

Online Book Review

WHO ARE YOU CALLING IRRATIONAL?†

Aneil Kovvali

WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM. By Cass R. Sunstein. New Haven, CT: Yale University Press, 2014. Pp. 195. \$25.00.

ABSTRACT—Nudges are interventions that encourage people to make particular choices by shaping the context in which the choices are made. These interventions can have major impacts because of quirks in the way that human beings process information. Cass Sunstein places nudges at the core of a regulatory philosophy of “libertarian paternalism,” which suggests that while the government should generally preserve the freedom of citizens to make their own choices, it should also intervene to improve on the choices it deems self-destructive. In *Why Nudge?*, Sunstein defends libertarian paternalism against John Stuart Mill’s Harm Principle, which holds that the government is only justified in coercing a person when it is acting to prevent harm to others. This Review uses an analogy to voting paradoxes to show that the type of quirks exploited by nudges can occur whenever people attempt to reconcile multiple, inconsistent goals. The fact of inconsistent goals also means that regulators deploying nudges must select their own objectives. Absent a harm to others, the legitimacy of such a selection is open to question. Legislatures are also structurally prone to many of the same quirks as individuals, meaning that governments must adopt troubling institutional arrangements to root out irrationality. Given the breadth and flexibility of the Harm Principle, there is little reason to abandon it.

AUTHOR—Associate, Wachtell, Lipton, Rosen & Katz. The views expressed in this Review are my own, and do not necessarily represent the views of the firm or its clients. This Review is dedicated to Professor Daniel Meltzer, a great teacher and mentor.

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INTRODUCTION

Cass Sunstein is the leading advocate of “nudges”—small policy interventions that yield major impacts because of behavioral quirks in the way that people process information. Such interventions form the core of Sunstein’s philosophy of “libertarian paternalism,” which seeks to improve on individuals’ decisions while preserving their freedom to choose. In *Why Nudge?*, Sunstein forcefully defends libertarian paternalism against John Stuart Mill’s famous Harm Principle, which holds that government should only coerce a person when it is acting to prevent harm to others. Sunstein urges that, unlike more coercive measures, nudges respect subjects’ goals, even as they reshape their choices. Using an analogy to voting paradoxes, this Review shows that reconciling multiple, inconsistent goals is a fundamentally challenging problem that leaves even deliberative individuals vulnerable to manipulation through nudges. The fact of inconsistent goals means that government regulators who deploy nudges select and impose their own objectives, instead of merely advancing the goals of the regulated. The analogy also highlights that multimember legislative bodies are subject to many of the same quirks as individuals, raising questions about the government’s ability to improve on individuals’ choices.

Part I of this Review introduces nudging and summarizes Sunstein’s analysis. Part II uses a hypothetical based on voting paradoxes to build intuition about seemingly irrational preferences, and ultimately concludes that regulators who deploy nudges will inevitably apply their own preferences instead of advancing the goals of those who are nudged. Part III uses an analogy to the concept of enumerated powers to argue that paternalistic approaches can be offensive even if they are implemented without injury to an individual. Part IV argues that paternalistic approaches can often only be pursued within a troubling institutional context. Part V argues that, in many respects, these difficulties are specific to nudging.

I. WHY NUDGE?

Classical economic models are peopled with unusual beings. The “Econs” posited by these models are hyperrational creatures who absorb all available information, discard irrelevant superficialities, process the relevant information correctly, and adopt strategies that optimally advance their clear and consistent interests.¹ In recent decades, psychologists and social scientists have increasingly recognized that we “Humans” do not behave like Econs. Humans do not absorb all available information, and we process the information we do absorb in ways that are inconsistent or irrational. As a result, our choices are often influenced by the context in which questions are presented to us, even when the context conveys no relevant information. “Choice architecture,” including such seemingly irrelevant details as placement of an item in a buffet, prominence of a disclosure, or selection of the default option, can thus have a powerful impact on the choices that Humans make.²

