

Center on Capitalism and Society
Columbia University
Working Paper No. 113

Bureaucracy vs. Democracy:
Examining the bureaucratic causes of public
failure, economic repression, and voter
alienation

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February 4, 2019

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The daily implosions in the White House are diverting our attention from deeper flaws in modern government. Donald Trump was elected for a reason: Many Americans won't tolerate Washington any longer. Americans see Washington as a kind of alien power, dictating policies and behavior without regard to the feelings or predicament of real people.

But neither party has gotten the message of voter revolt. They rely on the lack of credible political alternatives to take turns in power without taking responsibility to change things. Instead of presenting positive visions for change, the parties incite voter fervor by pointing fingers. Pulling out of this downward spiral of anger and polarization requires a new governing vision, not merely new leaders.

But where's a new vision? "There is only one sure way to quiet our populist distempers," argues the Niskanen Center report *The Center Can Hold*: "that is for...democratic institutions to deliver effective governance....through successful problem-solving."¹ Political scientist Francis Fukuyama digs deeper, in his new book *Identity*, into the innate human needs for belonging and self-respect.²

These and other diagnoses of voter alienation converge at one place: a sense of disempowerment by Americans, at every level of responsibility, to make practical and moral choices. Almost without our noticing when it happened, bureaucratic structures have crowded out human agency.

¹ Brink Lindsey, et al., *The Center Can Hold: Public Policy for an Age of Extremes*, Niskanen Center, December 2018.

² Francis Fukuyama, *Identity: The Demand for Dignity and the Politics of Resentment* (Farrar, Straus and Giroux, 2018).

Nothing much works sensibly, I argue in *Try Common Sense*,³ because no one is free to make them work. Of course Americans are angry: Washington is inept, and makes us inept, by paralyzing public choices in red tape.

The modern bureaucratic state must be replaced, not repaired. We must simplify governing structures to liberate human judgment and initiative at all levels of society. No institutions, including democratic ones, can work effectively when people are prevented from drawing on their knowledge, instincts, and experience about how to get things done. Refocusing government on public goals, and away from micromanaging daily choices and interactions, will relieve much of the frustration and anger that drives voters toward populist leaders and extremist solutions.

The current bureaucratic framework in the United States has been largely constructed since the 1960s. It bears little resemblance to the legal frameworks existing before that time. The law authorizing the Interstate Highway System was 29 pages long.⁴ The most recent transportation bill was almost 500 pages long,⁵ and must be implemented pursuant to regulations that are themselves thousands of pages long. Environmental review, an innovation of the National Environmental Policy Act of 1969,⁶ was intended to make decision-makers and the public aware of significant impacts of a project.⁷ The expectation was that reviews would be short (rules suggest no longer than 150 pages⁸), and done in a matter of months. Now reviews can be thousands of pages, and take upwards of a decade.⁹

³ Philip K. Howard, *Try Common Sense: Replacing the Failed Ideologies of Right and Left* (W.W.Norton, 2019). Parts of this paper are drawn from this new book.

⁴ Federal-Aid Highway Act of 1956, Pub. L. No. 84-627.

⁵ Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94.

⁶ 42 U.S.C. §§ 4321 et seq.

⁷ See 42 U.S.C. § 4331. See also Daniel A. Dreyfus, "NEPA: The Original Intent of the Law," *Journal of Professional Issues in Engineering Education and Practice*, Vol. 109, No. 4 (Oct. 1983).

⁸ 40 C.F.R. 1502.7. Even "for proposals of unusual scope or complexity," the rules suggest that reviews should be less than 300 pages.

⁹ See, e.g., Philip K. Howard, "Two Years, Not Ten Years: Redesigning Infrastructure Approvals," *Common Good*, September 2015 and Philip K. Howard, *The Rule of Nobody: Saving America from Dead Laws and Broken Government* (W.W.Norton, 2014), pp. 9-13.

There is no shortage of grumbling about bureaucratic paralysis—indeed, bureaucracy is attacked even by the people who are in charge of it. But there’s been little skepticism about the assumptions underlying how public choices are made.

The operating premise of modern bureaucracy is to prescribe a correct way of doing things. For 50 years, regulation-writers have been hard at work trying to dictate choices in every area of conceivable public interest. Unlike regulatory goals, which are relatively straightforward, most regulatory detail prescribes the precise, correct way to achieve the goals. It is this assumption—that bureaucratic structures should dictate the details of implementation—that accounts for much of the failure and frustration of modern government.

The imperative to rethink the current bureaucratic structure can be understood by analyzing its failures through the lenses of three separate disciplines: economics, psychology, and legal philosophy. In each case, the bureaucratic structure violates core truths and principles of the discipline:

- Clear law, economists assume, promotes growth by eliminating legal uncertainty. In practice, however, so-called clear law leaves little or no room for responsible humans to make tradeoffs, to balance competing interests, or to engage in the trial and error which is source of most solutions and innovation. The current “one-size-fits-all” approach to regulation is a variation of central planning, with the added disadvantage that the planners are often dead or retired and cannot themselves make adaptive choices.
- The psychological assumption of bureaucracy is that real people have the cognitive capacity to process detailed rules. Research by experts in cognitive load shows that bureaucracy is ineffective not just because of the economic costs of compliance, but because it shuts the door to the cognitive processing needed for success.

- The legal theory of bureaucracy is that law can be objective, and should operate independently of individual judgment and values. But most of the critical precepts of the rule of law, including reasonableness, good faith, and fairness, hinge on judgment in the particular circumstances. The modern effort to objectify law into rigid rules and rights has led to an epidemic of selfishness, as people parse legal words to get something for themselves. The main goal of law is social trust; the effect of modern bureaucratic legal structures is to infect social dealings with distrust and defensiveness.

Bureaucracy precludes human choice at the point of implementation. That is its goal. It prescribes choices in advance in order to avoid mistakes by fallible humans, without understanding the far greater mistakes caused by rigidity. In economic terms, modern bureaucracy dramatically reduces the supply of human initiative and innovation. If bureaucratic compliance were an occasional diversion, necessary to achieve institutional stability or coordination, the benefits might outweigh the costs. But the legal requirements and legal risks bearing down on us are not occasional, but continuous. The endemic inefficiency and ineffectiveness of American healthcare,¹⁰ public schools,¹¹ infrastructure,¹² and regulation¹³ suggest that almost any alternative that allows practical choices would reap enormous public and private benefits.

Bureaucratic rigidity has little to do with the partisan debate over regulation vs. de-regulation. The goals of regulatory programs aimed at the common good are generally valid. (This excludes a large number of programs which distort markets and public administration with special interest preferences, such as farm subsidies, labor preferences, and corporate tax giveaways.)

¹⁰ See, e.g., Jonathan Rothwell, “No Recovery: An Analysis of Long-Term US Productivity Decline,” Gallup, 2016, pp. 54-55.

¹¹ Ibid. at pp. 89-92.

¹² See, e.g., Philip K. Howard, “Two Years, Not Ten Years,” supra note 9.

¹³ See, e.g., Clifford Winston, *Government Failure versus Market Failure: Microeconomics Policy Research and Government Performance* (Brookings Institution Press, 2006) and Clifford Winston, *Reversing Roles: The Growing Case for Markets Correcting Government Failure*, unpublished manuscript (November 2018) (forthcoming Brookings Institution Press, 2019).

Just as a reliable rule of law enhances economic prosperity by enhancing trust instead of defensiveness in commercial dealings, so too government oversight of products, services, and safety can enhance freedom by protecting against externalities such as pollution and reducing concerns over adulterated food or unsanitary conditions.

