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Chapter 8

F. A. Hayek and the Administrative State

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This chapter examines the role of the administrative state in F. A. Hayek's analysis of political institutions. Its primary purpose is to make explicit an implicit positive theory of the administrative state that runs throughout Hayek's writing on political economy. This theory is composed of three related claims. The first states that the separation of powers is vital to ensuring that the actions of the administrative state are bound by the rule of law. The second claim states that unrestricted democratic control of the administrative state leads to the expansion of the scope and complexity of its activities. The third claim states that this expansion of activity makes democratic control of administration increasingly difficult.

In clarifying this theory of the administrative state—that is, a theory of what government agencies do and why they do it—this chapter also argues that Hayek's theory is worth being taken seriously by contemporary bureaucracy scholars. His theory is readily intelligible to contemporary institutional analysts in its methodological emphasis on individual action under rule-like constraints. Its contribution to contemporary scholarship is to provide a framework for rigorously analyzing one of the classic yet recently understudied problems in the study of administration: how, if possible, to separate politics from administration. This classic problem of separating professional yet accountable administration from the whims of politics and ideology has largely been abandoned by contemporary students of bureaucracy. Scholars now tend to accept a "policy-neutral bureaucracy" (Brehm and Gates 1999, 4) or the possibility of "neutral compliance" with statute (Gailmard and Patty 2007) to be a chimera. This is not without good reason as scholars have come to understand how information asymmetries (Crawford and Sobel 1982; Niskanen 1971), inherent biases of bureaucrats (Prendergast 2007), problems incentivizing bureaucrats to acquire expertise (Bendor and Meirowitz

2004; Callander 2008; Gailmard and Patty 2007), imperfect screening and monitoring technologies (Brehm and Gates 1999; Huber and Shipan 2002), the potential for agency capture (Wilson 1989), and political processes associated with the design and operation of agencies (Arnold 1979; Gailmard 2009; Lewis 2008; McCubbins, Noll, and Weingast 1987; Moe 1989) combine to make the possibility of separating the administrative sphere from the political sphere seem impossible. These features of bureaucrats, bureaucracies, and the political environments they inhabit, however, should not lead scholars to neglect the theoretical importance of the apolitical bureaucracy in a democratic society. Suleiman (2003) observes that as the apparatus charged with implementing public policies and delivering public services in an effective and just manner, a nonpolitical and professional bureaucracy is an indispensable institution for both the development and maintenance of the democratic state. Hayek's theory of the administrative state provides an entry point for reexamining this important question with the tools of contemporary institutional analysis. The next three sections address in turn each of the three major claims that make up Hayek's theory of the administrative state. A final section discusses how Hayek's three claims together offer contemporary scholars of bureaucracy a model for revisiting the separation of politics and administration in a rigorous fashion.

SEPARATION OF POWERS AND ADMINISTRATION UNDER THE RULE OF LAW

This section identifies and discusses the first of three claims in Hayek's theory of the administrative state. This first claim is that the strict separation of legislation and governance, provided that there exists a strong judiciary to enforce the separation of powers, is sufficient to support administration that is bound by the rule of law.

In *The Political Ideal of the Rule of Law* (1955) and *The Constitution of Liberty* (1960), Hayek offers a general analysis of political institutions. His third lecture in *The Political Ideal of the Rule of Law* is devoted to identifying institutional arrangements that are capable of supporting the rule of law. For Hayek, the separation of powers is a crucial feature of a free society's political institutions. In particular he emphasizes the importance of an independent judiciary to check the powers of the legislature:

The significance of the demand for the separation of powers is fairly clear in so far as the relation between legislature and judicature is concerned. The principle that the general rules should be laid down apart from their application to particular instances almost requires that these distinct tasks should also be performed

by distinct groups of people. This is perhaps not the only conceivable but almost certainly the only practicable safeguard that the rules are not made to fit particular instances but because of their general significance. (Hayek 2014, 168)