In *Nudge*, Cass R. Sunstein and coauthor Richard H. Thaler suggested that these observations created enormous opportunities for regulators. They introduced the concept of a “nudge”: an intervention that would have little impact on an Econ, but could change the behavior of a Human.³ A nudge, like a tailored disclosure or an altered default, could cause the Humans it touches to adopt different behaviors, including behaviors that advance Humans’ own interests. Thaler and Sunstein placed nudges at the center of a new regulatory philosophy, which they termed “libertarian paternalism.”⁴ In their view, nudges were libertarian because they avoid heavy-handed penalties (which would not be nudges because of the impact they would have on an Econ) and thus preserve freedom of choice. And nudges could be used in a thoughtfully paternalistic fashion “to influence choices in a way that will make choosers better off, *as judged by themselves*.”⁵

Sunstein and Thaler’s ideas have gained currency. Since President Reagan, presidents have issued executive orders requiring certain new rules promulgated by administrative agencies to undergo a centralized review process focused on cost–benefit analysis.⁶ Among other innovations,

¹ See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6–7 (2d ed. 2009).

² *Id.* at 4–13.

³ *Id.* at 8.

⁴ *Id.* at 5.

⁵ *Id.*

⁶ See, e.g., Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1994) (President Clinton’s order stating, “In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.”), reprinted as amended in 5 U.S.C. § 601 app. at 89 (2012); Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1982) (President Reagan’s order

President Obama's version of the executive order called for consideration of nudges by requiring agencies to "identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible."⁷ Sunstein himself worked to implement these ideas from a high level perch in the Obama Administration as the head of the Office of Information and Regulatory Affairs.

Released shortly after his emergence from government service, *Why Nudge?* builds on Sunstein's earlier ideas and works to justify them to a broader audience.⁸ Sunstein frames his argument as a response to John Stuart Mill's famous Harm Principle: "government may not legitimately coerce people if its goal is to protect them from themselves."⁹ Sunstein focuses on one justification for the Harm Principle, the "Epistemic Argument": "[b]ecause individuals know their tastes and situations better than officials do, they are in the best position to identify their own ends and the best means of obtaining them."¹⁰ He then attacks the Epistemic Argument, citing the type of behavioral findings discussed above.¹¹ These findings suggest the existence of "behavioral market failures," in which individuals fail to maximize their own welfare.¹² Like "standard market failures of the sort that support the most conventional roles of government,

stating, "Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."). President Reagan's order had historical antecedents. See Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. (SPECIAL EDITION) 37, 40–62 (2011) (providing a history of regulatory review from President Johnson to President Carter).

⁷ Exec. Order No. 13,563, 3 C.F.R. 215, 216 (2012), *reprinted as amended in* 5 U.S.C. § 601 app. at 104 (2012). The order also called for the analysis of "equity, human dignity, fairness, and distributive impacts." *Id.* As this Review originally went to press, President Obama issued a directive supplementing Executive Order 13,563 and encouraging the use of insights from behavioral science in the regulatory process. Echoing Executive Order 13,563, the directive encouraged agencies to "improve how information is presented to consumers"; "identify programs that offer choices and carefully consider how the presentation and structure of those choices . . . can most effectively promote public welfare, as appropriate, giving particular consideration to the selection and setting of default options"; and "consider how the timing, frequency, presentation, and labeling of benefits, taxes, subsidies, and other incentives can more effectively and efficiently promote [specific] actions," "such as saving for retirement or completing education programs." Exec. Order No. 13,707, 80 Fed. Reg. 56,365, 56,365–66 (Sept. 15, 2015).

⁸ CASS R. SUNSTEIN, *WHY NUDGE?: THE POLITICS OF LIBERTARIAN PATERNALISM* (2014) [hereinafter SUNSTEIN, *WHY NUDGE?*]. *Why Nudge?* is based on Sunstein's Storrs Lecture at Yale Law School. See Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826 (2013).

⁹ SUNSTEIN, *WHY NUDGE?*, *supra* note 8, at 3.

¹⁰ *Id.* at 7.

¹¹ *Id.* at 25–50.

