.

Second and somewhat less obviously, eliminating abuses requires setting up enforcement machinery that is itself a source of possible abuses. In order for police officials who may abuse their powers, one must set up a new cadre of monitors, such as Inspectors General, prosecutors, or judges, or all of these, who may proceed to commit abuses in their turn. The resulting question, "Who guards the guardians?" has a neat answer in principle: The guardians must be arranged in a circle, to enable mutual monitoring.[12] But the necessary institutional arrangements produce costs of their own because the circle of mutual monitoring inevitably operates with a certain degree of friction, disagreement, conflict, and delay.

The consequence is that given positive costs of enforcing constitutional rules, and competing uses for the relevant resources, some level of official abuse of power will be inevitable. In a thin second-best sense, this outcome will even be desirable; insofar as there is no feasible improvement, no alternative regime would do better. A certain level of abuse of power will necessarily be part of the best overall package solution to the problems of constitutional design.

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[12] *See* Leonid Hurwicz, *Nobel Prize lecture*: but who will guard the guardians? (Dec. 8, 2007), available at: <www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2007/hurwicz_lecture.pdf>. [http://perma.cc/S352-D7YG].

II. "Private" abuse of power

Let me turn now to a more complex issue: the abuse of power by nongovernmental actors, wielding delegated legal powers under general common law rules or under corporate law. In his 1938 Storrs Lectures,[13] James Landis argued—along the lines of Berle and Means's 1932 manifesto[14]—that increased economic interdependence and the sheer density of economic interactions had generated "pressure for efficiency"[15] that in turn generated massive corporations. These corporations represent "concentrations of power on a scale that beggars the ambitions of the Stuarts."[16] In spheres dominated by the lords of capital, there is an "absence of equal economic power"[17] between corporation and individual. The consequence is that the "umpire theory of administering law is almost certain to fail. . . . [G]overnment tends to offer its aid to a claimant . . . because the atmosphere and conditions created by an accumulation of such unredressed claims is of itself a serious social threat."[18] The administrative state, whose defining feature is tribunals exercising active and ongoing supervision rather than reactive common law adjudication,[19] is necessary to redress this imbalance of economic power.

Conditional on creating a tribunal with active and supervisory regulatory jurisdiction is determining which form the tribunal should take. Here emerges Landis's famous argument for the combination of powers or functions in agencies: the fusion of legislative, executive, and judicial powers. The eighteenth century was anxious to keep these powers apart as a fundamental precaution against abuse.[20] Landis argues by contrast that "[i]f in private life we were to organize a unit for the operation of an industry, it would scarcely follow Montesquieu's lines."[21] The form of the agency must follow the form of the concentrated entities it regulates.

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13 James M. Landis, *The administrative process* (1938).
14 Adolf A. Berle, Jr. & Gardiner C. Means, *The modern corporation and private property* (1932).
15 Landis, *supra* note 10, at 46.
16 *Id.* at 46.
17 *Id.* at 36.
18 *Id.*
19 *Id.* at 22-23.
20 *See, e.g.*, Samuel Bryan, "Centinel," *Number I* (Oct. 5, 1787), reprinted in *The anti-federalist papers and the constitutional convention debates*, 230 (Ralph Ketcham ed., Signet Classic 2003) (1986).
21 Landis, *supra* note 10, at 10.

This is not simply magical thinking, although there may be a dash of that. Rather, the point is that the supervisory character of the agency's role implies that it will be performing the same sort of tasks as the entities it regulates; it is thus "intelligent realism" for government to adopt a functionally similar form.[22] The imperative is to counterbalance concentrated corporate power by means of expert supervisory agencies; this imperative dictates not only the scope of regulatory jurisdiction, but also the organizational form for exercising that jurisdiction. That form sharply qualifies a central, classical precaution against abuse—the separation of powers—to ensure an adequate level of information and an adequate activity level on the part of official bodies charged with countervailing private power. Although Landis is too much the politician to say this explicitly, the structure of the argument necessarily implies some degree of official blundering, even abuse of power, as the anticipated, necessary, and unavoidable byproduct of a level of governmental information and vigor that is desirable overall.

A. Administrative combination of prosecutorial and adjudicative functions

Let me offer two illustrations within contemporary administrative law: first, the combination of prosecutorial and adjudicative functions, and second, the combination of the power to make law with the power to interpret law. A central topic of administrative law is the combination of functions in bureaucracies and agencies—the brute fact, which horrifies separation-of-powers traditionalists,[23] that agencies quite often combine the powers to legislate binding rules, to enforce the rules through the prosecution of complaints, and to adjudicate whether the rules have been violated.[24] Shockingly, the Federal Trade Commission (to choose only one example) may legislate rules about unfair competition, within the bounds of its statutory delegation from Congress; may authorize its legal staff to file a complaint that alleges a violation of the rules; and then, rapidly switching its hat, may assume the mantle of judge and hear and decide the complaint that it has caused its

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[22] *Id.* at 11-12.