The evidence is overwhelming, however, that even vital regulatory programs, as designed, are wasteful and ineffective. That is because the failures of modern government are largely failures not of faulty goals but of implementation: Doctors, teachers, officials, business managers, and others find themselves unable to act on their best judgment because of bureaucracy or other legal concerns.¹⁴ By incurring costs without commensurate public benefit, bureaucracy causes society to produce less of both guns and butter.

Every president since Jimmy Carter has promised to streamline red tape but, with a few notable exceptions (industry deregulation under Carter, and welfare reform under Clinton), their efforts have yielded little, and the bureaucratic burden has gotten progressively heavier.¹⁵

The steady growth of bureaucratic verbiage is a natural consequence of the drive to clarify each new ambiguity or wrinkle. Tangled bureaucracies are the inevitable consequence of the premise: to create an instruction manual for correct public choices. This unexamined frame of reference explains why would-be reformers have had little success in taming the bureaucratic behemoth.

The Bureaucratic Imperative to Remove Human Choice

Bad institutions and cultures have a staying power that stems not only from the vested interests at the center, but from inertia. There's a general presumption that if something works a certain way, there must be a good reason for it.

¹⁴ See discussion in Howard, *Try Common Sense*, supra note 3 at pp. 25-36. See generally Philip K. Howard, *The Death of Common Sense: How Law Is Suffocating America* (Random House, 1995).

¹⁵ Howard, *Try Common Sense*, supra note 3 at pp. 50-56.

But no one designed this bureaucratic tangle. No experts back in the 1960s dreamed of thousand-page rulebooks, ten-year permitting processes, doctors spending up to half the day filling out forms, entrepreneurs faced with getting permits from 11 different agencies, teachers scared to put an arm around a crying child, or a plague of legal locusts demanding their self-appointed rights. America backed into this bureaucratic corner largely unthinkingly, preoccupied with avoiding error without pausing to consider the inability to achieve success.

The tendency towards detailed rules is rooted in human nature. Humans like the idea of telling people how to do things. Evolution has wired us to be risk averse, and controlling decisions by other people addresses the risk of people deciding something badly. Kahneman and Tversky have demonstrated that people overweight low probabilities (e.g., shark attacks), and are unreasonably loss-averse.¹⁶ Just as people don't go into the ocean for fear of shark attacks, they like rules to prevent a human shark from making abusive choices. Rules also have the advantage of avoiding the personal risks inherent in taking responsibility. David Hume observed that people "are mightily addicted to general rules."¹⁷ Even bureaucrats with impregnable job protection, *Washington Monthly* founder Charlie Peters observed, cling to rules because of an almost pathological fear of being put on the spot¹⁸: "The rule made me do it."

The debate over rule specificity started early in American history. The main dispute around the ratification of the Constitution was the objection of the "Anti-Federalists" that the powers of government needed to be specifically prescribed. The Anti-Federalists argued that the Constitution was "made like a fiddle, with but few strings," so that those in power might "play any tune upon it they pleased."¹⁹ The disagreement was resolved not by prescribing detailed

¹⁶ Daniel Kahneman and Amos Tversky, "Judgment Under Uncertainty: Heuristics and Biases," *Science*, Vol. 185, No. 4157 (Sep. 1974). See also Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011).

¹⁷ David Hume, *A Treatise of Human Nature*, L. A. Selby-Bigge and P. H. Nidditch, eds., 2nd ed. (Oxford University Press, 1978), p. 551.

¹⁸ Charles Peters, *How Washington Really Works* (Basic Books, 1992), p. 43.

¹⁹ William Manning, as quoted in Saul Cornell, *The Other Founders: Anti-Federalism & the Dissenting Tradition in America, 1788-1828* (University of North Carolina Press, 1999), p. 229.

powers in the Constitution, but by adding a Bill of Rights whose goals and principles would be enforced by officials in the Constitution's system of separated powers.²⁰

With some notable exceptions, organizational literature after the industrial revolution embraces a control vision of administration. These theorists believed not just in control, but in a one correct solution—if the central organizer was smart and thoughtful, the institution would hum like a perpetual motion machine. The efficiency of assembly lines over craftsmen's workbenches were working proof of the power of a fixed route of march. Max Weber decried the anti-human effects of lockstep bureaucracy but believed its efficiency made it unstoppable.²¹ Frederick Winslow Taylor's "scientific management" approach also saw organizational choices as an assembly line.²² In the mid-twentieth century, Nobel laureate Herbert Simon saw that perfection was impossible in the hands of real people and advanced the idea of "bounded rationality"—where fallible people would never get it completely right but could "satisfice" by using available information within a formal framework.²³ But Simon too believed, with Weber and Taylor, that there was one correct way of doing things: "Given a complete set of value and factual premises, there is only one decision which is consistent with rationality."²⁴

Leading up to the tumultuous decade of the 1960s, debate around government organization had a kind of cartoon quality, as if the only options for governing were cast-iron dictates or anything goes.²⁵ A 1952 compendium on bureaucracy organized by sociologist Robert K. Merton and others presented three possible ways organizational structures failed: 1) "over-organization...an excessive development of...bureaucratic routines"; 2) "under-organization, as instanced by nepotism, favouritism, graft, corruption, and the like"; and 3) "anti-organization...in which much of life's business is conducted within a parochial sphere characterized by personal ties rather

²⁰ See discussion in Howard, *The Rule of Nobody*, supra note 9 at pp. 96-110.

²¹ Max Weber, *Economy and Society*, Guenther Roth and Claus Wittich, eds. (University of California Press, 1978), pp. 956-1002.

²² Frederick Winslow Taylor, *The Principles of Scientific Management* (Harper and Brothers, 1911).

²³ Herbert Simon, *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organizations*, 4th ed. (Free Press, 1997), pp. 89, 118.

²⁴ *Ibid.* at p. 307.

²⁵ Howard, *The Rule of Nobody*, supra note 9 at pp. 101-04.

than by structures of impersonal relations.”²⁶ Notably missing from this list are the infinite ways that organizations can fail by ineffective execution, such as torpor in the workplace culture, and failure to adapt to changing circumstances. Designing bureaucracy to avoid those three categories of errors ignores the critical need for an organization design to liberate human initiative.

The compendium included harsh critics of bureaucracy, notably Merton and Marshall Dimock, who noted its “inflexibility, unimagination, uniformity, complexity, routinism, stratification, delay, dispersion, timidity, unresponsiveness, officiousness, mediocrity, and stagnation.”²⁷ In this compendium of leading thinkers, including Weber, Veblen, Michel, Simon, Mannheim, Lipson, Mills, and more, no essay suggested a simplified governing structure such as the Constitution, which allocated responsibility to officials and citizens and provided a framework of accountability and checks and balances to keep choices within reasonable bounds. There was no acknowledgment of the infinite organizational variations built around goals, principles, responsibility, market mechanisms, a dynamic of continual adaptation, and a hierarchy of authority to make and evaluate all these decisions. The assumption in most of the essays is that preset bureaucratic rules would define chutes through which officials, like cattle, would pass with little room for deviation or error. Less bureaucracy would be good, of course, but only as long as it achieved reasonably uniform results.

There were also a few notable counter-thinkers in management theory, led by Chester Barnard and Peter Drucker, who focused on individual responsibility and institutional culture.²⁸ Herbert Kaufman’s *The Forest Ranger* (1960)²⁹ described an open structure in which forest rangers made many practical choices without many bureaucratic constraints, subject only to distant oversight from Washington. Kaufman concluded that “guided discretion” and a culture of shared values were the key to this successful agency.

²⁶ *Reader in Bureaucracy*, Robert K. Merton, et al., eds. (Free Press, 1952), p. 396.

²⁷ *Ibid.* at p. 401.

