Revitalizing American Institutions
LEGITIMACY OF ADMINISTRATIVE LAW

The Administrative State, Inside Out

Cass R. Sunstein

Abstract

In the United States, are administrative agencies illegitimate? A threat to democracy? A threat to liberty? A threat to human welfare? Many people think so, and in some ways, they might be right; agencies can, and sometimes do, misuse their authority. But an understanding of the actual operation of the administrative state in the United States, seen from the inside, makes it exceedingly difficult to object to “rule by unelected bureaucrats” or “an unelected fourth branch of government.” Such an understanding casts a new light on some large and abstract objections from the standpoint of democracy, liberty, and welfare. Indeed, it makes those objections seem coarse and tinny, and insufficiently informed. What is needed is less in the way of arguments from adjectives and nouns, and more conceptual and empirical work on welfare and distributive justice, and on how regulators can increase both.

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STEPS AND MORE STEPS

In the United States, are administrative agencies illegitimate? Undemocratic? A threat to well-being? To liberty? These are large and abstract questions; some people find them exciting. But they are also a bit overwhelming. Because of their sheer size and abstraction, they are not simple to approach. To make some progress on addressing them, let us be concrete (and not exciting at all).

Suppose that a government agency—e.g., the Department of Transportation, the Environmental Protection Agency, the Department of Agriculture, the Department of Justice, the Department of Education, the Department of Homeland Security—wants to issue a regulation. The topic might involve automobile safety, fuel economy, air pollution, racial discrimination, mobile

driver's licenses, student loans, prison rape, or processes for granting asylum. Here, in brief, are the relevant steps:

1. The agency must have legal authority for what it wishes to do. Within the agency, a great deal of work will be done by agency lawyers to ensure that Congress has authorized the agency to act as its leadership deems fit. The agency might well consult with the Department of Justice on difficult questions. In some cases, Congress will have given the agency a great deal of discretion. In many more cases, Congress will have narrowly confined the agency's authority. Agency lawyers might describe the "litigation risk" associated with various courses of action. If the risk is deemed to be high, or too high, the agency is likely not to go forward. In countless cases, regulations sought by high-level political officials will never see the light of day, because it is clear that Congress has not authorized them. In many cases, regulations favored by high-level officials within the administration will not see the light of day, because the administration as a whole, including the White House, does not support them.

2. An agency might elect to consult with various people in the private and public sectors, seeking to obtain information and views. For example, the Environmental Protection Agency might consult with affected industries; it might consult with state and local officials; it might consult with environmental groups. Consultation is undertaken largely to learn more about the likely effects of various options and about potential alternatives. It might be intended to learn about the likelihood, nature, and magnitude of "pushback."

3. The agency might elect to consult with other federal offices or agencies, again to inform its own judgments about whether and how to proceed. An agency is likely to engage closely with White House offices when considering important and controversial rules. For example, it might work with the National Economic Council, the Domestic Policy Council, or the Council of Economic Advisers. For some rules, especially those with budgetary implications, agencies may engage with relevant officials in the Office of Management and Budget (who specialize in budgetary questions). Information sharing is common. For example, the Environmental Protection Agency might consult the Department of Energy before completing a draft of a rule that will affect the electricity sector. In cases of disagreement about whether and how to proceed, there might be a "principals' meeting," involving high-level officials, such as the director of the Domestic Policy Council, the attorney general, and the secretary of transportation. These kinds of meetings are common. (The principals' meeting might be preceded by a "deputies' meeting," which might be preceded by a meeting at a lower level.) The president might be informed or asked for guidance.

4. The agency must produce a rule for public comment. The rule will contain two things: a preamble and a regulatory text. The preamble must explain the agency's choices; it will often run to hundreds of pages. Once finalized, the regulatory text will have the force of law. Many people—possibly dozens, even hundreds—will be involved in producing the preamble and the regulatory text, frequently after close consultation with the agency's political leadership, and potentially with ongoing consultation with the White House.

This process will often take months; it might take a year or more; it could take a decade. During the drafting process, the agency might also consult with other federal agencies.

5. The agency will produce an analysis of the costs and benefits of its rule. For certain rules, the analysis will be extensive, potentially running to hundreds of pages. In some cases, the economic analysis will be the most time-consuming and labor-intensive part of the entire process. Agencies are generally required to show that the benefits of a regulation justify its costs.

6. The agency must go through internal clearance processes. These processes will involve a large number of people within the agency, some of whom have been confirmed by the US Senate (such as the deputy secretary and the secretary). The agency's choices will be assessed and reassessed during this process. Lawyers will play a significant role. Economists might be involved. Policy makers of various kinds will be enlisted.

7. After the rule is signed by the cabinet head, it will be submitted to the Office of Information and Regulatory Affairs (OIRA), which will review the rule itself, and which will circulate the rule to other parts of the federal government, including other White House offices and other agencies. There will often be detailed comments, potentially including significant concerns and objections. In some cases, the rule will never be proposed; it might be withdrawn on the ground that the concerns and objections cannot be met. Much more frequently, the rule will be proposed, but it will be significantly changed.