[23] *See* Adrian Vermeule, Contra *nemo iudex in sua causa:* the limits of impartiality, 122 *Yale L.J.* 384, 404 (2012).

[24] Stephen G. Breyer et al., *Administrative law and regulatory policy* 743-787 (7th ed. 2011).

own creatures to prosecute.[25] What could possibly make this constitutional? What happened to venerable maxims such as, "No man should be judge in his own case"?[26] And what of all the decisional distortions that such a scheme risks—most obviously, self-serving bias as well as the reputational cost that a decisionmaker would incur by finding invalid a complaint that the decisionmaker itself had put forward?

In *Withrow v. Larkin*,[27] the Supreme Court recognized all these institutional risks, yet upheld the combination of agency functions— essentially on the ground that the administrative state could not go on otherwise.[28] The case involved a due process claim,[29] specifically that a tribunal combining prosecutorial with adjudicative functions must be a biased tribunal, forbidden by due process. Surely, the complaining party said, there is an intolerable risk of biased decisionmaking when the same decisionmaker who lodges the charges is also the one who decides (at least in the first instance) whether those charges are correct.[30] The pattern is typical for the cases; the central harm that flows from violation of the classical separation of functions is thought to be a distortion of decisionmaking.

The Court, however, said that the principle of separation of functions, such as the functions of law execution and judging, was too much of a straitjacket to be tolerable in the administrative state: "[T]he growth, variety, and complexity of the administrative processes have made any one solution highly unlikely. . . The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle."[31] In other words, were the principle of separation of powers to be enforced, too much of the vast and heterogeneous administrative state would have to be jettisoned—an intolerable result, given everything the administrative state does.

Withrow v. Larkin built on an earlier case, *FTC v. Cement Institute*,[32] which had upheld a similar combination of functions in the Federal Trade Commission (FTC) itself. That case involved monopoly price-fixing in a

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[25] *See* Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2012), available at <www.ftc.gov/sites/default/files/documents/statutes/federal-trade-commission-act/ftc_act_incorporatingus_safe_web_act.pdf>. [http://perma.cc/GW25-5TCZ].

[26] For a critique, see Vermeule, *supra* note 20, at 386-387.

[27] 421 U.S. 35 (1975).

[28] *Id.* at 51-52, 55.

[29] *Id.* at 41.

[30] *See id.* at 47 (addressing the "contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication").

[31] *Id.* at 51-52.

[32] 333 U.S. 683 (1948).

regulated industry[33]—exactly the sort of "private" abuse of market power that is a central concern of the regulatory state. The regulated firms complained that the structure of the FTC, which combined investigative functions with adjudicative ones, was an affront to the separation of powers and to due process because of the risk of a biased tribunal.[34]

With either stunning naiveté or a sophisticated faux-naiveté, the Court rejected the constitutional challenge on the ground that the complaining party's "position, if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act."[35] Both expertise and activity levels were at issue. The Court went on to state that, as to expertise, investigation of the industry by the same Commissioners who would judge violations was a feature, not a bug; the experience gained through those investigations would be the necessary precondition for the Commissioners to form genuine expertise in the trade practices they are charged with regulating.[36] As to activity levels, requiring a separation of prosecution from judging would disqualify the entire membership of the Commission with the result that "this complaint could not have been acted upon by the Commission or by any other government agency."[37] To the Court, in other words, it seemed intolerable that government should be forbidden to act against monopolistic distortions of the market—against the private abuse of power—even if the price of avoiding that intolerable passivity of government would be predictable distortions of governmental decisionmaking.

The Constitution, then, does not generally require a separation of prosecution from judging. But statutes may; I have simplified the legal situation a bit by leaving statutes out of the analysis. In fact, the Administrative Procedure Act creates another layer of complication that illustrates how the administrative state gropes towards optimal tradeoffs among institutional risks.[38] When the FTC's lawyers file a formal complaint against a firm, the first adjudicator to decide the case will not be the Commission itself. Rather there will be an initial, formal adjudication on the record, conducted by an official called an administrative law judge (ALJ), with an appeal lying from that decision to the Commission itself.

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[33] *Id.* at 688.
[34] *Id.* at 700, 702-703.
[35] *Id.* at 701.
[36] *Id.* at 702.
[37] *Id.* at 701.
[38] *See* Administrative Procedure Act §§5, 7-8, 5 U.S.C. §§554, 556-557 (2012).

The ALJ emphatically does not combine prosecutorial functions with adjudicative functions, and the ALJ has no legislative rulemaking functions either. Rather, the Administrative Procedure Act puts into place a set of protections for the independence and impartiality of the ALJs, who may neither prosecute themselves nor be subject to the supervision of the prosecuting staff.[39] But the Act exempts from those strictures the agency itself,[40] meaning, in the case of the FTC, the top-level commissioners, who review and may reverse the decisions of the ALJs.