¹² *Id.* at 34.

such as the provision of national defense, antitrust law, environmental protection, and a system of justice committed to the rule of law,” these behavioral market failures justify government action.¹³

Sunstein then seeks to deepen his analysis by adding new dimensions to the concept of libertarian paternalism. He first develops the libertarian aspect by distinguishing between “hard” and “soft” tools: “a statement that paternalism is ‘hard’ would mean that choice architects are imposing large costs on choosers, whereas a statement that paternalism is ‘soft’ would mean that the costs are small.”¹⁴ He then develops the concept of paternalism by distinguishing between “means” paternalism and “ends” paternalism: ends paternalism seeks to dictate goals, while means paternalism seeks to aid people in pursuing the goals that they have chosen for themselves.¹⁵ Sunstein argues that paternalism that is soft¹⁶ and means-oriented¹⁷ avoids the concerns that animate the Harm Principle.

II. “IRRATIONAL” PREFERENCES

Though a distinction between means and ends paternalism is attractive, it rapidly proves illusory. Sunstein recognizes that ends paternalism—telling people what their best interests are, not just how to pursue them—is especially troubling. He reassuringly asserts that “behavioral economists have not sought to revisit people’s ends, and their findings do not support ends paternalism.”¹⁸ But he immediately admits that the distinction raises “hard questions,”¹⁹ and ultimately reveals that it turns entirely on “the level of generality at which people’s ends are to be described.”²⁰ If the end is described as a desire “for life to go well,” then all paternalism is means paternalism.²¹

This in itself is troubling, since there is no ready formula for determining when an objective is stated with enough precision.²² And Sunstein exposes the flimsiness of the distinction by suggesting that when it is difficult to distinguish between means and ends, regulators should

¹³ *Id.* at 115.

¹⁴ *Id.* at 57.

¹⁵ *Id.* at 61–63.

¹⁶ *Id.* at 143.

¹⁷ *Id.* at 157–59.

¹⁸ *Id.* at 63.

¹⁹ *Id.*

²⁰ *Id.* at 70.

²¹ *Id.*

²² *Cf.* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 911–13 (2004) (arguing that there is no judicially manageable standard for determining whether a statute or administrative rule has sufficient precision).

instead aim to “increase people’s aggregate welfare over time.”²³ If there is a distinction between the end of maximizing “aggregate welfare over time” and having “life . . . go well,” it is not readily apparent.

Even if the distinction between means and ends can be made to work in some instances, Sunstein himself acknowledges that it “may not be tractable”²⁴ when individuals seem to have one preference (e.g., healthy living), but also others (e.g., cigarettes, whiskey, and peanut butter cookies). In other words, the distinction does not work when multiple, inconsistent sets of preferences can be inferred from a person’s choices.

Of course, this is precisely the domain on which nudges operate: a nudge can only work on a person who expresses different preferences in different contexts. It is also an expansive domain—multiple, inconsistent preferences are unavoidable in many situations where multiple factors are relevant to a choice, even if the chooser is fully informed and deliberative.

Imagine a high school senior, Susan, who has applied to three colleges: Amherst, Bowdoin, and Carleton. While awaiting the results, Susan finalizes her research and begins to plan her decision in the event that she is accepted to more than one school. Based on the available information, she draws up the following rankings for the subject areas that interest her:

Economics	Political Science	History
1. Amherst	1. Bowdoin	1. Carleton
2. Bowdoin	2. Carleton	2. Amherst
3. Carleton	3. Amherst	3. Bowdoin

She resolves that if she receives two acceptance letters, she will consult her rankings and discard the letter from the college that wins in fewer categories. For example, if she receives acceptance letters from Amherst and Bowdoin, she will note that Amherst outperforms Bowdoin in Economics and History, while Bowdoin outperforms only in Political Science. As a result, she will discard the letter from Bowdoin.

She further resolves that if she receives a third letter, she will compare it to the surviving letter from the first two. So if she receives acceptance letters from Amherst and Bowdoin, and later Carleton, she will first discard the letter from Bowdoin as described above. Once the offer from Carleton arrives, she will compare it to the surviving offer from Amherst and apply the same analysis. Noting that Carleton outperforms Amherst in Political

²³ SUNSTEIN, WHY NUDGE?, *supra* note 8, at 70.