²⁸ See, e.g., Chester Irving Barnard, *The Functions of the Executive* (Harvard University Press, 1968) and Peter F. Drucker, *The Age of Discontinuity: Guidelines to Our Changing Society*, 2nd ed. (Transaction, 1992).

²⁹ Herbert Kaufman, *The Forest Ranger: A Study in Administrative Behavior* (RFF Press, 2006).

The upheavals in the 1960s caused public organization to veer even further towards legal and bureaucratic protections. Like a hot iron searing the public consciousness, the abuses by institutions and people with authority—from racism and environmental abuse to the Vietnam War and gender inequality—created demand for a governing approach that was purged of bias and any opportunity for bad judgment. Public law was largely remade on the assumption that public choices could be programmed like a computer.

Rulemaking burgeoned—from a little over 10,000 pages in the Federal Register in the late 1950s to almost 100,000 pages in 2016.³⁰ While the 1960s reforms are known for creating new areas of government oversight—such as civil rights, environmental protection, and safety laws—most of the bureaucratic detail had little to do with the *scope* of regulation; thick rulebooks instructed people on exactly *how* to meet public goals.³¹ Forest rangers used to do their job with a pamphlet of rules. Soon it became thick volumes of instructions.³² Almost every aspect of the workplace rule-writers could think of was turned into a legal prescription: Worker safety law prescribes that stairwells must be “illuminated by either natural or artificial” light.³³ How else can stairwells be lit?

The evil to be purged by dense bureaucracy was human judgment, especially by people with authority. But thick rulebooks were not sufficient. Guarding against unfair choices required something more. The fix here was to apply due process—the hallowed constitutional protection against the state throwing you in jail or taking your property—to personnel and management

³⁰ George Washington University Regulatory Studies Center, “Pages in Federal Register (1936-2017),” available at: <https://regulatorystudies.columbian.gwu.edu/reg-stats>.

³¹ Howard, *Try Common Sense*, supra note 3 at pp. 49-52. See generally Howard, *The Death of Common Sense*, supra note 14.

³² Al Gore and Tom Peters, *Creating a Government That Works Better and Costs Less: The Report of the National Performance Review* (Plume, 1993).

³³ Occupational Safety and Health Administration, Standard Number 1926.851(c), available at: <https://www.osha.gov/laws-regs/regulations/standardnumber/1926/1926.851>.

decisions. Teachers would have to prove in a disciplinary hearing that Johnny threw the pencil first; supervisors would have to prove that Ethel didn't try hard or get along with co-workers.³⁴

The expansion of due process had the effect of inverting the hierarchy of authority—the burden was now on the public supervisor to prove the correctness of his supervisory decisions. Public managers no longer had the practical ability to manage public personnel.³⁵ It is now basically impossible, for example, to terminate a public employee for incompetence.³⁶ Another effect, commonly, is a listless public culture; it is difficult to maintain energy and camaraderie in an office where everyone knows that job performance doesn't matter.³⁷

The new bureaucratic machinery to honor due process was imposed in the name of individual rights, but the meaning of rights had been transformed from protection against state coercion into a tool for self-interest against co-workers and organizations. Instead of government making choices based on what best served the common good, it made choices based on the legal demands of each claimant. Instead of being held to a standard of serving the public, public servants now demanded, in essence, that the public should serve them.³⁸

This flash flood of individual rights swept nearly everyone along. Virtually ignoring his own findings in *The Forest Ranger*, even Herbert Kaufman flipped his point of view and embraced detailed rules and processes in a short book, *Red Tape*. Kaufman acknowledged the costs of

³⁴ Howard, *Try Common Sense*, supra note 3 at pp. 85-109 and Philip K. Howard, "Civil Service Reform: Reassert the President's Constitutional Authority," *American Interest*, January 2017. See also Daniel DiSalvo, *Government Against Itself: Public Union Power and its Consequences* (Oxford University Press, 2015).

³⁵ Daniel DiSalvo, "The New Spoils System," *American Interest*, February 2015 and DiSalvo, *Government Against Itself*, supra note 34. See also Howard, *Try Common Sense*, supra note 3 at pp. 85-109 and Howard, "Civil Service Reform," supra note 34.

³⁶ See, e.g., Steven Brill, *Tailspin: The People and Forces Behind America's Fifty-Year Fall—and Those Fighting to Reverse It* (Knopf, 2018), pp. 260-68. More federal employees die on the job than are dismissed for job performance: see, e.g., Dennis Cauchon, "Some Federal Workers More Likely to Die Than Lose Jobs," *USA Today*, July 19, 2011.

³⁷ Howard, *Try Common Sense*, supra note 3 at pp. 85-98.

³⁸ See, e.g., DiSalvo, *Government Against Itself*, supra note 34 and Philip K. Howard, "Fixing the Civil Service," *Ripon Forum*, Vol. 51, No. 2 (April 2017).

bureaucratic stultification but argued that the rules were essential to avoid any hint of unfairness.³⁹

For 50 years since the 1960s, modern government has been rebuilt on what I call the “philosophy of correctness.”⁴⁰ The person making the decision must be able to demonstrate its correctness by compliance with a precise rule or metric,⁴¹ or by objective evidence. All day long, Americans are trained to ask themselves, “Can I prove what I’m about to do is legally correct?”

In the age of individual rights, no one talks about the rights of institutions. But institutions provide the services and products that society needs, and their ability to function effectively directly benefits individuals who rely upon them. The achievement and self-respect of employees who work in institutions also hinges on the health of the institutional culture.

The disempowerment of institutional authority in the name of individual rights has led, ironically, to disempowerment of individuals. Instead of striving towards their goals, Americans tiptoe through a legal minefield. In virtually every area of social interaction—schools, healthcare, business, public agencies, public works, entrepreneurship, personal services, community activities, nonprofit organizations, churches and synagogues, candor in the workplace, children’s play, speech on campus, and more—studies and reports confirm how sensible choices are prevented, delayed, or skewed by overbearing regulation,⁴² by overemphasis on objective metrics,⁴³ or by legal fear of violating someone’s alleged rights.⁴⁴

³⁹ Herbert Kaufman, *Red Tape: Its Origins, Uses, and Abuses*, reissue ed. (Brookings Institution Press, 2015).

⁴⁰ Howard, *Try Common Sense*, supra note 3 at pp. 30-36.

⁴¹ Kaufman, *Red Tape*, supra note 39.

⁴² See, e.g., Howard, “Two Years, Not Ten Years,” supra note 9 and Howard, *The Rule of Nobody*, supra note 9 at pp. 7-23.

⁴³ See generally, e.g., Jerry Z. Muller, *The Tyranny of Metrics* (Princeton University Press, 2018) (arguing that overreliance on metrics skews sensible choices by shifting the focus from outcomes to measurements).

⁴⁴ See, e.g., Philip K. Howard, *The Collapse of the Common Good: How America’s Lawsuit Culture Undermines Our Freedom* (W.W.Norton, 2002).

A Three-Part Indictment of Modern Bureaucracy

Reformers have promised to rein in bureaucracy for 40 years, and it's only gotten more tangled. Public anger at government has escalated at the same time, and particularly in the past decade. While there's a natural reluctance to abandon a bureaucratic structure that is well-intended, public anger is unlikely to be mollified until there is change. But changing towards populist solutions does not bode well for the future of democracy. More productively, overhauling operating structures to permit practical governing choices would re-energize democracy as well as relieve the pressures Americans feel from Big Brother breathing down their necks.