Consider the odd patchwork of rules that result: Functions are separated at the lowest level of the agency but only for formal adjudication on the record, not for either informal adjudication or the agency's legislative rulemaking functions. And in any event, when the case is appealed to the top level of the agency—the level of the commissioners themselves—there is no separation of functions at all. This patchwork is clearly an equilibrium compromise—the Supreme Court has described it as such[41]—that trades off competing considerations, involving the risks of biased decisionmaking on the one hand and the risks of insufficient activity levels and expertise on the other. It seems unlikely that the compromise is optimal in any strong sense, but historically it was designed to protect multiple values, each to some degree but none fully, and in that weaker sense has an optimizing character.

B. Administrative combination of lawmaking and law-interpretation

So far I have discussed the combination of prosecutorial with adjudicative functions, but there is also the recurring issue of the combination of lawmaking with law-interpretation. Agencies often do both things, to the horror of separation-of-powers devotees. Here, the classical worry about abuse of power is not so much a worry about cognitive distortion as it is about motivational distortion: A decisionmaker that knows it will have license to interpret the very same laws it creates will have incentives to write vague laws in order to maximize its own interpretive discretion farther downstream.[42]

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[39] *Id*. §554(d).

[40] *Id*. §554(d)(2)(C).

[41] Wong Yang Sung v. McGrath, 339 U.S. 33, 40-41 (1950).

[42] This is a Lockean theme. *See* John Locke, *Two treatises of government and a letter concerning toleration* 138-141 (Ian Shapiro ed., Yale Univ. Press 2003) (1690); Jean-Jacques Rousseau, *The social contract and discourses* 180, 213-215 (J.H. Brumfitt & John C. Hall eds., G.D.H. Cole trans., 1993) (1762).

The modern Supreme Court, however, largely ignores this concern. In fact, it not only allows agencies to interpret the legislative rules they themselves create, but also holds that judges have to defer to the agencies about what those rules mean.[43] The Court has held this because it believes that agencies have special expertise about the meaning of the rules they themselves have created, and—even more importantly—because interpretation is not cleanly separable from policymaking, so that the power to interpret the rules is a necessary component of the agency's policymaking expertise with respect to the given problem or industry.

This is essentially to accept a tradeoff. The Court has never said that the motivational distortion posited by the classical separation of powers is not a real one; instead, what the Court seems to think is that the costs of distorted incentives are worth paying in light of the benefits to policymaking by expert agencies. In other words, a certain risk of abuse is tolerable in the service of overall institutional gains.

III. The rate of policy adjustment over time

I turn now to the third principal point, the rate of policy adjustment over time. Holding constant the institutional variables we have already discussed, there is a separate question about the rate at which governmental policy adjusts over time, as the rate of change in the economic and policy environment itself changes. Here I follow William Scheuerman's insight[44] that the engine of the administrative state is the increasing rate of change in the policy environment, relative to any baseline we choose. That is, the rate of

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[43] Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). In recent years, Justice Scalia has questioned the validity of *Auer* deference. *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part). However, in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015), six Justices—Roberts, Kennedy, Ginsburg, Breyer, Kagan, and Sotomayor—signed an opinion that reaffirmed *Auer* deference and that said arbitrary and capricious review under the APA is the right vehicle for addressing concerns with the interests of regulated parties. *See* 135 S. Ct. at 1208–09 & n.4. Justices Scalia and Thomas concurred separately to criticize *Auer* deference, *see id.* at 1211 (Scalia, J., concurring); *id.* at 1213 (Thomas, J., concurring). At least for the time being, a clear supermajority of the Court thinks the *Auer* approach is correct.

[44] William E. Scheuerman, *Liberal democracy and the social acceleration of time passim* (2004).

change in the economy, technology, and so on, was plausibly greater in 2000 than in 1900, and greater in 1900 than in 1800.[45]

Legislative institutions are structurally incapable of supplying policy change at the necessary rates, a point made by students of constitutional law as radically dissimilar as Chief Justice Harlan Fiske Stone[46] and Carl Schmitt.[47] The veto-gates; second, third, and *n*th opinions;[48] and interbranch checks and balances that, in a Madisonian system, are intended to promote reasoned deliberation, and launder out passion and interest, together ensure that legislatures will "come too late"[49] to the resolution of an increasing fraction of policy problems. To some extent, legislatures may solve the problem by internal specialization, through an ever-more-elaborate committee system and an ever-larger staff. But there is an upper bound to the capacity of legislative institutions to do this; the constraint arises from the increasing complexity of legislative institutions as they are scaled up, and the increasing transaction costs of conducting legislative business. The U.S. Congress has gone about as far as it is possible to go in this regard, with its 20,000-odd employees and staff, dozens of principal committees, and more than a gross of subcommittees.[50] Even so, Congress's agenda is so radically compacted and constrained that it is routine for critical policy problems to languish indefinitely on the congressional docket even as extant law becomes risibly maladapted to the relevant problems as the policy environment changes over time.[51]

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45 *See id.* at 1-9.