Hayek doubts whether an independent executive branch of government coequal with the judiciary and legislature is compatible with the rule of law. In order for an independent executive branch to fit into a political institutional framework that supports the rule of law, all coercive acts that the executive takes against citizens must be subject to judicial review and bound by general rules laid down by the legislature. Whether such an executive can justifiably be given the power to create and enforce rules is a matter that concerns democracy more than the rule of law. So long as executive branch agencies make general rules that can be reviewed by the judicial branch, delegation poses no threat to the rule of law, although delegation of rulemaking authority by the democratically elected legislature to unelected bureaucrats may be objectionable as antidemocratic. Delegation becomes problematic for the rule of law when an administrative agency is given discretion such that its actions take the force of law. Under such a delegation scheme, "authorities are in effect given power to wield coercion without rule, because no general rule can be formulated for the exercise of the powers in question" (2014, 170).

The Constitution of Liberty develops at greater length the arguments Hayek makes in *The Political Ideal of the Rule of Law*. Hayek reiterates the importance of the separation of powers for preserving the rule of law and the need to ensure that administrative actions are both reviewable by the courts and limited to rule making and rule enforcement. He adds to this a clarification of the type of judicial review of agency action that supports the rule of law. Hayek observes that most countries have legal provisions by which individuals can dispute administrative action through the court system. These provisions, however, often confine the scope of appeals to the question of whether or not the agency had the authority to act in the way that it did. If the law said that everything a certain authority did was legal, it could not be restrained by a court from doing anything. What is required under the rule of law is that a court should have the power to decide whether the law provided for a particular action taken by an agency.

In the *Constitution of Liberty*, Hayek provides a partially institutional account of the decline of the rule of law in Europe and the United States in the late nineteenth and early twentieth centuries. An important part of this narrative is the rise of the autonomous administrative state. In the American case, Hayek argues that progressive thought on public administration and governance combined with efforts by administrators to expand their agencies accounts in part for the growth of government and the increasing degree of arbitrary discretionary authority granted to the bureaucracy. The tendency

for the bureaucrats to attempt to acquire greater discretion and command of resources from the government follows from the incentives that the task of administration provides for them. In directing and allocating its resources to the needs of the community, an agency must decide on what tasks are most important and on the means of executing these tasks. Hayek writes that

the tendency of the professional administrators concerned with these tasks is inevitably to draw everything they can into the service of the public aims they are pursuing. It is largely as a protection of the private citizen against this tendency of an ever growing administrative machinery to engulf the private sphere that the rule of law is so important today. (Hayek 2011, 324)

Hayek refines his analysis of the separation of powers in *Economic Freedom and Representative Government* (1973) and volumes one and three of *Law, Legislation, and Liberty* (1973; 1979). In his earlier work, Hayek emphasizes the importance of subordinating administration to legislative constraint and judicial review. He is agnostic as to whether administration is a responsibility of the government that should be carried out by a body independent of the legislature in a society governed by the rule of law. Where this is a separate executive branch, delegation of rulemaking power is compatible with the rule of law as long as such rules are reviewable.

In his writing in the 1970s, Hayek argues for a much more explicit separation of administration and legislation. As he did earlier in *The Constitution of Liberty*, Hayek attempts to identify the characteristics of a political institutional framework capable of supporting the rule of law. He takes the position that the tasks of laying down general rules and of directing the particular activities of government should be carried out by separate elected bodies. One elected body, a legislative assembly, should be made responsible for making law in the form of general rules. This power to make rules should be exclusively carried out in the legislative assembly. Delegation of rulemaking authority to the bureaucracy, a potentially expedient option for the legislature in Hayek's earlier writing, is now impermissible in his model constitution. Where Hayek was similarly ambivalent regarding the role of the legislature in governance in his earlier writing, his updated position is that the legislature should have no direct executive authority. A separate elected body, a governmental assembly, would be responsible for everyday administration. Having no rulemaking authority of its own, the governmental assembly would determine the organization of government, how to use the means placed at its disposal, and the character of the services to be rendered by government (1973, 21). The governmental assembly would have authority to raise revenue through taxation but this action, like all of its permissible actions, would be limited to the enforcement of general rules passed by the

legislative assembly. Legislative acts and administrative actions would both be reviewable by an independent judiciary.