8. The fact that the rule is under review at OIRA will be public on its website (Reginfo.gov). Anyone—*anyone*—may request a meeting with OIRA and the agency, and the request will be granted. Comments received during the meeting might inform decisions about the content of the preamble and the regulatory text.

9. In some cases, hard questions will be "elevated" for high-level resolution. The elevation might (again) involve "principals," including cabinet heads and heads of White House offices. In unusual cases, it will involve the president personally.

10. The rule will be proposed for public comment for a period of at least sixty days. The number of comments might be very large.

11. If the agency decides to finalize its rule, it will repeat step 1, step 2, step 3, step 4, step 5, step 6, step 7, step 8, and step 9. Critically, it will also engage with the public comments. It will begin with a careful investigation of the relevant concerns and objections. It might change some part of the rule in response. For significant changes, it will engage political leadership.

12. The rule will be finalized, typically with a delayed effective date of sixty days.

13. The rule will typically be subject to challenge in court. It might be challenged on the ground that it has not been authorized by Congress. It might be challenged on the ground that it is "arbitrary or capricious," meaning that the underlying judgments of fact or policy have not been adequately explained, or that they are unreasonable. The rule might be challenged on constitutional grounds.

Though this is the standard process, there are some qualifications. In some cases, Congress has authorized agencies to act without notice-and-comment processes. (And note well: an agency must show such authorization, and courts are not enthusiastic about finding it.) In very rare cases, agency decisions are not subject to judicial review. (Also note well: if they are not, it is because Congress has said they are not, and courts are not enthusiastic about finding that Congress has said they are not.) Some agencies, such as the Federal Communications Commission and the Federal Trade Commission, are "independent," in the sense that they are not subject to the close or ongoing supervision of the president. Step 7 will not apply to them, and the same may be true of steps 3 and 5. (And note well: if agencies are independent, it is because Congress has said that they are. Note too: the term "independent" is a misnomer; the relevant agencies must follow the law, must not act arbitrarily, and will have lines of connection, if only through the appointments process, with the president.)

I am acutely aware that I have described the rulemaking process in tedious detail. I have also simplified it radically. (The full story is a lot more tedious. I have not said a word about the Unified Agenda and Regulatory Plan, Regulations.gov, negotiated rulemaking, the Paperwork Reduction Act, the Regulatory Flexibility Act, or the Congressional Review Act. I have not discussed interim final rules, requests for information, advance notices of proposed rulemaking, or supplemental notices of proposed rulemaking.) But rulemaking is a principal vehicle by which administrative agencies exercise legal authority; in some ways, it is *the* principal vehicle by which they exercise that authority. If we are to come to terms with contemporary objections to the administrative state, we had better know what it is, exactly, to which we are objecting.

Nothing here is meant to provide an idealized account of existing processes. It should be clear at the outset that those processes may go very well or very poorly. The agency might produce a rule that is lawful and in the public interest. Its rule might save hundreds and even thousands of lives every year. The agency might produce a rule that is unlawful and not in the public interest. Its rule might be well beyond its authority. It might cost hundreds of millions of dollars and produce little in the way of benefit; it might actually cost lives. The agency might be biased or ignorant in some important way. The numerous safeguards built into the rulemaking process increase the likelihood that rules will be lawful and good. But they provide no guarantees. Inside and outside government, there are constant efforts to make the administrative state do better, and be better; some of these efforts, and some existing proposals, are quite ambitious.

"Politics," understood as the inclinations of the president and his senior advisers, might play a legitimate and even crucial role, connecting the administrative state to the democratic process. But politics, so understood, might also produce mistakes, ugliness, and foolishness, even colossal blunders—ideologically driven judgments that do not adequately engage with the facts. And, of course, interest groups of various sorts might turn out to matter, potentially a great deal. To the extent that they provide useful information, they can help. In some cases, they are *essential* (the point is counterintuitive, and so I have emphasized it). But to the extent

that the information they provide is self-serving or false, and to the extent that administrators are responsive to parochial interests, they can be damaging.

SELF-GOVERNMENT

Many critics of the administrative state object that contemporary agencies threaten democratic self-government. Perhaps so. But in what sense? Is there an insufficient linkage between their decisions and the views of the American public? With what conception of democracy are we working? As a candidate, let us consider the time-honored ideal of "deliberative democracy," which places a high premium both on deliberation, with close attention to facts, and on accountability to the electorate.[1] On deliberative accounts of democracy, reason-giving in the public sphere is essential, and reason-giving must be undertaken with close attention to facts. At its best, the administrative process described above is an exercise in deliberative democracy. It prioritizes deliberation. Because Congress and the president play essential roles (indeed that description is too weak; they run the show), the process prioritizes accountability as well.

Recall that agencies are *creatures of Congress*; they exist only because the democratic process has so decreed. The Department of Education and the Department of Energy did not create themselves. In addition, such agencies are required to operate within the restrictions of the law, and while they do not always do that, the law imposes sharp limits on what they may do and how they may do it. Congress has constrained the Department of Agriculture, the Department of Health and Human Services, and the Department of Homeland Security in multiple ways. Some of those constraints involve substance (as in statutory mandates, statutory prohibitions, and statutory restrictions on their authority). Some of those constraints involve processes (including processes of notice and comment, obliging agencies not only to receive but also to respond to public comments). In addition, Senate-confirmed officials lead agencies, and they are, of course, subject to the direction of the president, who has been democratically elected (more or less). From the standpoint of democracy and self-government, where, precisely, is the concern? In light of the central roles of Congress and the president, and the multiple (democratic) constraints built into the rulemaking process, where, exactly, is the threat to self-government?