46 Yakus v. United States, 321 U.S. 414, 424 (1944) (Stone, C.J.) (upholding delegation of price-control authority to administrative agency, on the ground that "[t]he Constitution as a continuously operative charter of government does not demand the impossible or the impracticable [and] does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate").

47 Carl Schmitt, *The crisis of parliamentary democracy* 48-50 (Ellen Kennedy trans., MIT Press 1985) (1923); William E. Scheuerman, The economic state of emergency, 21 *Cardozo L. Rev.* 1869, 1870, 1887 (2000).

48 On second opinions in institutional design, see Adrian Vermeule, *The constitution of risk* 141-162 (2014).

49 *See* Scheuerman, *supra* note 45, at 1887.

50 As of 2001, there were about 200 committees and 23,000 congressional staff of all types. *See* Norman J. Orstein et al., Vital statistics on Congress, *Brookings Institution* ch. 4 at tbl. 4-1, ch. 5 at tbl. 5-1, <www.brookings.edu/research/reports/2013/07/vital-statistics-congress-mann-ornstein> [http://perma.cc/KR4H-CLMS].

51 Consider that administrative regulation of carbon emissions and climate change is proceeding under a statute, the Clean Air Act, written in the 1970s to address different problems altogether. *See* Massachusetts v. EPA, 549 U.S. 497 (2007); Jody Freeman & David Spence, Old statutes, new problems, 163 *U. Pa. L. Rev.* 1 (2014).

Under the pressure of necessity, three institutional developments occur in parallel. First, Congress's main response to the increasing rate of change in the policy environment is ever-increasing delegation to the executive branch and independent agencies. Second, courts defer ever more strongly to agencies, who are better positioned than courts to update policy under obsolete statutes in a world in which Congress has increasingly abdicated its policy responsibilities.[52] And, third, the executive itself expands its own power of unilateral action,[53] exploiting broad and vague delegations, vague constitutional powers, and traditional pockets of discretion, such as power over prosecution and enforcement, in order to change policies without going to Congress for statutory authorization.

Constitutional law's main response to these developments, after an initial period of resistance, has been to get out of the way. In the United States, judicial resistance to delegation began in earnest in 1935[54] and ended, at the latest, in 1944.[55] Judicial deference to agency interpretations of law is not constitutionally problematic. The reigning justification, however fictional it may be, is that Congress itself intends for such deference to occur.[56] Similarly, unilateral presidential action has occasionally been invalidated,[57] but for the most part it has become the routine stuff of government in the United States. Consider that President Obama, having failed to obtain a liberalization of the immigration laws from Congress (the "DREAM Act"), instituted roughly the same policy merely by announcing a very broad policy of deliberate nonenforcement of the extant immigration statutes.[58]

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52 *See* Freeman & Spence, *supra* note 49; Cass R. Sunstein, Is tobacco a drug? Administrative agencies as common law courts, 47 *Duke L.J.* 1013, 1049-1050, 1053, 1056 (1998).

53 Terry M. Moe & William G. Howell, The presidential power of unilateral action, 15 *J.L. Econ. & Org.* 132 (1999).

54 *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-538 (1935).

55 *See* Yakus v. United States, 321 U.S. 414, 424 (1944). For a sweeping recent restatement of congressional power to delegate, see *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472-476 (2001).

56 United States v. Mead Corp., 533 U.S. 218, 227-230 (2001).

57 Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

58 Alejandro Mayorkas, Deferred action for childhood arrivals: who can be considered, *The White House Blog* (Aug. 15, 2012, 11:55 AM), <www.whitehouse.gov/blog/2012/08/15/deferred-action-childhood-arrivals-who-can-be-considered> [http://perma.cc/Q83C-LMEJ]; Brad Plumer, Can Obama legalize 11 million immigrants on his own?, *Wash. Post Wonkblog* (Nov. 14, 2013), <www.washingtonpost.com/blogs/wonkblog/wp/2013/11/14/can-obama-legalize-11-million-immigrants-on-his-own/> [http://perma.cc/3BMG-E4RF]; Letter from Law Professors

The cause or consequence of all this is a tradeoff. In a simple model, broader and looser delegation, with fewer veto-gates in the lawmaking process, allows the executive to put new beneficial policies in place more easily, while also allowing more expropriation—more abuse of delegated power.[59] As the rate of change in the policy environment increases, the benefits of loosening the constraints on new executive action increase, despite the greater risk of abuse. The basic approach is to justify abuses of power as the unavoidable byproduct of a package solution that is increasingly desirable overall as the rate of policy change increases.