This strict separation of legislation and governance accomplishes two primary objectives vital to the preservation of the rule of law. First, separation of these two functions allows for the two branches of government to specialize in their respective areas. When the two tasks are combined in the same body as they are in most Western democracies, legislators are not able to devote sufficient time and resources to acquiring the detailed expert knowledge required to make law. Relieving the legislature of its administrative obligations allows its members to specialize in the difficult task of crafting general rules. Second, separation of powers provides a check on the expansion of state authority. Bound by legislation and deprived of the authority to craft law itself, the governmental assembly acts as an independent agent of the legislative assembly. The legislature has no say in the performance of specific actions that the governmental assembly takes. The governmental assembly has no say in determining the bounds on its coercive activities or the broad social objectives that it is to pursue. Were either of these constraints on the authority of the two bodies to be relaxed, law could easily be produced to serve the momentary purposes of the government. If those who decide on particular issues can make for any purpose whatever law they like, they are clearly not under the rule of law.

Compared to this later work, Hayek's analysis of how political institutions support the rule of law in *The Constitution of Liberty* is rather broad. The rule of law is protected by constitutional provisions that mandate that all rules made by legislators or their bureaucratic agents be stated as general rules. The pivotal institution that constrains these actors is an independent judiciary with the authority to review and nullify legislative acts or government actions that violate the constitution. There is little to be critiqued about the capacity of this institutional configuration to support the rule of law on its own terms. The constitution essentially says that the rule of law is the principle by which society is to be governed and a strong apolitical judicial branch ensures that the government is prevented from getting away with actions that violate the constitution. Without relaxing the assumption that the judiciary's rulings are strictly enforced or that it acts apolitically, this institutional framework may potentially fail to work effectively if the judiciary's resources are outpaced by government violations of the constitution. Outside of this concern, however, the assumption of a strong judiciary and a rule-of-law constitution are trivially sufficient to support the rule of law. What happens to the rule of law when these relatively strong assumptions are relaxed? Hayek's subsequent institutional analysis explores just this.

In volume three of *Law, Legislation, and Liberty* Hayek appears to relax the assumption that the constitution restricts all state action to the making

and enforcing of general rules. Although Hayek does not explicitly frame his analysis in terms of relaxing this assumption, it is clear that the need for separation of powers to extend to executive and legislative responsibilities arises from modifying this assumption about the constitution. The point of strictly separating legislation and governance is to prevent one body from having the power to make its own actions lawful. If a non-amendable constitutional principle exists limiting government to general rule making and rule enforcement, there is no risk of one branch establishing arbitrary rule in the presence of a strong judiciary. The court would strike down any arbitrary rule or action and the political environment characterized by stable rule of law from *The Constitution of Liberty* prevails. The effect of relaxing the strong judiciary assumption, however, is ambiguous. If either the government or the legislature can violate the constitution, then a constitutional requirement preventing either branch from taking particular actions is meaningless. The institutional analysis is held together by the ability of the judiciary to enforce the law.

By relaxing the strict assumption that the constitution binds the state to make and enforce general rules, Hayek relies on the separation of powers between the legislative assembly and government assembly to maintain the rule of law. Here Hayek needs to assume that the division of responsibility between the two branches can be enforced. The legislature is prohibited from taking action against or in the service of private citizens and the government cannot write rules. Without the power to create rules, the governmental assembly should work as Hayek intends it to. Its actions can never take the force of law and are always reviewable by the court. Arbitrary action by the governmental assembly is prevented by construction given a strong judiciary. The tendency of administrators to attempt to expand the scope of their own authority is similarly checked by the constitutional separation of bureaucrats from the rulemaking process.