A BOGEYMAN? AGENCY DISCRETION

The question is not meant to be rhetorical. A possible answer is signaled briskly in step 1 above: Congress might have given an agency a great deal of discretion, and in that way, perhaps, authorized the administrative state "to make law." For example, the National Traffic and Motor Vehicle Safety Act of 1966 directs the secretary of transportation to issue motor vehicle safety standards that "shall be practicable, [shall] meet the need for motor vehicle safety, and [shall] be stated in objective terms."[2] The Clean Air Act instructs the Environmental Protection Agency to set standards "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety."[3] The Occupational Safety and Health Act defines an "occupational safety and health standard" as a standard

that is "reasonably necessary or appropriate to provide safe or healthful employment."[4] In all of these cases, agencies seem to be authorized to exercise a great deal of discretion, not only on matters of fact, but also on matters of policy.

Some people seem to think that the problem of the administrative state can be captured in one word: discretion. Or perhaps in two words: excessive discretion.

A true story: When I was in the White House, I worked on a rule involving "rear visibility," meant to require a technology that would allow drivers to see behind their vehicles (and thus reduce the risk of crashes). After extensive internal discussions and elaborate engagement with the public, the rule ultimately required cameras, which enable drivers to see what is behind them when they back up. It was an expensive rule, imposing hundreds of millions of dollars in costs, and it was specifically authorized by a statute, the Cameron Gulbransen Kids Transportation Safety Act of 2007. The key provision of the act says this:

> Not later than 12 months after the date of the enactment of this Act, the Secretary shall initiate a rulemaking to revise Federal Motor Vehicle Safety Standard 111 to expand the required field of view to enable the driver of a motor vehicle to detect areas behind the motor vehicle to reduce death and injury resulting from backing incidents, particularly incidents involving small children and disabled persons. The Secretary may prescribe different requirements for different types of motor vehicles to expand the required field of view to enable the driver of a motor vehicle to detect areas behind the motor vehicle to reduce death and injury resulting from backing incidents, particularly incidents involving small children and disabled persons. Such standard may be met by the provision of additional mirrors, sensors, cameras, or other technology to expand the driver's field of view. The Secretary shall prescribe final standards pursuant to this subsection not later than 36 months after the date of enactment of this Act.

The act grants a great deal of discretion to the secretary of transportation. Indeed, it does not even appear to create a rule of decision. (Should the secretary engage in cost-benefit analysis? Adopt some kind of precautionary principle?) Puzzled by the breadth of discretion conferred by the act, I asked a well-respected, hard-working, and conscientious member of the US Senate what he and his colleagues were thinking when they voted for it. His answer, in brief: "I don't remember that one at all." Does that answer demonstrate an abdication of responsibility? Maybe. Does it tell us something about how Congress operates? Undoubtedly.

Still, it is important to emphasize that such broad grants of authority are the exception, not the rule. Much of the time, Congress constrains discretion, sometimes with statutory provisions with granular detail. But when broad discretion exists, is it a problem? A serious problem from the standpoint of democracy? From the standpoint of deliberative conceptions of democracy?

It should be clear that even when agencies act under broad grants of discretion, they are hardly free agents. "Unelected bureaucrats" exist, and there are many of them. But they

work for and under Senate-confirmed officials, and their own policy-making discretion is sharply limited. It might be modest; it might be much less than that. Most generally, there is a chain of command. The deputy administrator of the Environmental Protection Agency, the deputy secretary of labor, and the deputy secretary of transportation are confirmed by the Senate, and they work for their respective cabinet heads. The administrator of the Environmental Protection Agency, the secretary of labor, and the secretary of transportation work for the president. As we have seen, they are, themselves, democratically accountable via the White House. An additional example from personal experience: cabinet heads have "counselors" and "senior counselors" helping them to do their jobs, and while counselors and senior counselors are not Senate-confirmed, they are accountable to cabinet heads, with whom they work closely, and also to the White House, with whom they also work closely.

DELIBERATIVE DEMOCRACY REDUX

Perhaps all this is not enough. Return, however, to the idea of deliberative democracy and recall that any grant of authority must itself be an exercise of lawmaking authority, operating pursuant to the constitutional requirements for the making of federal law. If Congress has granted broad authority to agencies, perhaps that is what voters want, or in any case what the idea of deliberative democracy requires or at least yields. Whether or not that is so, there is no question that when Congress grants such authority to agencies, it is responding to political considerations. And whenever Congress is leaning toward granting broad authority to the executive, it might run into political objections. This is a perfectly legitimate issue for members of Congress to raise during the relevant debates, or even during an election, and "passing the buck" to bureaucrats is unlikely, in many circumstances, to be the most popular electoral strategy. That may be a reason that provisions that grant broad discretion are emphatically the exception rather than the rule. The broader point is that when discretion exists, we might nonetheless see a form of deliberative democracy in action; recall the steps with which I began. When the administrative process is working well, deliberative democracy is essentially what it yields.