²⁴ *Id.*

Science and History, while Amherst outperforms only in Economics, she will discard the letter from Amherst.

Susan's approach is not "irrational" in the colloquial sense. She has gathered and organized a broad range of information, synthesized it, and brought it to bear on a complex question. The resulting preferences are predictable, not random.²⁵ It follows that Susan's preferences are deserving of respect.

But Susan's choices also have a curious quality. If she receives letters from Amherst and Bowdoin alone, she will choose Amherst. If she receives letters from Bowdoin and Carleton alone, she will choose Bowdoin. But if she receives letters from Amherst and Carleton, she will choose Carleton. It follows that if she receives acceptance letters from all three colleges, her ultimate choice will depend on the order in which the letters are received: If she receives letters from Amherst, then Bowdoin, then Carleton, for example, she will choose Carleton; if she receives letters from Bowdoin, then Carleton, then Amherst, she will choose Amherst; if she receives letters from Amherst, then Carleton, then Bowdoin, she will choose Bowdoin; and so on. Susan's choice will depend on the context in which it is presented, even though the context conveys no relevant information.

In other words, Susan is a Human, not an Econ, despite her careful collection and analysis of all available information, and despite her stable preferences. As discussed in greater detail below, this type of irrationality is an inevitable feature of decision processes like Susan's. Indeed, it may

²⁵ The discussion in the text focuses on a type of procedural rationality. Susan followed a deliberative approach in making her decision. Susan's decision is also substantively rational in the sense that any choice that she might make is defensible: each school has greater strength in ranking over the others in at least one area. Substantive and procedural reasonableness are distinct but related concepts. When a decisionmaker is faced with a broad range of reasonable options, reviewing courts often focus on the procedures that were used to make a selection. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that courts evaluating agency action "may not supply a reasoned basis for the agency's action," even if one is available, but must instead evaluate the explanation given); *United States v. Ingram*, 721 F.3d 35, 37–45 (2d Cir. 2013) (Calabresi, J., concurring) (highlighting a possible procedural issue in a criminal sentence while acknowledging that it was substantively reasonable, and noting that such procedural issues are material, partly for behavioral reasons). In other words, when a number of alternative choices are reasonable, review focuses on whether the choice was well reasoned. A more deliberative and formal procedure can also persuade reviewing courts to accept decisions that would otherwise be seen as substantively unreasonable. *See id.* at 45 ("The closer a sentence comes to the boundary of the substantively reasonable, the more attentive will (and should) our procedural scrutiny be."); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 546–47 (2006) (providing evidence "that the procedural formality of an agency decision can buy the agency more deference from the reviewing court"). For Susan, the fact that there is no "wrong" choice on the selection of colleges implies that there is a need to focus on the manner in which her choice was made. If Susan somehow made an unusual or questionable choice, skepticism regarding her thought process would be natural.

be impossible to aggregate multiple factors in a way that avoids this type of irrationality.²⁶ But Susan's irrationality renders her susceptible to nudges.

Suppose that Susan's father Pat is aware of her approach to college selection. An Amherst graduate, Pat is convinced that deep down, Susan wants to attend Amherst because of the superior experience it offers. So when the letters arrive from Amherst, then Carleton, then Bowdoin (which would lead Susan to select Bowdoin), he surreptitiously intercepts them before Susan has an opportunity to collect them. While he is unwilling to actually destroy a letter or limit the choices available to Susan, he is willing to manipulate the context in which her choices are made. So he delivers the letters to Susan in a different order: Bowdoin, then Carleton, then Amherst. After receiving the letters in this order, Susan, predictably, selects Amherst.

Pat might defend his actions by channeling *Why Nudge?*. First, he might suggest that he had not meaningfully intervened in Susan's decision. After all, "[c]hoice architecture is inevitable."²⁷ Every choice is made in a context, whether the context has been deliberately manipulated or not. Susan was going to receive the letters in one order or another, and her choice would be driven by that order. While Pat may have manipulated the choice architecture within which Susan made her decision, he did not impose costs on one choice or another. As a result, Pat may insist that Susan was free to make her own decision, and that the changed outcome was simply an expression of Susan's own preferences.