It is less clear whether a strong judiciary can similarly constrain a legislature whose actions are strictly confined to writing rules. Even if a court could prevent the legislature from engaging in direct governance, would there be anything preventing the legislature from indirectly using the government to achieve its momentary arbitrary aims? Presumably an arbitrary rule could be written by the legislature that the government would be compelled to enforce. The rule could potentially be struck down on the grounds that the constitution mandates that the legislative assembly only make general rules. This cause for prohibiting arbitrary rule crafting, however, throws out the reason for having separation of powers in the first place. If the courts can force the legislature to only make general rules, then the political environment is essentially the same as that of *The Constitution of Liberty*. In such an environment, separating legislation and governance may still have desirable

effects on law and policy by allowing specialization, but there would be no additional need to use separation in order to support the rule of law.

Alternatively, a non-general rule drafted by the legislative assembly may be struck by the court on the grounds that it is a violation of the separation of powers. A specific rule is an effective act of governance that the legislature is constitutionally forbidden from taking. The core assumption here is that separation of powers is a constitutional provision that courts can enforce. Hayek's accomplishment in the model constitution of *Law, Legislation, and Liberty*, therefore, is to find an institutional or procedural solution to a constitutional problem. If the state is not constitutionally bound to explicitly obey the rule of law as such, the separation of rulemaking and rule enforcement provides procedural conditions that prevent the creation of arbitrary rules.

From a theoretical perspective, replacing one strong assumption about the enforceable content of the constitution with a similarly strong assumption may be problematic. If courts are assumed to be strong enough to enforce constitutional provisions, why write a more institutionally complicated constitution? A reasonable answer to this concern is that there are many imaginable circumstances in which a constitution that mandates the rule of law may not be available to an institutional designer. Politics is a messy conflict-ridden process. The first-best trivial solution to establishing the rule of law, even in an unrealistic world in which courts can perfectly enforce the constitution, is unlikely to emerge from any noncooperative process of constitutional design. Institutional or constitutional reforms that procedurally amend lawmaking and governance in a society may also be more likely than deeper constitutional changes that redefine the role of government. Moreover, separation of powers is an institutional arrangement that across time and space has been found to function as more than mere constitutional window dressing. A large literature in comparative politics examines the ways in which different varieties of the separation of powers substantively influences political processes and outcomes across democracies (Laver and Shepsle 1999; Linz 1994; Londregan 2000; Samuels 2009; Shugart and Carey 1992). It may also be realistic to think that courts can be strong enough to resolve disputes between two branches of government according to procedures specified in a constitution but not strong enough to bind the government as a whole. However it specifically comes about, a circumstance in which separation of powers can be established in a constitution and actually enforced is hardly unimaginable. Although executive and legislative authority is not separated specifically along the lines that Hayek suggests in any contemporary democracy, there exist numerous stable democracies with strong judicial branches in which executive and legislative powers are constitutionally separated (Lijphart 1999; Widner 2001). Similar working examples of societies in which government is

effectively bound to adhere to the rule of law or a similar general principle by constitutional provisions are difficult to find.

The conclusion regarding administration and the rule of law that can be drawn from this analysis is relatively straightforward. Setting aside the issue of whether government and legislation are carried out through democratic means or not, Hayek's claim is that the constitutional separation of these two activities and a strong judiciary are sufficient to support non-arbitrary public administration. The strict separation of government and legislation in Hayek's model constitution that engenders non-arbitrary administration is essentially the same politics-administration dichotomy that appears in Woodrow Wilson's (1887), Frank Goodnow's (1900), and Max Weber's (1948) foundational theoretical analyses of bureaucracy. Wilson (1887) draws an analytical distinction between government and administration that closely maps onto Hayek's distinction between legislation and governance. For Wilson, "the broad plans of governmental action are not administrative; the detailed execution of such plans is administrative" (1887, 212). Goodnow echoes this distinction, separating the elected legislative government from the professional executive government (1900, 17). With this distinction, Wilson makes an argument similar to Hayek's regarding the role of a constitution in checking the potential threat posed to liberty by the administrative state. "Liberty," he writes, "cannot live apart from constitutional principle; and no administration, however perfect and liberal its methods can give men more than a poor counterfeit of liberty if it rests upon illiberal principles of government" (Wilson 1887, 212). Constitutions and the institutional arrangements they define structure the extent and nature of government activity. The separation of politics and administration—or in Hayek's terms the separation of legislation and government—is an important arrangement for the preservation of liberty. Voters and their representatives are too ill-informed or improperly incentivized to be trusted with the power to directly manage administration. Wilson concludes that "although politics sets the tasks for administration, it should not be suffered to manipulate its offices (1887, 210)."