The point is fractal; it holds in the same form at whatever scale we examine the administrative state. Once delegating statutes are in place, the law faces the question of how costly it should be for agencies to adjust or update policies within the scope of their delegated authority. Beginning in the 1960s and through the 1980s, judges pioneered a form of scrutiny of administrative action called hard look review, under which courts would examine the justifications agencies offered for their policy choices, assessing both the procedural rationality and the substantive plausibility of those justifications.[60] Critics complained that hard look review resulted in "ossification," or excessive legal drag on agencies' ability to update policies with changing circumstances.[61]

Empirically, it isn't clear that ossification is a real problem.[62] Nonetheless, in recent years, the Supreme Court has courageously dealt this possibly imaginary problem several powerful blows through decisions that in effect

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to President Barack Obama (May 28, 2012) (*available at* <www.law.uh.edu/ihelg/documents/Executive AuthorityForDREAMRelief28May2012withSignatures.pdf> [http://perma.cc/V7Q3-9WSH]).

59 Philippe Aghion et al., Endogenous political institutions, 119 *Q.J. Econ.* 565, 570 (2004).

60 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 52 (1983); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420-421 (1971).

61 *See, e.g.*, Stephen Breyer, Judicial review of questions of law and policy, 38 *Admin. L. Rev.* 363, 382-384 (1986); Thomas O. McGarity, The courts and the ossification of rulemaking: a response to professor Seidenfeld, 75 *Tex. L. Rev.* 525 (1997); Note, Rationalizing hard look review after the fact, 122 *Harv. L. Rev.* 1909 (2009).

62 There is a growing literature. *See, e.g.*, William S. Jordan, III, Ossification revisited: does arbitrary and capricious review significantly interfere with agency ability to achieve regulatory goals through informal rulemaking?, 94 Nw. U. L. Rev. 393 (2000); Anne Joseph O'Connell, Political cycles of rulemaking: an empirical portrait of the modern administrative state, 94 Va. L. Rev. 889, 963-966 (2008); Jason Webb Yackee & Susan Webb Yackee, Administrative procedures and bureaucratic performance: is federal rule-making "ossified"?, 20 J. *Pub. Admin. Res. & Theory* 261 (2010); Jason Webb Yackee & Susan Webb Yackee, Testing the ossification thesis: an empirical examination of federal regulatory volume and speed, 1950-1990, 80 *Geo. Wash. L. Rev.* 1414 (2012).

reduce legal constraints on agencies' ability to update policies over time—even if the result is that agency policymaking is less reasoned and more arbitrary.[63] An example is *Federal Communications Commission v. Fox Television Stations, Inc.*,[64] in which the Commission moved to a new, more restrictive set of rules governing broadcasting of expletives or indecent content. The problem (in stylized form) was that although the Commission had given a set of reasons to justify the new policy, it had not given any reasons to think that the new policy was better than the old one.[65] The Court, however, held that the law's ban on "arbitrary" and "capricious" decisionmaking by agencies[66] was not violated by failure to compare past and present policies; all that the agency had to give was a good reason for its current position.[67]

Now this is not obviously consistent with agencies' fundamental obligation to make reasoned decisions. At least in static contexts, where the options do not change over time, and where the costs and benefits of the options are known (at least in expectation), *comparative* policy evaluation seems a minimum necessary condition of rationality. In this sort of static context, "satisficing"—settling for something good enough[68]—is irrational; why not pick the best option, the one with the highest expected value? If the value of the options is known, at least in expectation, it is irrational to say, "I have good reasons to pick *A*, so it doesn't matter that *B* is even better."[69]

To be sure, in *Fox Television* itself, the policy context of the case at hand involved uncertainty, and under uncertainty satisficing can be a rational approach.[70] Agencies frequently operate in uncertain, dynamic environments in which search for the best policy is costly and must somehow be truncated.

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63 In addition to the example in text, see, e.g., *National Cable & Telecommuncations Association v. Brand X Internet Services*, 545 U.S. 967, 1002-1003 (2005), which allowed agencies to change their interpretations of ambiguous statutes over time, even if doing so effectively nullifies a preexisting judicial decision.

64 556 U.S. 502, 529-530 (2009).

65 *Id*. at 514-515 (finding that the reasons for the new policy need not be better than those reasons for the old one).

66 5 U.S.C. § 706(2)(A).

67 *Fox Television*, 556 U.S. at 515 ([I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better . . . .").

68 Michael Slote, *Beyond optimizing*: a study of rational choice 8-20 (1989); Herbert A. Simon, A behavioral model of rational choice, 69 *Q.J. Econ.* 99 (1955).

69 David Schmidtz, Satisficing as a humanly rational strategy, *in Satisficing and maximizing*: moral theorists on practical reason 30, 39-40 (Michael Byron ed., 2004).