Viewed in hindsight, the operating premise of modern bureaucracy was utopian and designed to fail. Here's the three-part indictment of why we should abandon it:

1. The Economic Dysfunction of Modern Bureaucracy

Regulatory programs are notoriously wasteful, and frequently have costs that exceed their benefits.⁴⁵ The costs of compliance are high, about \$2 trillion for federal regulation alone.⁴⁶ Economists' critiques of government have focused on the imbalance of costs and benefits, and called for market-based solutions where feasible.⁴⁷ But compliance costs do not account for many opportunity costs of ineffective bureaucracy—for example, discouraging initiative and innovation. Doctors and nurses who spend up to half their time “doing paperwork” are not caring for patients.⁴⁸ Is it a coincidence that the US spends almost double what other western nations do on healthcare?⁴⁹

⁴⁵ See, e.g., Winston, *Government Failure versus Market Failure*, supra note 13 at p. 79 et seq.; Winston, *Reversing Roles*, supra note 13; and Peter H. Schuck, *Why Government Fails So Often: And How It Can Do Better* (Princeton University Press, 2015), pp. 127-97.

⁴⁶ Clyde Wayne Crews, Jr., “Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State,” Competitive Enterprise Institute, 2017.

⁴⁷ See, e.g., Winston, *Government Failure versus Market Failure*, supra note 13; Winston, *Reversing Roles*, supra note 13; and Brink Lindsey, et al., *The Center Can Hold*, supra note 1.

⁴⁸ See, e.g., Danielle Ofri, “The Patients vs. Paperwork Problem for Doctors,” *New York Times*, November 14, 2017.

⁴⁹ Rothwell, “No Recovery,” supra note 10.

Bureaucratic delay is far more costly than generally recognized. In the Common Good report “Two Years, Not Ten Years,” I found that a six-year delay in infrastructure permitting more than doubles the effective cost of projects. I also found that lengthy environmental reviews generally cause significant environmental harm by delaying projects which alleviate polluting bottlenecks.⁵⁰ Often there are few or no benefits to offset the substantial costs and delay—for example, a project to raise the roadway of the Bayonne Bridge had little environmental impact because it used existing foundations, yet nonetheless required a 10,000-page review statement, plus another 10,000 pages of exhibits.⁵¹

There has been surprisingly little effort to redesign regulations to be less rigid and wasteful. Liberals are preoccupied with maintaining a rear-guard action to defend the goals of regulation. Conservative calls for broad deregulation go too far. That’s why they’ve been notably unsuccessful for the past four Republican administrations—voters want Medicare and want government to protect common resources such as clean water.⁵² Ironically, what both sides have in common is to demand what they call “clear law.” There will be little or no room for either government overreach or business evasion of regulation, the theory goes, when human judgment is replaced by detailed rules. Their allegiance to this automatic, hands-free conception of regulation --not the goals of government oversight--is what causes waste and frustration.⁵³

Bureaucratic rigidity cannot avoid crippling costs and inefficiencies:

The high marginal cost of perfect compliance. Regulation is typically designed in absolute terms, requiring uniform compliance with each rule or mandate. Striving for complete compliance is sometimes critical: A pre-flight checklist is important to avoid a disastrous accident from a small mistake; all restaurants need grease traps to avoid clogging the sewers.

⁵⁰ Howard, “Two Years, Not Ten Years,” supra note 9.

⁵¹ Ibid. at p. 13.

⁵² Howard, *Try Common Sense*, supra note 3 at pp. 50-56.

⁵³ Nassim Taleb calls this the “Soviet-Harvard delusion”: Nassim Taleb, *Antifragile: Things That Gain from Disorder* (Random House, 2012), pp. 9-10.

But many other regulatory goals involve more complex tradeoffs. Often a public goal can be substantially achieved at a fraction of the cost by accepting a measure of non-perfection. Criminal law doesn't eliminate all crimes, just as contract law doesn't eliminate all cheating, but they are both effective to instill public trust needed to support our freedom in social dealings.

The goal of privacy laws in healthcare, for example, could be substantially achieved with a few broad principles and protocols, particularly if there were not onerous consequences for the occasional slip up. The main goal of healthcare law should be effective care; spending extra tens of billions for perfect privacy means that those resources are not being used to save lives.

The inability to balance competing public goals. Rigid regulation is commonly counterproductive because it conflicts with other public goals. Safety, for example, is only a partial idea. The question is what we're giving up to achieve it. Delaying the approval of a new drug, to try to understand perfectly the side effects, can cause harm to thousands of patients who need the drug now. "Helicopter parenting"—for example, not letting them play by themselves, or explore the neighborhood—stunts a child's emotional and physical growth.⁵⁴

Valuing compliance more than results doesn't usually work. Many situations require immediate action—as with an accident or other unexpected event. The square shapes of regulatory compliance will not fit these odd-shaped holes in life. Not saving a drowning person because the first responders had not yet been re-certified “in land-based water rescues,”⁵⁵ or refusing to assist a heart attack victim because the rules say to call 911,⁵⁶ are extreme examples of the inevitable failure of a governing framework that does not honor the need for human judgment on the spot.

Discouraging innovation and initiative. The engine of innovation is trial and error. People try this and that, continuously moving towards ideas that seem to work. Regulation that

⁵⁴ See, e.g., Howard, *Try Common Sense*, supra note 3 at pp. 84, 124, 149-50, 165.

⁵⁵ Alan Wang, “Alameda Police, Firefighters Watch as Man Drowns,” KGO-TV (San Francisco, CA), May 30, 2011. See also discussion in Howard, *The Rule of Nobody*, supra note 9 at pp. 85-88.

⁵⁶ Peter Hermann, “Man, 77, Dies After Collapsing Near D.C. Fire Station and Not Getting Immediate Aid,” *Washington Post*, January 29, 2014. See also discussion in Howard, *The Rule of Nobody*, supra note 9 at pp. 85-88.

comprehensively dictates choices in almost all areas of social and business endeavor traps people in a kind of spider web. Often, a person is uncertain whether a new approach conflicts with a rule, and lacks the time or resources to find out. When California initiated a program to waive rules for certain innovative school programs, it found, after reviewing the waiver applications, that most applications required no waiver—the schools had assumed that innovation violated some rules.⁵⁷ Just as unreliable law dampens economic initiative, so too does uncertainty about the scope of regulation.

2. Bureaucracy Causes Cognitive Overload

The complex detail of bureaucracy also causes cognitive overload, impairing a human's ability to focus on the actual problem at hand. The phenomenon of the unhelpful bureaucrat, famously depicted in fiction (by Dickens, Balzac, Kafka, Gogol, and Heller, to name just a few), has generally been characterized as a cultural flaw of the bureaucratic personality.⁵⁸ But studies of cognitive overload suggest that people who are thinking about rules actually lack the capacity to think about solving problems. This overload not only impedes drawing on what Nobel laureate Daniel Kahneman calls “system 2” thinking—that is, questioning assumptions and reflecting on long term implications—but also impedes access to what they call “system 1” thinking—that is, drawing on their instincts and heuristics to make intuitive judgments.⁵⁹

Professor William Simon tells the story of the bureaucratic clerk who refused to restore welfare to a desperate mother who filed the application late.⁶⁰ The clerk asserted to the mother: “There is nothing I can do.” In fact, the error could have readily been fixed by another department; what the clerk meant was that there was nothing that the clerk could do. But in the mental cubicle of bureaucratic rules, all the clerk thought about was her own compliance, not solving the dire predicament of the young mother before her. This might be called “system zero” thinking—

⁵⁷ H. M. Levin, “Why Is This So Difficult?” in *Educational Entrepreneurship: Realities, Challenges, Possibilities*, Frederick Hess, ed. (Harvard Education Press, 2006), pp. 173-74.