Hayek and Wilson differ somewhat regarding the appropriate way that administration should be organized. While not denying that economies of scale in some domains of administrative action could make centralization an efficient use of resources, Hayek speaks favorably about the potential benefits of delegating certain tasks to local administrative authorities ([1994] 2007, 107). Wilson, however, saw centralization as a key structure in the executive of efficient administration (Ostrom 2008, 24). The two also place different limits on the scope that government activity should take in a free society. These disagreements aside, Hayek and Wilson can both be read as engaged in the problem of fostering effective rule-bound administration by separating the administrative sphere from the political sphere.

In Weber's ideal-typical bureaucracy, the separation of politics from administrative activities emerges from the core features of the bureaucracy. Merit-based recruiting standards, the treatment of government service as a vocation or career, clear hierarchies, written operating procedures, and the vesting of authority in specific positions rather than specific individuals are features of administrative organizations that foster apolitical professionalism. As Suleiman (2003) notes, for Weber, "the politics-administration dichotomy is based on a division of labor that assumes the bureaucracy's loyalty to the government of the day as well as to the even-handed, professional implementation of policies."

Like Hayek, Weber understood that this class of nonpolitical professional administrators could develop and defend interests of its own that may conflict with the requirements of democracy. The two differ, however, in their analysis of this problem. Hayek begins with administrative self-interest and prescribes separation of powers as a check on the capacity of bureaucrats to pursue these interests. For Weber, the separation of powers helps to define the parochial interests of the bureaucracy by creating a class of professional administrators. Despite this potential problem created in part by the politics-administration dichotomy, Weber ultimately concludes along with Hayek that the separation of powers is a necessary condition for the preservation of both democracy and a market economy.

The consequences of the self-interest of professional administrators is a topic that economists and public choice theorists attempted to understand after Weber. The behavioral assumption in most of these studies before the late 1970s matches Hayek's (Gailmard and Patty 2012). Whether for the purpose of self-enrichment or to aid in the execution of tasks in their domain of administrative responsibility, bureaucrats were often assumed to want to maximize the total amount of resources allocated to them. Mises (1962, 87), for example, asserts that "the bureaucrat as voter is more eager to get a raise than to keep the budget balanced." Tullock (1965, 147) similarly writes that "all bureaucrats, whether successful or not, thoroughly approve of an expansion of the whole bureaucracy." Downs (1967) shares this assumption for most types of bureaucrats. In the most systematic and influential early rational-choice approach to bureaucracy, Niskanen (1971) assumes that bureaucrats maximize the size of their agency's budget.

This behavioral assumption has received considerable criticism (Blais and Dion 1991; Migue and Balanger 1974). Accordingly, contemporary models of bureaucracy generally treat bureaucrats as policy preference maximizers rather than resource maximizers (Gailmard and Patty 2012). The implications of this for how bureaucrats prefer to expand their resources and domain of activity can be ambiguous. Working outside of a strict rational choice approach to bureaucracy, James Wilson (1989) observes that there is little

evidence that agencies universally seek to expand their size or resource base. Some agencies do this and these agencies receive considerable attention. Plenty of agencies, however, quietly go about their business without attempting to increase their discretion or command of government resources. Larger budgets and greater responsibilities can reduce an agency's autonomy (Carpenter 2001) as this expansion brings about higher expectations and oversight from political principals, draws more public attention to agency activities, creates new sources of conflict with other agencies or private actors, and often makes the tasks the agency is charged with carrying out more complex. If an agency desires political support and the autonomy that comes with it, the agency is best off keeping its tasks simple, its rivals non-existent, and constraints to a minimum.