70 Simon, *supra* note 66, at 115-118, emphasizes that satisficing is a rational strategy in dynamic environments, in which the decisionmaker must place limits on the search for new options or new information about options.

Satisficing is one way to do so. But the problem is that the Court's opinion is completely insensitive to these distinctions; *Fox* does not limit its holding in this way.

A more convincing account of *Fox Television* is that the Court was worried about granting a new license for ossification. Allowing parties to force agencies to perform comparative policy evaluation, on pain of judicial reversal, would allow regulated actors to delay agency action through harassing litigation, thereby gumming up the works even more than already occurs. Allowing agencies to satisfice, even in contexts where satisficing is not obviously a rational course, removes one margin—the margin of comparative policy evaluation—on which regulated entities may press in order to thwart and delay the course of policymaking. The tradeoff, in other words, is that the Court is willing to accept a degree of irrational satisficing in agency decisionmaking in the interest of unclogging the channels of administrative change. In the real institutional setting of the administrative state, a requirement of fully rational decisionmaking by officials may be exploited by self-interested private groups for socially harmful ends. Thus the tradeoff between the rationality of policymaking and its speed is, in part, another instance of the tradeoff between "public" and "private" abuse of power that is so fundamental to the administrative state.

IV. Waldron on the separation of powers and the separation of functions

I have suggested that the separation of powers has been deeply compromised by the administrative state, and for good reasons. However, not everyone agrees that this compromise is desirable. Jeremy Waldron offers us a late flower of classical constitutional thought—a deeply considered parsing of the notion of separation of powers, one that aims to distinguish it from neighboring notions like checks and balances, and to isolate and identify its inherent value.[71] Waldron's argument is not precautionary. His point is not that the separation of powers is a useful prophylactic against the abuse of power. Nonetheless his argument must be addressed, because if it is correct,

[71] *See* Jeremy Waldron, Separation of powers in thought and practice?, 54 *B.C. L. Rev.* 433, 460-462 (2013).

then the separation of powers has a special inherent value that ought not to be tossed into the soup of institutional tradeoffs. But I think that his argument is incorrect, and indeed that it is idolatrous; it makes the classical separation of powers into an implacable idol, deaf to all other considerations and to all other goods.

A. Waldron's argument

Waldron acknowledges that the separation of powers may not, at least in the United States, have the status of an enforceable legal norm.[72] The Constitution's text does not mention it as such, and it is hardly obvious that a freestanding principle of the separation of powers may validly be inferred from the larger constitutional structure.[73] But Waldron rightly observes that even if the separation of powers lacks legal force, it may still have force as a principle of our constitutional culture—a political ideal in the high constitutional sense.[74]

The principle of separation of powers, Waldron argues, has value that is conceptually distinct from the values underpinning checks and balances, the division of powers, or even the rule of law. The value underpinning separation of powers is respect for "the character and distinctiveness of each of the three main functions of government."[75] Rather than collapse all official decisionmaking into an undifferentiated mass, as in the dictates of a khadi or monarch, it is desirable that there should be "*articulated government through successive phases of governance each of which maintains its own integrity . . . .*"[76] Power must flow through differentiated institutions: "The legislature, the judiciary, and the executive—each must have its separate say before power impacts on the individual."[77]

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[72] *Id.* at 435-438.
[73] John F. Manning, Separation of powers as ordinary interpretation, 124 *Harv. L. Rev.* 1939, 1944-1945 (2011).
[74] Waldron, *supra* note 69, at 436-437.
[75] *Id.* at 466.
[76] *Id.* at 467.
[77] *Id.* at 459.

B. Waldron's argument as tautology

Why isn't Waldron's argument tautological? To say that powers should be separated because there is a value to institutions with differentiated and distinctive powers having a "separate say"—isn't this just equivalent to saying, in circular fashion, that powers should be separated because there is a value to the separation? Waldron does *not* appeal to the functional consequences of such differentiation; his argument is not that (or is only incidentally that) separating powers produces institutional benefits, such as slower or better decisions. That sort of justification would implicate the countervailing considerations and tradeoffs I have detailed. Rather, Waldron is looking for something more conceptual, more enduring. He speaks in the language of the sacred, the language of "integrity" and "contamination."

> The Separation of Powers Principle holds that these respective tasks have, each of them, an integrity of their own, which is contaminated when executive or judicial considerations affect the way in which legislation is carried out, which is contaminated when legislative and executive considerations affect the way the judicial function is performed, and which is contaminated when the tasks specific to the executive are tangled up with the tasks of law-making and adjudication.[78]

The idea seems to be that functionally separated decisionmaking has an intrinsic or inherent value from the standpoint of political morality. But it is not clear that Waldron has identified any such value in terms that are distinct from merely describing the separation itself. Furthermore, it is not obvious that what are, after all, merely *institutional* arrangements—whose value is heavily dependent upon contingent circumstances of time and place—could ever be the sorts of things that could be "contaminated," even in principle. The language of the sacred is simply misplaced as to matters of institutional design. Waldron has made a particular, highly contingent institutional pattern—the classical separation of powers—into a kind of idol whose commands trump any other consideration.