⁵⁸ See, e.g., Anthony Downs, “Inside Bureaucracy,” RAND Corporation, 1964.

⁵⁹ Kahneman, *Thinking, Fast and Slow*, supra note 16.

⁶⁰ William H. Simon, “Legality, Bureaucracy, and Class in the Welfare System,” *Yale Law Journal*, Vol. 92, No. 7 (June 1983), pp. 1198-99.

where mental capacity focuses on artificial constraints instead of instincts, norms, or public goals.

Research by psychologist John Sweller and others has demonstrated that “working memory”—the conscious part of the brain—can process only a few things at once.⁶¹ “Long-term memory,” by contrast, is not conscious and holds a vast store of experience and evolutionary instincts which are drawn into working memory as people are dealing with particular problems. A chess grandmaster doesn’t consciously remember thousands of variations, but is able to draw on past experience, stored subconsciously, to quickly respond to multiple boards before him.⁶² Dealing with the needs of a particular person requires a social worker to perceive the emotional and physical state of a client, and make judgments that draw upon instincts and experience about what is needed. When both engines shut down when taking off from LaGuardia Airport, the pilot Sully Sullenberger was able to draw on a lifetime of experience to keep the glide angle just steep enough to keep up airspeed and avoid stalling, and then to feather the nose up just before ditching the airliner so that it would “plane” onto the river instead of crashing.⁶³

Humans are smart mainly because of our ability to draw on long-term memory. In most situations of technical expertise, our skills are internalized in long-term memory and constitute what we think of as “understanding.” Our ability to draw on our accumulated knowledge requires, however, that working memory be available to receive these signals and wisdom. People go back and forth, figuring things intuitively. Nicholas Negroponte found that children in Ethiopia, having never seen a computer, could figure out how it worked in short order by trial and error.⁶⁴ That’s because modern computers are designed with multiple pathways to get to a goal, so people can make them work intuitively.

⁶¹ See John Sweller, Paul Ayres, and Slava Kalyuga, *Cognitive Load Theory* (Springer, 2011).

⁶² *Ibid* at p. 20.

⁶³ See Howard, *Try Common Sense*, *supra* note 3 at p. 179 (note for “They become the project”).

⁶⁴ See, e.g., David Talbot, “Given Tablets but No Teachers, Ethiopian Children Teach Themselves,” *MIT Technology Review*, October 29, 2012.

Bureaucratic constraints are difficult to internalize because they rarely fit together into a broad understanding. They're more like a shopping list, which must be referred to consciously in order to meet each requirement. This conscious effort to refer to detailed bureaucracy is mentally exhausting.

The fallibility of human judgment has received substantial attention in recent years, prompting experts to recommend controls on decisions. Atul Gawande has shown how checklist protocols before pilots take off, or surgeons start operating, can avoid tragic errors that occur because human cognition is not, in fact, good at keeping lists.⁶⁵ The virtue of going down the checklist is precisely that it absorbs all the cognitive capacity of working memory to make sure that a person hasn't forgotten one small detail that might cause the plane to crash. A checklist avoids error in complicated activities, but a checklist does not achieve success. To fly a plane, or perform surgery on a person, requires finishing the checklist and then going back to human instincts and experience to use skill to adapt to the particular situation.

The functioning of the brain has critical implications for the design of organizational systems. The brain is “minute in its ability to process new material but massive in its ability to process very extensive and complex, previously learned information.”⁶⁶ Because of the “hidden nature of long-term memory,” Sweller explains, we do not consciously draw out the solution to the situation before us; it simply appears in working memory and then we make choices.⁶⁷ In computer terms, the brain has terabytes of hard drive memory, but eight-bit processors.⁶⁸

⁶⁵ Atul Gawande, *The Checklist Manifesto: How to Get Things Right* (Picador, 2011).

⁶⁶ John Sweller, “Evolution of Human Cognitive Architecture,” from *Psychology of Learning and Motivation, Volume 43*, Brian H. Ross, ed. (Elsevier, 2003), p. 215.

⁶⁷ Ibid. at p. 220. Sweller and colleagues have focused on how people learn, and found that certain learning techniques are far more effective than others—basically, keep the demands on conscious thinking to a minimum. For example, people far more easily process a geometric proof when the textual description is printed adjacent to the angle instead of at the bottom of the diagram. It takes much more working memory to read an explanation and then apply it to the geometric angle than to look at the angle and description at the same time: Sweller, et al., *Cognitive Load Theory*, supra note 61 at p. 112.

⁶⁸ Sweller, et al., *Cognitive Load Theory*, supra note 61 at pp. 42-43.

Imposing multiple requirements for bureaucratic compliance has what Sweller and colleagues call “the redundancy effect”: Forcing people to focus on marginal or irrelevant requirements uses up working memory.⁶⁹ One study found that students learn more from summaries of material than from fuller explanations.⁷⁰ People can readily internalize the goal of a “safe workplace,” and strive to create incentives and environments to achieve it. A person thinking about whether a stairwell is lit “by either natural or artificial” light—although completely self-evident—has less capacity to think about something more important. Focus on A, as Robert K. Merton observed, and you do not see B.⁷¹ When designing systems, Sweller concludes, “redundant information should be omitted to preclude an extraneous cognitive load.”⁷² Getting things done requires focus on the challenge at hand, not trudging down a bureaucratic checklist.

Highly functioning modern organizations, such as Toyota, have institutionalized a process of continuous improvement (known by the Japanese term “kaizen”), where workers constantly strive for better ways to do things and then communicate their findings throughout the organization.⁷³ A mindset of learning from continuous trial and error achieves understanding in each worker, not just mindless compliance, and pays off in results, as Toyota has demonstrated. On the other hand, most people can’t read or understand a computer instruction manual. I certainly can’t. Can you?

Bureaucracy is the world’s largest instruction manual—a self-enclosed system where every detail is laid out in words, whether needed or not, and regardless to its importance to accomplishing a public goal. Bureaucratic rules also tend to be poorly written and contradictory. Instead of providing multiple pathways to a goal and allowing people to find the best ways to get there, bureaucracy imposes one “correct” way, and fails, among other reasons, because people can’t internalize it.

⁶⁹ Ibid. at pp. 141-49.

⁷⁰ Ibid. at p. 148.

⁷¹ Robert K. Merton, “Bureaucratic Structure and Personality,” *Social Forces*, Vol. 18, No. 4 (May 1940), p. 562.

⁷² Sweller, et al., *Cognitive Load Theory*, supra note 61 at p. 141.

⁷³ See Steven J. Spear, *Chasing the Rabbit: How Market Leaders Outdistance the Competition and How Great Companies Can Catch Up and Win* (McGraw-Hill, 2008).

Friedrich Hayek understood that the human capacity to make advances in “nearly all...social phenomena” requires taking most things for granted and only dealing with the hurdle before you, quoting Alfred North Whitehead: “It is a profoundly erroneous truism...that we should cultivate the habit of thinking what we are doing. The precise opposite is the case. Civilization advances by extending the number of important operations which we can perform without thinking about them.”⁷⁴

Bureaucracy causes alienation as well as failure. By pulling people away from their natural instincts towards complicated criteria, bureaucracy imposes severe psychological and cultural costs. Working, as Studs Terkel observed, is about the “search...for daily meaning as well as daily bread.”⁷⁵ People derive dignity and satisfaction from the ways that they do their jobs. In his studies of waitresses, plumbers, and other manual jobs, Mike Rose exposes the complexity and know-how required to do these jobs well.⁷⁶ Professor Philip Jackson’s studies on successful teachers reveal how little they have in common, and how success hinges on many subtle factors.⁷⁷ People are energized by the satisfaction of drawing on all their instincts to achieve good things—teaching students, healing patients, having a cheerful relationship with a customer, finding and fixing the leak. People who get into a “flow” of doing things in their way find that work is both invigorating and satisfying—they flourish, to use Nobel laureate Edmund Phelps’s term.⁷⁸

Burnout is another side effect of a bureaucratic system that denies people the opportunity to take initiative and solve problems in their own ways. Psychologist Christina Maslach and colleagues have found that one of the main causes of burnout is “lack of control”—“when workers have

⁷⁴ Friedrich Hayek, “The Use of Knowledge in Society,” *American Economic Review*, Vol. 35, No. 4 (Sept. 1945), p. 528.