Second, Pat might assert that there had been no injury to Susan. It may be tempting to suggest that Susan does have an injury. If $u(B)$ is the enjoyment or utility she would derive from selecting Bowdoin, and $u(A)$ is the utility she would derive from Amherst, Pat's manipulation resulted in a loss of utility of $u(B) - u(A)$. But as shown above, there are circumstances under which Susan will choose Amherst despite having the option of choosing Bowdoin, suggesting that $u(A) > u(B)$. Perhaps more strikingly, there are also circumstances under which Susan will choose Bowdoin despite having the option of choosing Amherst, suggesting that it is also true that $u(B) > u(A)$. Since these points cannot be reconciled, the only conclusion to be drawn is that Susan's preferences cannot be distilled into a utility function, $u(x)$, meaning that it is impossible to conceptualize an

²⁶ See *infra* notes 39–40 and accompanying text. This point has significant implications for the basic concept of nudging. A nudge is an intervention that has little to no consequence for an Econ. But certain types of preferences are not reconcilable through any process meeting basic desirable criteria. A person with such preferences would be affected by choice architecture, even if that person had the infinite intelligence and discipline of an Econ.

²⁷ SUNSTEIN, *WHY NUDGE?*, *supra* note 8, at 118.

injury, $u(B) - u(A)$. As a result, Pat might argue that his action did not harm Susan or invade her rights.²⁸

Pat's first argument is more easily defeated than the second. The same logic that demonstrates the absence of an injury demonstrates that the outcome of Susan selecting Amherst is not an expression of an innate preference for Amherst. Under some circumstances, Susan will behave as if $u(A) > u(B)$, but in others she will behave as if $u(B) > u(A)$. As a result, Pat cannot defend his actions as merely facilitating some inner preference. The features of Susan's decisionmaking process that render her susceptible to nudges defeat any such claim about her preferences. Thus, while Pat's exercise of power is not coercive, it is an exercise of power.

This point has resonance in the real world. In some contexts, an individual might say he wants to lose weight. In other contexts, he might say he wants peanut butter cookies. While a government official may choose to encourage the former preference instead of the latter, it is a choice made by the government official.²⁹ Sunstein tries to present nudging as facilitating a person's own true preferences. But a government official who nudges has made a decision of her own for her own reasons, and that decision must be defended on its own terms.

III. ENUMERATED POWERS

It is more difficult to counter the other argument in Part II that Pat did nothing wrong because he did not injure Susan or invade her rights. But a response might be found by shifting the focus from Susan's rights to Pat's power. Even though it would be difficult to criticize Pat's behavior by urging that Susan had a right to attend Bowdoin or that it was infringed upon, it might be possible to criticize Pat's behavior by asking what entitled him to exercise power in the first place. In sum, there is a conceptual basis for criticizing an exercise of power that does not turn on an identifiable injury or invasion of an individual's rights. To concede that

²⁸ Of course, Susan did receive the letters later than she otherwise would have. But this relatively minor injury does not seem to get at the gravamen of Pat's offense. It may also be possible to suggest that Susan has a right to a manipulation-free choice of colleges. If it is assumed that Susan has such a right, then it is trivially easy to conclude that nudges like Pat's are improper. Sunstein appears to concede as much when he acknowledges that a "thick" conception of autonomy "is, in a sense, a show-stopper. If people have to be treated as ends rather than as mere means, and if this principle requires government not to influence private choices on paternalistic grounds, there is not a lot of room for further discussion." SUNSTEIN, WHY NUDGE?, *supra* note 8, at 133.

²⁹ The basic point that nudging requires the government to adopt its own vision of ideal outcomes is not new. *See, e.g.*, Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1269 (2005) ("Sunstein and Thaler's welfarist approach will inevitably result in the imposition of some conception of welfare on irrational people that some subset would surely find objectionable under conditions that permit rational evaluation.").

Susan was not “injured” by Pat’s actions in any traditional sense is not to concede that Pat was entitled to act as he did.