How sensitive is Hayek's analysis of the separation of politics and administration to the problematic assumption that administrators have a tendency "to draw everything they can into the service of the public aims they are pursuing?" It appears to be hardly important at all. The rule of law is threatened by the combination of legislation and governance in the same body regardless of the goals of administrators. If an agency is asked to execute an arbitrary police action against a specific class of citizens; for example, and it carries out this task perfectly without pressing for more resources or discretion, the rule of law is nonetheless violated.

As this discussion has made clear, Hayek's theory of the administrative state features at its core an understanding in common with seminal early theories that the separation of politics and administration is a causally relevant institutional arrangement for fostering professional, rule-bound, and nonpolitical administration. Hayek expands on these foundational works by moving his analysis back one step further. Rather than simply working out the consequences of the politics-administration dichotomy on what government agencies do and why they do it, Hayek takes the sustainability of this dichotomy as problematic in the presence of rational self-interested actors and provides an institutional mechanism—the separation of powers in the presence of a strong judiciary—that allows the separation of politics and administration to arise endogenously. Unlike similar rational-institutional theories of administration that emerged around the time Hayek published *Law, Legislation, and Liberty*, Hayek's argument withstands the weakening of a problematic assumption that it had in common with these early theories, namely, the assumption that bureaucrats seek to maximize their budgets and expand the scope of their responsibilities. The following two sections discuss what becomes of administration when separation of executive and legislative authority breaks down. In particular, they examine what Hayek sees as the consequences combining both powers in a single democratic body.

UNLIMITED DEMOCRACY AND THE EXPANSION OF THE ADMINISTRATIVE SPHERE

This section and the following section address the issue of democratic control of government separately from that of maintaining the rule of law. While the two concerns are closely related in Hayek's writing, they are conceptually separable.¹ The focus of this section specifically is Hayek's claim that in the absence of the separation of powers, majority rule enables the arbitrary expansion of administrative authority.

Hayek's earliest analysis of political institutions comes out of his writing on the political economy of planning and deals directly with the complicated relationship between democratic governance and the execution of administrative objectives. In "Freedom and the Economic System" (1939) and *The Road to Serfdom* ([1944] 2007), Hayek argues that democratic governance and economic planning are incompatible. Democratic political institutions only function effectively where there is considerable room for agreement among elected representatives. Accordingly, the scope of government activity in a democracy is best confined to those domains over which agreement can be reached. Democratic planning demands that individuals and their representatives agree on the relative importance of different social ends. This requires citizens and their representatives to agree on almost everything. As a consequence of the inability of democratic assemblies to produce a unitary plan to centrally organize the economy, political pressure arises for discretionary authority to be delegated to administrative officials. The nature of the task of planning, moreover, places strong centralizing pressure on the state bureaucracy. Delegation of specific planning powers to separate agencies creates a potential coordination problem between agencies. The most readily available solution to this problem is to make a single agency responsible for the entire plan.

Hayek notes that delegation in general by a democratic assembly to an agency is not inherently antidemocratic. Central planning, however, is not a responsibility that can be delegated to an agency without endowing it with decision-making powers that undermine democracy:

So long as the power that is delegated is merely the power to make general rules, there may be very good reasons why such rules should be laid down by local rather than by the central authority. The objectionable feature is that delegation is so often resorted to because the matter in hand cannot be regulated by general rules but only by the exercise of discretion in the decision of particular cases. In these instances delegation means that some authority is given power to make with the force of law what to all intents and purposes are arbitrary decisions. (Hayek [1994] 2007, 107)

In *The Road to Serfdom*, Hayek shows that even when freed from the constraints of the rule of law, a government is incapable of central economic planning by democratic means. Arbitrary authority may be exercised, but only under highly unrealistic conditions can majority consensus be formed over the set of arbitrary actions that should be taken to organize all production that takes place in a society. Hayek's jump from the impossibility of democratic planning to the inevitability of delegated planning in *The Road to Serfdom* follows from the structure of his analysis. His task is to take a particular goal, state economic planning, and identify which institutional arrangements are capable of supporting this goal and which are not. Whether the response of a democratic government to its inability to centrally coordinate production would be to leave its goal unchanged and delegate planning authority to an agency or to abandon the goal of planning in the interest of maintaining democracy were it free to do so is not clear in *The Road to Serfdom*. His subsequent writings on democracy in the absence of the constraints of the rule of law focus on the latter case in which planning is no longer the objective.