⁷⁵ Studs Terkel, *Working: People Talk About What They Do All Day and How They Feel About What They Do* (New Press, 1997), p. xi.

⁷⁶ Mike Rose, *The Mind at Work: Valuing the Intelligence of the American Worker* (Viking, 2004).

⁷⁷ Philip W. Jackson, Robert E. Boostrom, and David T. Hansen, *The Moral Life of Schools*, new ed. (John Wiley & Sons, 1998).

⁷⁸ Edmund Phelps, *Mass Flourishing: How Grassroots Innovation Created Jobs, Challenge, and Change* (Princeton University Press, 2013).

insufficient authority over their work or are unable to shape the work environment to be consistent with their values.”⁷⁹

The prerequisite to satisfying work is that people have a sense of ownership in how they do things. That’s what allows them to have the dignity of making a difference. “Few things help an individual more than to place responsibility upon him,” Booker T. Washington noted. “Every individual responds to confidence.”⁸⁰ Conversely, as Hayek observed: “Nothing makes conditions more unbearable than the knowledge that no effort of ours can change them.”⁸¹

Broad voter anger and alienation at Washington should not surprise us: Bureaucracy denigrates human self-worth.

3. Bureaucracy Subverts the Rule of Law

The purpose of law is to enhance freedom. By prohibiting bad conduct, such as crime or pollution, law liberates each of us to focus our energies on accomplishing our goals instead of protecting ourselves from abuse. Societies which protect property rights and the sanctity of contracts enjoy far greater economic opportunity and output, Douglass North found, than those which do not enforce the rule of law.⁸²

The main mechanisms of law are supposed to be protective, not prescriptive. Law provides legal walls on the edges of a free society which, by guarding against abuse, define and safeguard the

⁷⁹ John Rampton, “The 6 Causes of Professional Burnout and How to Avoid Them,” Forbes.com, May 13, 2015. See also Michael P. Leiter and Christina Maslach, “Areas of Worklife: A Structured Approach to Organizational Predictors of Job Burnout,” from *Research In Occupational Stress and Well Being, Volume 3: Emotional and Physiological Processes and Positive Intervention Strategies*, Pamela L. Perrewe and Daniel C. Ganster, eds. (Emerald Publishing Limited, 2003).

⁸⁰ Booker T. Washington, *Up From Slavery: An Autobiography* (Doubleday, Page & Co., 1907), p. 172.

⁸¹ Friedrich Hayek, *The Road to Serfdom*, Bruce Caldwell, ed. (University of Chicago Press, 2007), p. 128.

⁸² Douglass C. North, “Transaction Costs, Institutions, and Economic Performance,” International Center for Economic Growth, Occasional Papers, No. 30, May 1992.

field of our freedom. As Isaiah Berlin put it, law provides “frontiers, not artificially drawn, within which men should be inviolable.”⁸³

Bureaucracy too aims to be protective—striving to prevent bad conduct by setting rules in advance. But it does this by supplanting freedom. Bureaucracy protects the egg by killing the goose. Its suffocating rulebooks and procedures smother the freedom that people need to accomplish their goals.

Modern bureaucracy is built upon three misconceptions about the rule of law:

The myth of clear law. Both liberals and conservatives demand detailed rules as a matter of received wisdom. The motivation in each case is mutual distrust. Liberals see detailed rules as the way to shackle corporate malefactors.⁸⁴ Conservatives see detailed rules as the way to prevent officials from abusing their powers.⁸⁵ The theory is that detailed law achieves clear legal boundaries.⁸⁶

But it doesn’t work: Thousand-page rulebooks do not achieve legal clarity. Sometimes law can be both precise and clear, as with speed limits or effluent discharge limits. But for most human activity, words are insufficient to capture the complexity of a situation. Too many words usually

⁸³ Isaiah Berlin, “Two Concepts of Liberty,” from *The Proper Study of Mankind: An Anthology of Essays*, Henry Hardy and Roger Hausneer, eds. (Farrar, Straus and Giroux, 1998), p. 236.

⁸⁴ See discussion in Howard, *Try Common Sense*, supra note 3 at pp. 64-68. But see Ralph Nader, *The Seventeen Solutions: Bold Ideas for Our American Future* (Harper, 2012), p. 3 (“The more complex the laws are, the more shenanigans the corporations are likely to attempt”).

⁸⁵ See discussion in Howard, *Try Common Sense*, supra note 3 at pp. 59-64. See, e.g., Brian Z. Tamanaha, “The Dark Side of the Relationship Between the Rule of Law and Liberalism,” *NYU Journal of Law and Liberty*, Vol. 33 (Jan. 2008), pp. 519-24. See also generally Richard H. Fallon, Jr., “‘The Rule of Law’ as a Concept in Constitutional Discourse,” *Columbia Law Review*, Vol. 97, No. 1 (Jan. 1997), p. 14 (“The ideal if not necessary form of ‘law’ is that of a ‘rule,’ conceived as a clear prescription that exists prior to its application and that determines appropriate conduct or legal outcomes”).

⁸⁶ Hayek, while eloquently espousing the role of human choice in all accomplishment, advocated putting public choices in a legal straightjacket: “Government in all its actions [should be] bound by rules fixed and announced beforehand”: Hayek, *The Road to Serfdom*, supra note 81 at p. 112. (Hayek later recanted, finally understanding that the judgment of the official or judge was essential to preserve the freedom of judgment by citizens: Friedrich Hayek, *Law, Legislation and Liberty, Volume 1: Rules and Order* (University of Chicago Press, 1973), p. 116.)

obscure or even impede regulatory goals.⁸⁷ No human can comprehend thick rulebooks, such as the 4,000 detailed rules in federal worker safety law. Studies have shown that perfect compliance with hundreds or thousands of rules is literally impossible, even for large companies with giant legal staffs. J.P. Morgan Chase employs thousands of lawyers, yet constantly runs afoul of regulators. Small businesses cannot know, much less comply with, all of these requirements, leading to a predictable pattern of involuntary noncompliance.⁸⁸

Clarity in law is usually achieved not with precise rules but with goals and principles that people can readily understand and internalize. “Standards that capture lay intuitions about right behavior,” Richard Posner observes, “may produce greater legal certainty than a network of precise but technical, nonintuitive rules.”⁸⁹ There “may be more of honest truth in the inspiring generality,” legal philosopher Frederick Pollock observed, than in “many an arid” rule.⁹⁰ These general goals and principles are enforced by officials who apply accepted norms of reasonableness.

The unfairness of uniformity. Most legal scholars also accept as received wisdom that uniform application of rules ensures that law is fair. To the contrary, by not letting responsible people take specific circumstances into account, mechanical application of rules usually guarantees unfairness. Disciplining an eight-year-old under “zero tolerance” laws for bringing to school a plastic soldier carrying a rifle is absurd.⁹¹ So too is a life prison sentence for someone who stole

⁸⁷ See, e.g., Frederick Schauer, “Formalism,” *Yale Law Journal*, Vol. 97, No. 4 (Mar. 1988), p. 542 (“By limiting the ability of decisionmakers to consider every factor relevant to an event, rules make it more difficult to adapt to a changing future. Rules force the future into the categories of the past...A decisionmaker can never exceed the optimal result based on all relevant factors. Thus, a rule-bound decisionmaker, precluded from taking into account certain features of the present case, can never do better but can do worse than a decisionmaker seeking the optimal result for a case through a rule-free decision”).