If Congress does grant broad discretion, it might well be because it lacks the information that would enable it to be more precise, and it might well be because it seeks to make the system of deliberative democracy work as well as it can. Should Congress try to specify a national ambient air quality standard for ozone or particulate matter? How would it know what such a standard should say? Should Congress decide on the appropriate level of fuel economy in heavy-duty vehicles over the next five years? Should it assess the rebound effect? (Does it know what the rebound effect is?) The effect on safety? The likely evolution of relevant technologies? As an institution, would it be able to master the relevant considerations? Or it may be that Congress is able to achieve a consensus on the existence of a problem (say, a lack of rear visibility in motor vehicles, or the risks associated with automated vehicles), but it is not able to achieve a consensus on the best way to solve it, or even on the specific rule of decision. Perhaps national legislators are clear that motor vehicle standards must be "practicable," but perhaps they cannot specify the meaning of that term.

NOT ACCOUNTABILITY IN THE ABSTRACT

It is true that, for those who are concerned about self-government, these points might not be decisive. If we focus on deliberative democracy, what matters is perhaps not self-government in the large but the particular form of self-government embodied in the US Constitution. Congress has a distinctive form of accountability, through the mechanisms for representation and the system of bicameralism, and perhaps it is that form of accountability, not accountability in the abstract, that matters. Even if so, consider and perhaps linger over an important truism: if Congress has granted broad discretion to agencies, it is Congress, subject to its distinctive form of accountability, that has granted such discretion to agencies. In any case, the democratic case for sharp limits on agency discretion is far from clear-cut. When such grants stem not from a desire to evade accountability (and what does that even mean, exactly?) but from a lack of relevant information, we are dealing with a pervasive and perfectly legitimate basis for grants of discretion in law or even life. One more time: Congress can be held accountable for broad grants of discretion.

Those who are concerned about agency discretion often see the specter of "capture," reflected in the power of self-interested private groups. But in fact, it is congressional *specificity* that often reflects the power of such groups—as, for example, where legislation embodies a capitulation to organizations using public-spirited rhetoric for their own parochial ends. If self-government is our focus, it is not at all clear that the discretion in the administrative state, as such, is our problem.

A PREPOSTEROUS CLAIM

A more concrete and quite recent concern is that agencies impose rules that are "binding," in the sense that those who violate them will face sanctions. Is that a problem? Are binding rules effectively legislation, or legislation in some critical sense, such that they must be enacted by Congress?

That would be a preposterous claim (hence the brevity of this section). If an agency issues a regulation that is binding in the relevant sense, it is because Congress has authorized it to do so.[5] Nothing in the Constitution forbids Congress from authorizing that. If there were any doubt, the course of history should erase it. Binding regulations have been part of the American republic for a very long time.[6]

THE NONDELEGATION DOCTRINE

Sometimes the objection to broad discretion points to the Constitution itself and in particular the separation of powers. Article I vests all legislative power in a Congress of the United States. If Congress gives open-ended discretion to administrative agencies, perhaps it has "delegated" legislative power, in violation of the founding document. Perhaps the institution contains a "nondelegation doctrine," and perhaps the modern administrative state frequently runs afoul of it. But perhaps not. A grant of discretion, even if it is very broad, need not be a "delegation of legislative power"; it might be simply a grant of discretion, taking the form of an *exercise* of legislative power.

The Supreme Court has converged on the view that so long as a statute contains some kind of "intelligible principle," there is no violation of Article I. As the court understands that test, it is not particularly demanding. Almost all statutes, including those quoted above, are constitutionally unobjectionable. To be sure, it is common for some people to observe, and lament, that no statute has been struck down on nondelegation grounds since 1935. But it might be more informative to observe that no statute was struck down on nondelegation grounds *before* 1935. The nondelegation doctrine has had only one good year.[7]

To those with "originalist" inclinations, drawn to the original meaning of the founding document, there is an even more fundamental point.[8] To the surprise of many people, recent historical work has cast grave doubt on the idea that Article I was originally understood to forbid Congress from granting broad discretion to administrators.[9] At least in its most vigorous forms, the nondelegation doctrine, as it is called, appears to be a contemporary concoction—an invented tradition, like the Scottish tartan (or, in my own family, Wood Street Cinema).[10]

These various points have implications for the "major questions doctrine," newly created and embraced by the Supreme Court. The basic idea is that when agencies seek to exercise their authority in some large, novel, or transformative way, they must demonstrate that they have unambiguous congressional authorization—a vague or unclear statute is not enough. Thus, for example, if the Environmental Protection Agency seeks to regulate greenhouse gas emissions from power plants in a way that would be in some sense transformative, or if the Occupational Safety and Health Administration seeks to regulate workplaces in some intrusive and large way in order to combat COVID-19, Congress must clearly grant that authority. The Supreme Court seems to see the major questions doctrine as an inference from the nondelegation doctrine and understands it to serve the purpose of ensuring legislative, rather than merely administrative, judgments on certain questions. For this reason, the doctrine can be understood as a form of "democracy-forcing minimalism."