In volume three of *Law, Legislation, and Liberty*, Hayek argues that the expansion and bureaucratization of democratic governments in the nineteenth and twentieth centuries follows from this failure to institutionally separate law making and governance. Legislators in possession of the authority to make law and direct specific administrative actions are pressured by electoral concerns to cater to specific interests. In the absence of a check on their ability to make a government action legal or to take such an action in the first place, there is little to prevent democracy from becoming all-encompassing.

Although detrimental to the rule of law, arbitrary government action is not necessarily antidemocratic if democratic actions are defined as those authorized by a majority of citizens or their representatives. Moreover, the delegation of the authority to act arbitrarily within a particular domain to an unelected bureaucracy is compatible with democratic administration as long as the majority retains final authority to override the bureaucracy's action. Assuming that this possibility of override is maintained, what are the effects of democratic administration? If legislation and governance are not separated, the primary consequence of democratic administration is the expansion of the size of the state and the scope of its activities. Representatives of various constituencies and interest groups can legally carry out whatever government action they so choose as long as a temporary majority can be secured. The growth of government is still checked by the requirement that government action and legislation be approved by majority consensus. As Hayek observes in *The Road to Serfdom*, there is a limit to how all-encompassing the domain of democratic government action can be. However, the constraint

on the growth of government imposed by democracy is likely to be far less restrictive than that implied by the strict separation of governance and legislation in Hayek's model constitution.

Whether the expansion of arbitrary state authority is more pronounced in a democracy than in other types of politics when legislation and governance are combined is not clear in Hayek's writing. Regardless of the choice rule by which laws and government actions are legitimized, the combination of governance and legislation in the same body opens the door for the unchecked growth of arbitrary state administration. Autocrats and oligarchs would likely be just as ambitious as democratic majorities to use political means to attain their preferred ends. How limited the growth of government would be across political regimes in the absence of strict separation of powers will depend presumably on the specific procedural rules used to generate lawful government action. This interaction between decision-making rules and the scope of government activity has received considerable attention from political scientists and economists (Agranov and Palfrey 2015; Buchanan and Tullock 1962; Meltzer and Richard 1981; Roberts 1977; Romer 1975). Hayek's institutional analysis, while not directly contributing substantively to this literature, may provide a qualification for some of its main conclusions by pointing out that the effect of decision-making rules on the size of government is conditional on the effective combination of legislative and governmental authority in the hands of decision makers.

This second claim, like his first claim, is readily intelligible to contemporary institutional analysts. It is a causal claim that takes self-interested actors as given and connects an institutional arrangement—democratic administration—to a political outcome—growth of administrative responsibility. The institutional causal structure of Hayek's claim makes it possible for contemporary analysts to apply contemporary methodological tools, in particular formal theory, to assess the veracity of his claim under various conditions.

DEMOCRATIC CONTROL OF COMPLEX ADMINISTRATION

This section considers Hayek's third and final major claim regarding the administrative state: the expansion of administration into more complex and all-encompassing domains makes democratic control of administration impossible. In *Law, Legislation, and Liberty*, Hayek works out the consequences of the unchecked expansion of administrative responsibility into any feasible domain of private life so long as a temporary majority can be assembled to charge the bureaucracy with a new task:

Democracy, at the same time at which it seems to become all-engulfing, becomes on the governmental level an impossibility. It is an illusion to believe that the people, or their elected representatives, can govern a complex society in detail. Government relying on the general support from a majority will of course still determine the major steps, so far as it is not merely driven to these by the momentum of its previous proceedings. But Government is already becoming so complex that it is inevitable that its members, as heads of the various departments, are increasingly becoming puppets of the bureaucracy, to which they will still give "general directions," but on the operation of which the execution of all details depends. It is not without reason that socialist governments want to politicize the bureaucracy, because it is by it and not in any democratic body that more and more of the crucial decisions are made. (Hayek 1979, 144-45)