⁸⁸ See discussion in Howard, *The Rule of Nobody*, supra note 9 at pp. 36-38.

⁸⁹ Richard A. Posner, *The Problems of Jurisprudence* (Harvard University Press, 1993), p. 48.

⁹⁰ Frederick Pollock, “The Methods of Jurisprudence,” from *Oxford Lectures and Other Discourses*, (MacMillan and Co., 1890), as paraphrased in Benjamin Cardozo, *The Growth of the Law* (Yale University Press, 1963), p. 142.

⁹¹ See e.g., Associated Press, “School Bans Hat Over Toy Soldiers’ Guns,” CBS News, June 18, 2017. See also discussion in Howard, *Try Common Sense*, supra note 3 at pp. 77-82.

three golf clubs, under a “three strikes and you’re out” law, because of prior theft convictions.⁹² Balancing conflicting public goals is much of what government is called upon to do—acting as traffic cops in a crowded society. Rigid law is synonymous with injustice. As Justice Benjamin Cardozo put it, “Justice...is a concept by far more subtle and indefinite than any that is yielded by mere obedience to a rule.”⁹³

Fear of abusive decisions. Precise law, the theory goes, prevents officials from acting arbitrarily or corruptly. To the contrary, the inability of mortals to comply with thousands of rules puts arbitrary power into the hands of each official. That’s part of why Americans go through the day looking over their shoulders. Is your paperwork in order?

Most officials are not inclined to abuse their authority, but, even so, the effect of too many precise rules means that regulation is enforced arbitrarily. In studying Illinois nursing home regulation, John Braithwaite found that government inspectors focused on only a small percentage of the rules, and which rules varied from inspector to inspector.⁹⁴ Studies of corruption conclude that the best protection is to give responsibility to officials to use their judgment when making regulatory judgments.⁹⁵ When the spotlight shines on decisions by a particular official, he is less likely to try to get away with misconduct.

The error of legal philosophy that helped spawn modern bureaucracy was that law can function without human judgment. Law achieves trust, and supports practicality, only when applied with human values and understanding.⁹⁶ “The first requirement of a sound body of law,” Oliver

⁹² Linda Greenhouse, “California’s 3-Strikes Law Tested Again,” *New York Times*, November 6, 2002.

⁹³ Cardozo, *The Growth of the Law*, supra note 90 at p. 87.

⁹⁴ John Braithwaite, Toni Makkai, and Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar, 2007). See also John Braithwaite, “Rules and Principles: A Theory of Legal Certainty,” *Australian Journal of Legal Philosophy*, Vol. 27 (Oct. 2002).

⁹⁵ See, e.g., State-City Commission on Integrity in Government, “Report and Recommendations Relating to City Procurement and Contracts,” November 19, 1986, p. 67 (finding that corruption “thrive[s] in the confusion and opacity of procurement laws”). See generally Frank Anechiarico and James B. Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective* (University of Chicago Press, 1998).

⁹⁶ Howard, *The Rule of Nobody*, supra note 9 at pp. 62-74.

Wendell Holmes, Jr. said, “is that it should correspond with the actual feelings and demands of the community.”⁹⁷ Law achieves this by allowing people to draw on norms of fairness and reasonableness at the point of implementation. Hayek at the end of his career understood this: “[J]udicial decisions may in fact be more predictable if the judge is...bound by generally held views of what is just, even when they are not supported by the letter of the law....”⁹⁸ Otherwise law is brittle, and words of law are parsed for selfish purposes. Legal philosopher Jeremy Waldron puts it this way: “The Rule of Law is, in the end,...a human ideal for human institutions, not a magic that somehow absolves us from human rule.”⁹⁹

Remaking Law to Support Human Flourishing

Rigid rules work no better for law than central planning does for an economy. The reason is the same: As Hayek put it, “the knowledge of the particular circumstances of time and place” requires that humans be free to make choices on the spot.¹⁰⁰

Law is different from the marketplace in that it is enforced by coercive state power, not by the aggregate of “decentralized planning by many separate persons.”¹⁰¹ Law thus requires mechanisms to guard against arbitrary or unfair enforcement. But protecting against arbitrary legal choices, like other choices, also requires “the knowledge of the particular circumstances of time and place.” Just as “zero tolerance” and mandatory sentencing laws basically mandate unfairness, so too removing the power of an environmental official over the scope of review will practically guarantee higher costs to taxpayers and cause environmental damage by prolonging bottlenecks with unnecessary delay.

Freedom is concentric: Your freedom is dependent on the freedom of choice by people up and down the hierarchy of responsibility. Only if the official is free to decide what’s practical in a

⁹⁷ Oliver Wendell Holmes, Jr., *The Common Law*, revised ed. (Dover, 1991), p. 41.

⁹⁸ Hayek, *Law, Legislation and Liberty*, supra note 86 at p. 116.

⁹⁹ Jeremy Waldron, “The Rule of Law and the Importance of Procedure,” from *Getting to the Rule of Law*, James E. Fleming, ed. (New York University Press, 2011), p. 25.

¹⁰⁰ Hayek, “The Use of Knowledge in Society,” supra note 74 at p. 521.

¹⁰¹ Ibid.

particular instance will the citizen be free to be practical in the same situation. If the teacher isn't free to maintain order in the classroom, based on her perceptions of who is misbehaving, then the disruption caused by the breakdown of authority will deprive students of their freedom to learn. If the supervisor isn't free to make personnel decisions, based on her perceptions of who is doing the job well, the energy and camaraderie of the office culture will dissipate like a deflating balloon, as everyone realizes that work performance doesn't matter; why be the chump who stays late and makes sure things work well? If the judge isn't free to dismiss a lawsuit when Johnny breaks his leg while horsing around at recess, then schools will ban running (or end recess altogether).

There's no reason why regulatory frameworks must deny people the ability to adapt to the circumstances before them. Find any governing activity that works—say, a successful public school, or an infrastructure project that got built on time and within budget, or successful agencies such as the federal Centers for Disease Control—and you will find responsible public employees who take ownership for daily choices, instead of mindlessly complying with rules.¹⁰² The FAA does an excellent job certifying the airworthiness of new planes, Nobel laureate Paul Romer concludes, because it lacks prescriptive rules and relies on the responsibility of regulators, while the federal worker safety agency is a tangle of detailed prescriptions. “Air travel is much safer,” Romer observes, “than working on a construction site.”¹⁰³

Creating a principles-based framework of regulation is far simpler, in all respects, than striving to dictate choices in every conceivable setting. Australia in the 1980s replaced a detailed rulebook on nursing homes with 31 general principles—for example, to provide a “homelike environment.”¹⁰⁴ Within a short period, the quality of nursing homes materially improved. One advantage was to liberate operators to focus on the residents, not compliance with the rules.

¹⁰² See, e.g., Philip K. Howard, *Life Without Lawyers: Restoring Responsibility in America* (W.W.Norton, 2009), pp. 93-121 and Howard, *Try Common Sense*, supra note 3 at pp. 63, 97.

¹⁰³ Paul M. Romer, “Process, Responsibility, and Myron’s Law,” in *In the Wake of the Crisis: Leading Economists Reassess Economic Policy*, Olivier Blanchard, et al., eds. (MIT Press, 2012) p. 121.