Reasonable people differ on whether the doctrine is a good idea. If the nondelegation doctrine is a concoction, the foundations of the major questions doctrine seem to dissipate. One of the downsides of the doctrine is that it prevents agencies from dealing with significant and even deadly problems that Congress could not anticipate and that plausibly (though not unambiguously) fall within the scope of existing enactments. In a period of congressional deadlock, the national consequences might not be good (to put it lightly).

LIBERTY

Is the administrative state a threat to liberty? Exactly why? To answer that question fully, we would need, of course, to have a working definition of liberty and to specify what endangers it. Some critics of the administrative state have what might be broadly described as a libertarian conception of liberty. They seem to identify liberty with free markets and the common law of tort, property, and contract. If so, they are unlikely to object to efforts to regulate monopolies or to control externalities. They might have a conception of "market failure" and accept, or even welcome, the idea that regulators can address it. If so, they might well embrace an

administrative state, overlapping with, though not hardly identical to, what the United States now has. They might object that regulators do not limit themselves to market failures, and they might want an administrative state that is limited in that sense.[11] They might want to use the idea of market failure as a kind of knife, enabling the administrative state to be more finely tuned. They might object that regulators go well beyond their appropriate role and that they are in some sense overreaching, imposing mandates and restrictions that interfere with liberty, properly conceived. They might have a Hayekian conception of the role of government, and they might insist that even for market failures, market ordering, supported by social norms, might be the right solution.

COARSE

Undoubtedly, some of these objections have force; no one should deny their importance. Deregulation is often an excellent idea, not least from the standpoint of liberty. But taken in the abstract, the objections are too coarse and broad-gauged; we need to consider details. It is far from clear, for example, that the common-law system for regulating air pollution should be seen as the embodiment of liberty, or that a federal statute controlling air pollution should be taken to be an abridgment of that freedom.

Some people do object, on principle, to antidiscrimination law; they think that laws forbidding discrimination on the basis of race and sex threaten liberty. Where, they might ask, is the market failure? In their view, the right not to hire people because of their race or sex is part of liberty under law. If so, their objection is to Congress, not to the administrative state (and in any case, the objection is very hard to defend). A system in which private discrimination is permitted and authorized by law might well be taken to present the greater threat to liberty. Some people do object, on principle, to the Endangered Species Act; they think that it results in undue restrictions on private liberty. If so, their objection is to Congress, at least mostly. The Department of the Interior has some room to exercise discretion under the Endangered Species Act, but is it so clear that the discretion it exercises is a serious threat to liberty? (Maybe.)

We can identify many situations in which the administrative state compromises liberty, rightly conceived. It is urgent to address those situations. But would there be more liberty without an administrative state? On what conception of liberty? With what kind of administrative state?

"THE CRY OF LAISSEZ-FAIRE"

There is a more fundamental problem in the background. The legal realists, most notably law professors Robert Hale and Morris Cohen, established that markets and property depend on legal rules and hence on coercion.[12] Even now, their points have not been adequately appreciated by critics of the administrative state. Supreme Court justice Oliver Wendell Holmes Jr., in some ways the first legal realist, wrote a near-haiku: "Property, a creation of law, does not arise from value, although exchangeable—a matter of fact."[13] Consider this suggestion: "Those who denounce state intervention are the ones who most frequently and successfully invoke it. The cry of *laissez faire* mainly goes up from the ones who, if really 'let alone,'

would instantly lose their wealth-absorbing power."[14] As Hale wrote, "*Laissez-faire* is a utopian dream which never has been and never can be realized."[15]

Hale set forth these ideas with particular clarity. His special target was the view that governmental restrictions on market prices should be seen as illegitimate regulatory interference with liberty in a coercion-free private sphere. This, said Hale, was an exceedingly confused way to describe the problem. Regulatory interference was already there. Hale wrote that a careful look would

> demonstrate that the systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom, and with restrictions, moreover, out of conformity with any formula of "equal opportunity" or "preserving the equal rights of others." Some sort of coercive restriction of individuals, it is believed, is absolutely unavoidable.[16]

Consider the situation of someone who wants to eat but who lacks funds. Hale acknowledged, with apparent bemusement, that "there is no law against eating in the abstract" but stressed that "there is a law which forbids him to eat any of the food which actually exists in the community—and that law is the law of property."[17] No law requires property-holders to give away their property for nothing. But "it is the law that coerces" a person without resources "into wage-work under penalty of starvation—unless he can produce food. Can he?"[18] Of course, no law prevents the production of food (at least not in general). But in every advanced nation, the law does indeed ban people from cultivating land unless they own it. "This again is the law of property," and the owner is not likely to allow cultivation unless he can be paid to do so.[19] For those who need to eat and who lack money, "[t]hat way of escape from the law-made dilemma of starvation or obedience" to the demands of owners "is closed."[20]

NO SOCIALISM HERE

With this argument, Hale did not mean to argue that property rights should be abolished; he was hardly a socialist. Nor did Hale mean to argue that in a free market system, most people lack ways of avoiding starvation. His goal was to draw attention to the pervasive effects of law and public coercion in structuring economic relationships. More generally, one scholar has described Hale's position as being that laissez-faire is not such, but really "governmental indifference to [the] effects of artificial coercive restraints (meaning artificial) partly grounded on government itself."[21] Thus "[t]he distribution of wealth at any given time is not exclusively the result of individual efforts under a system of governmental neutrality."[22] And constraints on the freedom of non-owners were an omnipresent result of property law. What would it mean to say, as many people did in the early twentieth century, and as many do now, that "a free American has the right to labor without any other's leave"?[23] Hale answered that, if taken seriously, this claim would "insist on a doctrine which involves the dangerously radical consequence of the abolition of private ownership of productive equipment, or else the equally dangerous doctrine that everybody should be guaranteed the ownership of some such equipment."[24] In a free market, people do not really have the right to work "without any other's leave." Because of property rights, people can work only with the "leave" of others.