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[78] *Id.* at 460.

C. A self-defeating argument

Let us put all this aside, however. Suppose that Waldron's justification manages to avoid tautology. An entirely separate question is the *level* at which the justification is supposed to operate. For clarity, let us refer to the separation of *powers* at the constitutional level and the separation of *functions* at the administrative level.

In the administrative state, the great bulk of rulemaking is accomplished by legislative delegation of power to agencies, which then make rules while exercising combined functions. Waldron clearly wants to condemn this in principle,[79] but it is not obvious that it should pose any problem for him. If the delegating statute itself has been deliberated by the legislature, approved by the executive, and reviewed for constitutionality by the judiciary, why hasn't the force of the separation of powers principle at the constitutional level been entirely exhausted? When the agency then exercises its (combined) functions as authorized by that statute, it *is* true that "[t]he legislature, the judiciary, and the executive—each [has had] its separate say before power impacts on the individual."[80] It is unclear, then, why Waldron should object to delegation of power to agencies or to the agencies' exercise of combined functions under a delegation.

It is not as though the issue is novel. The Justices, to their credit, considered these issues long ago, in the second round of the epic and defining litigation, *SEC v. Chenery Corp.*[81]—what administrative lawyers call *Chenery II*. The Securities and Exchange Commission (SEC), through adjudication, formulated an administrative order and applied it to the parties at hand, rejecting their proposal for a corporate reorganization as inconsistent with a general statutory requirement of "fair and equitable" action. Justice Jackson, taking Waldron's part in dissent, protested vehemently against the "retroactivity" of the Commission's approach. In Justice Jackson's view, rather than applying its order to the parties in the case at hand, the Commission ought to have first formulated a legislative-type rule applying solely prospectively, and only then proceeded to enforce it and adjudicate future violations. (This would have required letting the inequity in the case at hand go

[79] *Id.* at 464-465.
[80] *Id.* at 459.
[81] SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194 (1947).

unredressed.) Justice Jackson, in other words, objected to the agency as Sultan—to the mushing together of rulemaking, law execution, and adjudication in the same decision. In that Waldron-esque sense, he argued for separation of functions at the agency level, not merely separation of powers at the level of Congress, the President, and the judiciary.

Waldron clearly wants this as well.[82] But the *Chenery II* Court thought that Justice Jackson's dissent, which no other Justice joined, was overheated—inebriated by an excessive intake of principle. Although the Court agreed that "quasi-legislative promulgation" of prospective rules should occur "as much as possible," it rejected any "rigid requirement" to that effect.[83] Instead, the Court offered a famously nuanced and level-headed analysis of the circumstances under which separation of functions, and Waldron's preferred sequence of general rulemaking followed by specific application, might actually make impossible the execution of the very delegation with which the agency had been entrusted:

> [P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. *In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective*. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.[84]

The sentence I have emphasized explains the problem with holding that separation of functions is required at the administrative level. At the higher level of statutory lawmaking, Congress, the President, and the judiciary have engaged in just the sort of reticulated, deliberative lawmaking process that

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[82] Waldron, *supra* note 69, at 463-466.
[83] *Chenery II*, 332 U.S. at 202.
[84] *Id.* at 202-203 (citing Columbia Broad. Sys. v. United States, 316 U.S. 407, 421 (1942)) (emphasis added).

Waldron wants; after due constitutional deliberation, they have converged on a policy and have decided that the agency is best positioned to implement it. That decision—which must itself have unimpeachable credentials, in Waldron's view—will be thwarted if there must also be rigid separation of functions at the level of the agency. As the Court argued, the implementing agency would then lack the flexibility needed to carry out the instructions given to it by the highly reticulated, Waldron-esque process of sequential lawmaking. Two levels of separation is a pragmatically inconsistent arrangement, on Waldron's own premises. In this sense, Waldron's argument is self-defeating.

The point is emphatically not that pragmatics override principle. Rather the separation of functions at the second, lower level has to give way precisely *in order that* the principled, properly differentiated decisions reached at the higher level of statutory enactment and delegation may be given real life. In that sense, the administrative state must partially jettison the separation of administrative functions in order to carry out the larger purposes of the separation of powers. The form and the function of separation of powers trade off against one another at higher and lower levels, and some sort of compromise—ideally an optimal compromise— must be effected between them. The Administrative Procedure Act and the rules of administrative law, which give agencies a great deal of latitude to combine functions, are best viewed as an effort to achieve an optimal compromise of this kind.