The point resonates with the American conception of government as a creature of limited, designated powers. The Constitution creates a federal government, but authorizes it to act only in specifically enumerated areas.³⁰ The federal government is not empowered to act in any way it chooses, subject only to the requirement that it must not invade individual rights. Even where a federal statute does not invade a right belonging to an individual, it can still be improper because it exceeds the powers granted to Congress.³¹

The realm of speech and conscience offers a key example. Though often cast as a *right* to speak and worship freely, the text of the First Amendment is framed as a denial of *power*,³² and this textual framing corresponds precisely to the Amendment’s historical intellectual context, in which speech and religion were deemed outside the limited and enumerated powers of the federal government.³³ Put differently, the First Amendment captures the sense that the American social contract does not delegate to the government power over matters of the mind and soul.

This framing would have been familiar to John Stuart Mill, who also framed the issue in terms of authority and power: “Those who desire to suppress” an opinion “of course deny its truth; but they are not infallible. *They have no authority* to decide the question for all mankind, and exclude

³⁰ See U.S. CONST. art. I, § 8; *id.* art. III, § 2.

³¹ See, e.g., *United States v. Morrison*, 529 U.S. 598, 602 (2000) (concluding that provisions of the Violence Against Women Act of 1994 exceeded Congress’s power under the Commerce Clause and Section 5 of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (concluding that a provision of the Gun-Free School Zones Act of 1990 exceeded Congress’s power under the Commerce Clause).

³² See U.S. CONST. amend. I (“Congress shall make no law . . .”); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 39 (1998) (noting textual parallel between the First Amendment and clauses conferring power on Congress).

³³ AMAR, *supra* note 32, at 35–42; see also Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 369–71 (2002) (describing Locke’s view that individuals could not delegate to the government authority over matters of conscience). For a time, courts sought to express the essentially power-based norms of the First Amendment in terms of individual rights that are appropriate for judicial enforcement. See *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring) (recasting the government’s lack of legitimate power to establish a religion as a right of nonadherents not to feel excluded from the political community in order to permit judicial enforcement of the Establishment Clause in the context of a challenge to Christmas decorations); *Flast v. Cohen*, 392 U.S. 83, 88, 106 (1968) (recognizing taxpayers are injured by, and thus have standing to challenge, use of government funds on religious schools). These holdings have come under continuous pressure since. See *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447–49 (2011) (distinguishing between use of government funds, which create standing to press Establishment Clause claims in federal court, and tax credits, which do not); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (noting that taxpayers do not have standing to challenge executive action on Establishment Clause grounds).

every other person from the means of judging.”³⁴ His Harm Principle more generally fits this model: “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”³⁵

Similarly, critics of nudges rarely speak to the (often questionable) individual rights at stake, and instead discuss the proper role of government. It would be difficult to attack New York City Mayor Michael Bloomberg’s attempt to ban large soda cups on the ground that there is an inalienable natural right to receive a large amount of soda in one very big cup instead of two somewhat big cups.³⁶ But the charge that the restriction went beyond the proper role of government and amounted to “nannying” resonates. Whatever its failings as a descriptive matter, the maxim *de minimis non curat lex*—the law does not concern itself with trifles—is a reasonable slogan for lawmakers. This is not because individuals have profound natural rights with respect to trifling matters, but rather because the state should think twice before intervening in such issues.³⁷

IV. SEPARATION OF POWERS

And of course, the government’s decisions are often no better than those of the individuals it regulates. Legislatures in particular are structurally predisposed toward the same type of irrationality as Susan. As a result, to even attempt to avoid the irrationality endemic to individuals, governments must adopt troubling structural measures that shift power from legislatures to executives.

The analogy between legislative and individual irrationality can be made clear by means of a hypothetical. Consider a committee of three senators deliberating on the location of a government facility. After narrowing the possibilities down to Austin, Boston, and Chicago, the senators each decide on their preferences:

³⁴ JOHN STUART MILL, ON LIBERTY 88 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (emphasis added).

³⁵ *Id.* at 80.

³⁶ *Cf.* SUNSTEIN, WHY NUDGE?, *supra* note 8, at 75–80.