The realists' claims on this count were extremely prominent in America between 1910 and 1940. They can even be found in the work of socialism's greatest critic, Nobel Prize winner F. A. Hayek, a firm believer in free markets. In *The Road to Serfdom*, his most famous work, Hayek reminded his readers that the functioning of competition "depends, above all, on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make it operate as beneficially as possible."[25]

Hayek urged that "[i]t is by no means sufficient that the law should recognize the principle of private property and freedom of contract; much depends on the precise definition of the right of property as applied to different things."[26] Echoing the claim of the legal realists, Hayek wrote that "[i]n no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other."[27] The real battle was not between those who favor "government intervention" and those who reject it. The question was how the legal framework should be "intelligently designed and continuously adjusted."

Amen.

CONCERNS, WITHOUT HYSTERIA

One more time: nothing in these remarks should be taken to dismiss the concerns of those who insist that some actions by some agencies are illegitimate and even horrific interferences with liberty. Occupational licensing restrictions can easily be so characterized. Some environmental regulations greatly overreach. In many contexts, deregulation is an honorable enterprise. The problem of "sludge," understood to refer to administrative burdens and paperwork requirements, is a genuine challenge to liberty.[28] Regulators should indeed focus on market failures, even though they do not exhaust the legitimate grounds for regulatory action. It would be easy to offer illustrations of regulations that are plausibly taken to interfere with freedom of action without adequate justification. It is essential to scrutinize existing regulations to see if they fall within that category. But that pragmatic enterprise, urgent though it is, should not be confused with a broader and more colorful attack on the administrative state as such.

WELFARE

Is the administrative state a threat to welfare? That is not a straightforward question to answer. One reason should now be familiar: the idea of welfare is deeply contested, and it can be specified in multiple ways.[29] Another reason is that once we specify the idea, we need to bring it into contact with actual evidence. Suppose that we limit ourselves to actual regulations. Even if we do that, the number of regulations is very large. From January 1, 2000, to January 1, 2022, the Office of Information and Regulatory Affairs reviewed 12,371 rules. How many of those increase welfare? How many reduce it? In recent decades, regulations from the Department of Transportation have been said to have prevented more than 600,000 motor vehicle deaths; some of its regulations are spectacular winners on welfare grounds. But some are not.

PROXIES

Many economists believe that an analysis of costs and benefits can tell us a great deal about the welfare effects of various courses of action. Suppose, for example, that you could invest $100 today and receive $500 in return tomorrow morning; you would be better off. Now suppose that a regulation from the Department of Energy would cost $100 million today and deliver $900 million in benefits tomorrow; that regulation would seem to make society better off. It is true that to reach that conclusion, you might want to ask some questions. What do the costs and benefits represent? The costs may be monetary and imposed on companies (and potentially on consumers and workers as well)—as, for example, with energy efficiency requirements for refrigerators. The benefits may be monetary savings for consumers, coming, for example, from those same requirements. The benefits might also include lives saved from, for example, reduced air pollution (with a human life now valued at $11.8 million).[30] They might consist as well of illnesses averted, perhaps a reduction of nonfatal cancers.

If we want to know whether the administrative state is increasing or decreasing welfare, we might want to ask whether it is delivering monetized benefits in excess of monetized costs. Consider the relevant reports of OIRA, which is required by law to issue such reports on an annual basis. It is important to emphasize that the numbers are typically produced by civil servants, not by political actors; these are not political documents. At the same time, it is also important to acknowledge that the government's numbers must be taken with many grains of salt. For many regulations, costs and benefits are not quantified, and when numbers are given, they might reasonably be disputed. My goal is not to say that they should be taken as authoritative, as complete, or as unbiased but to say, more modestly, that they provide valuable information, especially about comparisons across years and administrations.

The central lesson is clear: in every year since 2001, agency regulations have had significant "net benefits," which is to say benefits well in excess of costs. In a good year, the annual net benefits are in excess of $50 billion. The good years have been 2004, 2005, 2007, 2010, 2011, 2012, and 2013. In a bad year, the net benefits are under $5 billion. The bad years have been 2002, 2003, 2006, 2018, and 2019. But even in the bad years, the administrative state has delivered net benefits (see table 1).

On reflection, these numbers should not be surprising. Recall step 5 above: agencies must assess the costs and benefits of their regulations, and, in order to proceed, they must show that the benefits justify the costs. Numerous regulations, favored by those within an agency or by some outside group, never see the light of day, because they do not have net benefits. Both Democratic and Republican presidents have prohibited agencies from proceeding unless they can make a reasoned demonstration that the benefits provide a sufficient justification. Table 1 is at least suggestive that the administrative state is often producing net benefits in terms of welfare. For those who think that it is not, or who believe that welfare would be increased without an administrative state, or with much less of one, the question is: What, exactly, is the evidence that supports that belief?