V. Optimal abuse of power?

Finally, let me tie up a loose end. I have been casually throwing around the phrase "optimal abuse of power." How much conceptual and philosophical baggage is stuffed inside that phrase? In my view, not very much. There is a pragmatic construal that makes perfect sense of optimization in the constitutional and administrative setting, a construal that fully recognizes the practical and epistemic difficulties that arise from grave uncertainty about where the optimum may lie.

To focus the issues, let me quote a brief discussion of optimizing institutional design by Jon Elster. Elster's view is skeptical, but—I believe—gives me everything I need to make the sort of claims I have advanced here. Elster says the following:

> [C]iting the need to find an "optimal compromise" between, say, expertise and impartiality is to presuppose that we can determine the trade-off between these two values. One might affirm, for instance, that the benefits from learning created by extending the tenure of rotating officials from one year to two years exceed the costs arising from the risk of capture. Similarly, one might affirm that the benefits of a two-terms-only rule for deputies exceed the costs. It follows from my general argument, however, that such claims will in general be unsustainable. They assume that we have a normative theory of what constitutes a good outcome and a causal theory of how to bring it about by institutional means. The present work as a whole is directed against this assumption.
>
> This being said, it would be absurd to be dogmatic on this issue. In some cases where a proposed reform would entail costs as well as benefits, one can confidently claim that the net effect will be positive. Examples include the abolition of life tenure for judges (an American practice created when life expectancies were less than half of what they are today) or of annual elections to Parliament (also a practice that may have made sense in the 18th century but not in the 21st). By contrast, the merits of triennial versus quadrennial elections or of six-year versus eight-year tenure for judges on constitutional courts seem entirely indeterminate.[85]

Elster here lays out all I need to motivate the thin and undemanding sense of optimality that I use. If cases exist in which we can be confident that the net benefits of an institutional reform would be positive, then we must have some common currency or metric—call it "welfare" if you like—by which to compare the costs and the benefits. Moreover, sometimes (not always or necessarily) we will have a sense of the *sign* of moves from the status quo—that is, whether we are moving in the right direction or the wrong direction within the space of possible institutional designs, where "the right direction" is *toward* the point at which no further net-beneficial moves will be possible. But if and when we have a sense of those things, there is nothing incoherent about calling ourselves "optimizers" in the following thin sense: We keep

[85] Elster, *supra* note 7, at 13.

making incremental net-beneficial moves within the institutional space just up until the point at which the net benefits from further moves have diminished to zero—to the point where marginal benefits and costs are equal, or roughly equal as far as we can tell.

True, we might well run out of information at some point. It might just be irreducibly unclear whether another small move in the institutional space will produce incremental net benefits. Moreover, even if we are confident that further small moves will indeed produce *no* more net benefits, that might just mean that we have arrived at a local maximum, a local peak of welfare, rather than a global maximum, the highest peak or "optimum" in a strong sense.[86] If so, then small moves might not help, but large leaps would, if only we knew which way to leap.

To pursue Elster's example, faced with a tradeoff between impartiality and expertise, suppose we fiddle with the length of officials' terms or the frequency of elections in the search for net benefits. We might encounter a wall of uncertainty, a veil of ignorance, such that we have no idea whether another change to the official term or some other fiddle in the same direction is a good idea. More seriously, even if we come to rest, thinking we have reached a peak, the true global optimum might actually be reached by a large leap—perhaps switching to a radically different system for selecting officials altogether, such as the system of selection by lot used in the ancient city-states. Who knows?

But none of this is to deny the coherence of the optimizing enterprise. It is just to say that optimizing under conditions of uncertainty is difficult. The problem is informational, not conceptual. The optimizing approach is pragmatic, contingent, and epistemic. If we think we can make incremental improving moves from wherever we happen to start, then we are aiming for some optimum while acknowledging that under uncertainty we may never quite know when or if we have arrived.

Conclusion

The administrative state faces inevitable tradeoffs among the classical institutional goal of reducing official abuse of power, the presence of

[86] For the local-maximum problem, see Jon Elster, *Explaining social behavior*: more nuts and bolts for the social sciences (2010).

positive costs of enforcing the constitutional rules, the regulatory goal of reducing private abuse of power, and a myriad of substantive welfarist goals. Its response—by fits and starts, and with all sorts of crosscutting political agendas and compromises—has been to grope towards a set of arrangements that tolerate a certain amount of official abuse as the unavoidable byproduct of a package solution that achieves the other aims of the administrative state. One does not know, of course, whether the rules of the administrative state are optimal in the strong sense that they reach a global welfare maximum. But there is no doubt that the architects of the administrative state were, in some cases anyway, searching for net institutional improvements in the face of the relevant tradeoffs, and thus intentionally optimizing—albeit locally, in my weak sense. "Optimal abuse of power," then, is just shorthand for the distance we have had to travel away from the classical ideal of precautionary constitutional arrangements that strictly minimize the risks of bad government by public officials.

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