¹⁰⁴ Braithwaite, et al., *Regulating Aged Care*, supra note 94.

They could readily internalize general goals and principles. Instead of spending their days with noses in rulebooks, operators could be sensitive to the needs of the person in front of them.¹⁰⁵

Giving officials room to use their common sense doesn't mean they can decide whatever they want. A legal structure of principles lets citizens and officials use their judgment in "the particular circumstances of time and place" while still confining their range of choice. Law, like freedom, is structured as a corral. Legal philosopher Ronald Dworkin described the bounds of authority this way: "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."¹⁰⁶

Whether an official has transgressed some legal principle should not be a question of objective compliance, but should be decided by the judgment and perceptions of other officials up a hierarchy of authority. A simpler legal framework can provide as many checks and balances as seem prudent and practical, but they all must ultimately rest on human judgment. Using a human hierarchy to oversee decisions also reduces the incidence of flawed decisions that Kahneman and Tversky found with isolated individuals. To guard against unfair firings, for example, Toyota convenes co-workers to get their views.¹⁰⁷

Success is a struggle requiring continual choices, not a fixed march on a parade ground. Studies of highly-functioning modern organizations demonstrate how continual adaptation, using trial and error, is the secret to success.¹⁰⁸ Markets derive much of their energy from the tension of risks and potential failure. Hayek described some typical travails of making any business work: "To know of and put to use a machine not fully employed, or somebody's skill which could be better utilized, or to be aware of a surplus stock which can be drawn upon during an interruption

¹⁰⁵ Ibid. See also Howard, *Try Common Sense*, supra note 3 at pp. 43-56, 77-84 and Florentin Blanc, "From Chasing Violations to Managing Risks: Origins, Challenges, and Evolutions in Regulatory Inspections," doctoral thesis, Universiteit Leiden, 2016, pp. 243-44 (comparing UK and EU worker safety inspection regimes, and speculating that the UK's less prescriptive approach is both cheaper and more effective).

¹⁰⁶ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), p. 31.

¹⁰⁷ See Spear, *Chasing the Rabbit*, supra note 73.

¹⁰⁸ Ibid.

of supplies” requires “constant deliberate adjustments, . . . in the light of circumstances not known the day before, by *B* stepping in at once when *A* fails to deliver. Even the large and highly mechanized plant keeps going largely because . . . it can [deal with] all sorts of unexpected needs; tiles for its roof, stationery for its forms, and all the thousand and one kinds of equipment . . . which the plans for the operation of the plant require to be readily available.”¹⁰⁹

Daily decisions in government also require daily adaptation, including, paradoxically, to achieve the goal of legal predictability. Governing choices are less noticeable to the general public because the goal is to maintain boundaries of a free society, not to make widgets or involve government in the daily lives of free people. Indeed, it is precisely the interference of prescriptive bureaucracy in daily choices that precludes the adaptive choices described by Hayek. But to people who are interacting with government, its ability to make sensible choices is critical. Just as a factory must constantly respond to new circumstances, so too providing services consistent with legal boundaries requires judgments in the circumstances. Law is like the edge of a forest that borders the field; the line of trees has a clear definition from a distance but is not exactly straight and even as you get closer. The Fourth Amendment protects against “unreasonable searches and seizures” and, as a result, most of us don’t go to bed in fear of state agents barging into our homes. But neither could we describe the nuances of the application of the Fourth Amendment, as applied by countless judicial rulings.

What’s important for law to support a free society is that the edge of the forest generally aligns with norms of right and wrong. That requires constant calibration by officials and judges to avoid abuse and ineffectiveness. As Justice Benjamin Cardozo put it, “the curse of this fluidity, of an ever shifting approximation, is one that law must bear”¹¹⁰; trying “to supply in advance for every conceivable situation the just and fitting rule”¹¹¹ will result in “curses yet more dreadful.”¹¹²

¹⁰⁹ Hayek, “The Use of Knowledge in Society,” *supra* note 74 at pp. 522, 524.

¹¹⁰ Cardozo, *The Growth of the Law*, *supra* note 90 at p. 68.

¹¹¹ Benjamin Cardozo, *The Nature of the Judicial Process* (Universal Law Press, 2010), p. 60.

¹¹² Cardozo, *The Growth of the Law*, *supra* note 90 at p. 68.

The resulting uncertainty at the edges of legal application tends to incentivize most people to stay away from sharp or selfish practices. A gray area of legality will drive most people to operate near the center, further reinforcing social trust and enhancing social capital. With the Australian nursing homes, for example, the operators, regulators, and other stakeholders had different visions of what constitutes a “homelike environment,” but it was precisely the uncertainty of how those disagreements might get resolved that gave all stakeholders an incentive to sit down and strive for reasonable accommodations.

What’s different here is not simply abandoning “one-size-fits-all” rules, but, most radical to the modern legal mind, allowing the decisions to be made without objective proof. As in a market setting, people will make choices based on what they feel is appropriate. How do you prove what’s fair in a particular setting? Or which teachers are ineffective because they bore their students? As in other settings in a free society, people must be free to make judgments about other people, and on up the line.

Giving people back the freedom to act on their best judgment requires abandoning the utopian dream of perfect fairness and uniformity. As in the marketplace, giving people responsibility to meet public goals is not a guarantee of success. Some people will have bad judgment and bad values. People will disagree, on practically every issue. But trying to preempt that disagreement with dense rulebooks enervates democracy. Conversely, democracy is energized by disagreement; that’s why people want to get involved. Democracy requires not mindless compliance but officials free to act on their values of practicality and morality, accountable up the hierarchy and ultimately to voters. The giant bureaucratic blob, by contrast, is immune to the will of the people, makes sensible choices illegal, and drives alienated voters into the arms of strongmen.

There’s nothing radical about the workings of judgment-based regulation, which are probably shared by every well-functioning organization in human history. The main challenge for change will be cultural. Officials are mired in a culture that fears change and views taking subjective responsibility the same as jumping off a cliff. In these situations, Paul Romer explains, it is more

effective to start new institutions than to wrestle the old culture into submission.¹¹³ For example, the Dayton-Hudson retail company started an entirely new division, Target, rather than trying to build a discount chain within the existing premium-priced group of stores. By giving William Penn the land grant for Pennsylvania, King Charles II gave Penn the opportunity to build a culture with new norms of religious tolerance and individual freedom.¹¹⁴ Moving most agencies out of Washington to other cities, I have suggested, will provide an opportunity to rebuild regulatory cultures with a healthy influx of new people who are not mired in the old bureaucratic ways.¹¹⁵

Leaving aside totalitarian systems, our options for an operating philosophy for modern government are either a rigid bureaucratic system that ossifies bad choices, stifles innovation, and is morally obtuse, or an open framework of goals and principles that gives people sufficient room to succeed (or fail) in meeting them. The rigid system encourages people to find cracks in legal structures to make selfish demands, and engenders distrust and alienation. The open framework encourages arguments over right and wrong, and, so long as voters are attracted to practical leaders with good character, engenders trust, social capital, and the opportunity to flourish.

The best cure to citizen alienation is citizen ownership. Americans must feel free to make sense of their daily choices, to deal with officials who also can be practical, and to elect leaders who can govern in a way that responds to voter desires and needs. That's why America should abandon modern bureaucracy and rebuild a governing framework grounded in human responsibility.

¹¹³ Paul M. Romer, "Technologies, Rules, and Progress: The Case for Charter Cities," Center for Global Development, March 2010.

¹¹⁴ Paul M. Romer and Brandon Fuller, "Cities from Scratch: A New Path for Development," *City Journal*, Autumn 2010.

¹¹⁵ Howard, *Try Common Sense*, supra note 3 at pp. 144-45.