TABLE 1 NET BENEFITS OF REGULATION, IN $BILLIONS

Year	Reported Costs	Reported Benefits	Net Benefits
2001	$14.4	$32.8–$40.5	$22.3
2002	$0.9–$3.2	$2.2–$9.3	$3.7
2003	$2.8–$2.9	$2.3–$6.6	$1.6
2004	$3.8–$4.1	$12.8–$101.5	$53.2
2005	$5.5–$8.9	$40.6–$259.4	$142.8
2006	$1.6–$2.0	$3.6–$7.3	$3.7
2007	$13.7–$15.6	$41.7–$268.3	$140.4
2008	$1.8–$2.2	$10.2–$35.7	$21.0
2009	$5.4–$14.0	$12.5–$44.7	$18.9
2010	$9.3–$18.1	$27.1–$125.1	$62.4
2011	$7.3–$14.7	$50.0–$130.4	$79.2
2012	$21.6–$28.4	$77.5–$167.0	$97.3
2013	$2.9–$3.6	$37.3–$98.0	$64.4
2014	$3.6–$5.4	$11.8–$27.5	$15.2
2015	$6.1–$7.7	$28.6–$53.8	$34.3
2016	$4.8–$7.1	$20.4–$40.8	$24.7
2017	$2.3–$3.5	$6.4–$10.5	$5.6
2018	$0.1–$0.3	$0.2–$0.7	$0.3
2019	$0.0–$0.6	$0.3–$3.8	$1.8

Source: Cass R. Sunstein, *On Neglecting Regulatory Benefits*, 72 Admin. L. Rev. 445, 451–54 (2020). All figures represented are adjusted for 2020 dollars.

DISCRETION AGAIN

With respect to welfare, does it matter whether agencies have broad discretion? It is hard to come up with any a priori reason why decisions by agencies under vague language would be worse, from the standpoint of increasing welfare, than decisions by agencies under more specific language from Congress. And while serious empirical research would be most welcome on that question, there is no evidence that net benefits are higher when agencies have little discretion than when they have a great deal. Indeed, many of the regulations with the highest net benefits are air pollution regulations; with respect to air pollution, the Environmental Protection Agency's discretion is not limitless, but it is not sharply constrained. If we are concerned about welfare, it is not at all clear that broad discretion is the problem. Actually, the problem lies elsewhere.[31]

Consider, in this regard, the conclusions of the most systematic and detailed empirical analysis of the sources of grants of discretion to administrative agencies.[32] To make a long story short, David Epstein and Sharyn O'Halloran urge that grants of discretion are "a necessary counterbalance to the concentration of power in the hands of committees," or to the surrender of "policy to a narrow subset of" members.[33] In these circumstances, they urge that an insistence on greater specificity "would only push back into the halls of the legislature those issues on which the committee system, with its lack of expertise and tendency toward uncontrollable logrolls, produces policy most inefficiently—hardly a step in the right direction."[34] On this account, the real problem, in terms of welfare, does not lie in discretion. It lies in poor choices from Congress or agencies. That problem needs to be addressed independently. We need better choices, which, it should be hoped, will promote self-government, liberty, and welfare at the same time.

FOUR GOALS

Nothing said here should be taken to suggest that the status quo is perfect, or even excellent, that incrementalism is a good idea, or that large-scale reforms are out of order. The opposite is true. Consider four propositions about the modern administrative state:

1. In many contexts, new regulatory requirements could achieve a great deal. About 480,000 Americans die each year from smoking. Drug overdoses killed more than 70,000 in recent years (a strong majority from opioids). Over 35,000 die annually from motor vehicle accidents. Over 5,000 die on the job. Approximately 3,000 die from foodborne illness. Regulatory interventions, of one kind or another, could make serious dents in all these problems.

2. Many imaginable regulatory requirements would do more harm than good. Some environmental regulations would impose large costs for modest gains. Unduly aggressive regulation of nuclear power might increase reliance on fossil fuels and aggravate health problems. Unduly aggressive regulation of e-cigarettes might have harmful effects on human health. New administrative burdens, including paperwork requirements, might not merely cost time and money; they could also deprive people of access to important goods and services (including licenses and permits).

3. Many existing regulatory requirements should be streamlined or eliminated. In the domain of health care, for example, some such requirements impose significant burdens and costs, and it is far from clear that all of them can be justified. Aggressive deregulation, including elimination of administrative burdens, could achieve a number of important goals.

4. We need to know much more about the welfare effects of regulations, and also about their effects on distributive justice. Cost-benefit analysis is helpful, but it is only a proxy; better measures are increasingly available.[35] We also need to know whether regulations are helping or hurting those at the bottom of the economic ladder.