While Hayek's claim that government expansion makes effective control over administration increasingly difficult is made as a warning regarding the consequence of democratic administration in the absence of the rule of law, the central logic of his claim appears to be much broader, applying to non-democratic regimes as well. The logic of his claim is rooted in an informational problem in which citizens or their representatives cannot possess the knowledge needed to democratically control the administrative state once the tasks it is charged with become sufficiently complex. This resembles a fairly standard principal-agent problem. If an agent is more well-informed than his or her principal about an underlying state of the world on which policy outcomes depend, this creates space for the agent to strategically manipulate the information he or she shares with a principal to obtain outcomes more favorable to him- or herself than those that would prevail were the principal able to make a decision with the same information possessed by the agent. In other words, an information asymmetry creates conditions for bureaucratic drift—that is, a circumstance in which the bureaucracy's actions diverge from those that the principal prefers it takes. Intuitively, as policy complexity—modeled as the severity of the informational asymmetry or the variance of the underlying state of the world—increases, informed policymaking comes at the price of greater bureaucratic drift and therefore less principal control over ultimate policy outcomes. Under certain regularity conditions, this intuition is largely corroborated in formal models of legislative-agency relations (Alonso and Matouschek 2008; Bendor and Meirowitz 2004; Epstein and O'Halloran 1999; Gailmard 2009; Gailmard and Patty 2007; Huber and McCarty 2004; Huber and Shipan 2002). These basic results clearly hold for any principal, regardless of whether he or she is a median voter or an autocrat.

A more nuanced separation of democracies and non-democracies may concern whether or not direct policy-making authority can be delegated to an agent. Following Hayek, democratic majorities would need to retain the power to ultimately choose policy while non-democratic decision makers

would be allowed to delegate the policy choice to an unelected agent. Alonso and Matouschek (2007) and Callander (2008) provide thorough formal treatments of this distinction. Callander's model in particular works out its implications for legislative control of government action and resulting policy. While the results of the model do not directly address bureaucratic drift as a function of policy complexity or the ability of the principal to commit to delegation, its results imply that if principals are free to choose the policy preferences of the agency, bureaucratic drift can be more problematic for democracies than non-democracies. A more direct formal analysis of this problem across regimes is needed to provide a more definitive answer to this question. Such a comparative formal analysis of institutions will also help to clarify the logic underlying Hayek's claim that democracy becomes impossible when it becomes all-encompassing. As for his previous two claims, the institutional logic of Hayek's informal claims makes his claims highly amenable to formalization.

It should be noted that Hayek's third claim requires some degree of conflict between the will of a democratic assembly and the interests of administrators. If bureaucrats and politicians had the exact same interests, bureaucratic drift would generally not be an issue. The conflict he identifies as particularly salient is the ambition of bureaucrats to expand their responsibilities and resources. Like the first claim, the third claim is not dependent on the potentially weak assumption that conflict over budgets and the scope of administration prevails. As the above discussion of principal-agent problems makes clear, conflict over most preferred policy outcomes is sufficient to allow bureaucratic drift to increase as the complexity of the tasks an agency is charged with executing grows. Following Wilson (1989), it is quite conceivable that bureaucrats who exclusively value policy outcomes would prefer to leave their agency's budget alone. Greater oversight, criticism, and responsibility may prevent the agency from bringing about its most preferred outcomes in a narrower and less conflictual domain of policy.

While Hayek's third claim is generally corroborated by the formal bureaucracy literature, a series of influential papers in the American politics literature suggests that the significance of this drift may be muted by oversight institutions and administrative procedures. Weingast and Moran (1983) argue that the institutions of Congress such as committees, interests groups, and ex-post sanctions enable Congress to effectively provide strong incentives for bureaucrats to obey legislative orders. McCubbins and Schwartz (1984) identify two types of bureaucratic oversight, "police patrols" and "fire alarms." The former refers to active monitoring of the bureaucracy by Congress. The latter describes an institutional structure of oversight in which citizens and interests groups can file complaints against the bureaucracy when it violates a legislative statute. Police patrols are costly for Congress,