These propositions suggest four goals for regulatory reform and administrative law. *First*, new steps should be taken to ensure that justified regulations are actually issued. *Second*, agencies should reduce or eliminate the flow of new regulations that are not beneficial. *Third*, agencies should act aggressively to reduce or eliminate, from the stock of existing regulations, those that are no longer, or never were, worthwhile (this category includes sludge, such as administrative burdens, waiting times, in-person interview requirements, and paperwork requirements). *Fourth*, we need to do much better in understanding the effects of regulations on actual experience—on how they actually affect people in their lives.[36] That enterprise requires close attention to direct evidence about subjective well-being and also to distributive justice, not only to aggregate welfare.[37] That enterprise is the most fundamental of all. It should orient pursuit of the first three goals. To be sure, people are not now marching under banners saying, "Technocracy Now!" But what the administrative state needs now is more engagement with evidence and facts, not less. For all four goals, such engagement is essential.

Of course, it is true that, because of divisions of fact or value, people might disagree about whether some regulations are justified, beneficial, or worthwhile, or even about the right framework for resolving relevant disagreements. But whatever framework we choose, we should be willing to agree with propositions (1), (2), (3), and (4). In so doing, we should be able to begin to pave the way toward better thinking about the administrative state and its fundamental reform, in a way that transcends arguments from adjectives and nouns—arguments that are unhelpfully abstract and that fail to engage with how the administrative state proceeds, and with what it actually does. The best path forward starts with such engagement and then seeks, at once, to improve self-government, increase liberty, and promote human welfare.

NOTES

1. *See generally* Deliberative Democracy (Jon Elster ed., 1998).

2. 49 U.S.C. § 30111(a).

3. 42 U.S.C. § 7409(b)(1).

4. 29 U.S.C. § 652(8).

5. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 472, 495 (2002).

6. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 294–96, 332–49 (2021).

7. On early history, see Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379 (2017).

8. An essential text is Jerry Mashaw, Creating the Administrative Constitution (2012).

9. *See, e.g., id*.; Mortenson & Bagley, *supra* note 6, at 279–82. I am acutely aware that I am going over some large territory very briskly here.

10. In precisely the same sense discussed in The Invention of Tradition (Eric Hobsbawn & Terence Ranger eds., 2012).

11. *See* Stephen Breyer, Regulation and its Reform (1982), for a classic discussion.

12. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470, 470 (1923); Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L.Q. 8, 26 (1927).

13. Int'l News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., concurring).

14. Lester Ward, *Plutocracy and Paternalism*, 20 FORUM 308–09 (1885). An excellent discussion of this period is BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (2001).

15. Robert L. Hale, *Current Political and Economic Review*, 8 AM. BAR ASSN. J. 638, 638 (1922).

16. Hale, *supra* note 12, at 470.

17. *Id*. at 470.

18. *Id*. at 473.

19. *Id*.

20. *Id*.

21. Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 326 (1973).

22. BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 89 (2001) (quoting Hale, *supra* note 15, at 639).

23. Hale, *supra* note 15, at 639.

24. *Id*. A similar point was made by Gerald Henderson in 1920. *See* Gerald C. Henderson, *Railway Valuation and the Courts*, 33 HARV. L. REV. 902 (1920).

25. *See* F. A. HAYEK, THE ROAD TO SERFDOM 39 (2d ed. 2001).

26. *Id*.

27. *Id*. at 40.

28. *See generally* CASS R. SUNSTEIN, SLUDGE (2021).

29. *See* MATTHEW ADLER, WELFARE AND FAIR DISTRIBUTION 155–236 (2011).

30. *See Departmental Guidance on Valuation of a Statistical Life in Economic Analysis*, U.S. DEP'T OF TRANSP., https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis.

31. *See* CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION xiv–xv (2018).

32. *See generally* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS (1999).

33. *Id*. at 237.

34. *Id*. at 238.

35. *See generally* Cass R. Sunstein, *Welfare Now*, 72 DUKE L. J. (forthcoming 2023).

36. *See* HM TREASURY, THE GREEN BOOK: CENTRAL GOVERNMENT GUIDANCE ON APPRAISAL AND EVALUATION 5, 8 (2022) (in particular, see Principle of appraisal 2.3 and Shortlist appraisal 2.15).

37. *See* Sunstein, *supra* note 35; ADLER, *supra* note 29, at 33–38.

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This essay was written for a conference at the Hoover Institution, to be held in early 2023. It is meant for a general audience, which means that I paint with a very broad brush and skim over technical issues (especially involving law) as well as footnotes, qualifications, acknowledgments, and the like. Readers are thanked for their indulgence with the broad brushstrokes and the emphasis on forests rather than trees.

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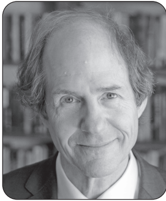
ABOUT THE AUTHOR



CASS R. SUNSTEIN

Cass R. Sunstein is the Robert Walmsley University Professor at Harvard Law School, where he also founded and directs the Program on Behavioral Economics and Public Policy. He previously served as administrator of the White House Office of Information and Regulatory Affairs and on the President's Review Group on Intelligence and Communications Technologies and the Pentagon's Defense Innovation Board.

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Hoover Institution, Stanford University
434 Galvez Mall
Stanford, CA 94305-6003
650-723-1754

Hoover Institution in Washington
1399 New York Avenue NW, Suite 500
Washington, DC 20005
202-760-3200