³⁷ The point has a clear economic rationale as well. See JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE FOURTH REVOLUTION: THE GLOBAL RACE TO REINVENT THE STATE 47–56 (2014) (characterizing Mill’s work as part of Victorian England’s reinvention of the state into a more focused and efficient entity).

Sen. Jones	Sen. Smith	Sen. Williams
1. Austin	1. Boston	1. Chicago
2. Boston	2. Chicago	2. Austin
3. Chicago	3. Austin	3. Boston

On this committee, there will be two votes for Austin over Boston, two votes for Boston over Chicago, and two votes for Chicago over Austin. As a result of this cyclicity, the committee's ultimate choice will depend entirely on the sequence in which votes are held.

In the context of voting, this toy example becomes more familiar. It is simply an application of Condorcet's paradox: even simple voting systems have in them the potential for cyclical, and thus irrational, preferences.³⁸ Modern social choice economics has broadened the observation, mathematically proving that it is impossible to create voting systems that yield rational decisions under a wide range of circumstances.³⁹ The only system that can consistently avoid this type of problem is a system in which only one individual's preferences are material to the decisions made.⁴⁰

And that's if every legislator were fully rational and well-informed. The truth is far worse. As Sunstein acknowledges, "elected officials, including those in Congress, may or may not be relying on careful analysis [T]heir own intuitive reactions, and those of their constituents, drive judgments about policy and even legislation."⁴¹ The

³⁸ See Amartya Sen, *Arrow and the Impossibility Theorem*, in THE ARROW IMPOSSIBILITY THEOREM 29, 33–34 (Eric Maskin & Amartya Sen eds., 2014); Partha Dasgupta & Eric Maskin, *On the Robustness of Majority Rule*, in THE ARROW IMPOSSIBILITY THEOREM, *supra* at 101, 104–05 (describing and illustrating Condorcet's paradox).

³⁹ Sen, *supra* note 38, at 33–34 (explaining Arrow's theorem as a generalization of Condorcet's paradox).

⁴⁰ Better results can be obtained if preferences are assumed to be "single-peaked," meaning that each individual's preferences have a single local maximum, and utility decreases as choices move away in any direction from that peak. In that situation, the majority will consistently favor the preferences of the "median voter." These conditions may prevail in certain contexts. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 70 (1991) (arguing that corporate voting rights should be limited to shareholders because they are likely to have similar preferences, thus leading to consistent corporate policies). But they are unlikely to prevail on issues of public policy, particularly on multidimensional problems. See Keith Krehbiel, *Legislative Organization*, 18 J. ECON. PERSP. 113, 114–15 (2004).

⁴¹ SUNSTEIN, *WHY NUDGE?*, *supra* note 8, at 121. Of course, legislators are free to adopt the same analytical techniques relied upon by executive offices. Many federal legislators have expressed a desire to do so. See *generally* MONEYBALL FOR GOVERNMENT (Jim Nussle & Peter Orszag eds., 2014) (essays by several prominent political figures, including two sitting senators, on the application of rigorous effectiveness analysis to legislative and regulatory work). While this desire is commendable, debates over analytical methods appear to be no less controversial than debates over policy. See Josh Zumbrun, *White House Budget Director Blasts GOP 'Dynamic Scoring' Plans*, WALL ST. J. (Jan. 6, 2015, 4:40 PM), <http://blogs.wsj.com/economics/2015/01/06/white-house-budget-director-blasts-gop-dynamic-scoring-plans> [<http://perma.cc/T99Q-493G>] (describing contentious debate over Republican plan to

point is confirmed elsewhere in Sunstein's work. *Why Nudge?* is part of a loose OIRA trilogy: a series of three books produced by Cass Sunstein shortly after his service as Administrator of the Office of Information and Regulatory Affairs (OIRA), and inspired by his work there.⁴² OIRA is an executive office, and once Sunstein was safely ensconced in it, he was insulated from "sewer talk": the kind of crass and illogical political considerations that drive the passage of legislation.⁴³ But before he was confirmed to the office, he had to deal with actual legislators. In eight pages of *Simpler*, he describes the time prior to his confirmation as a surreal experience in which he was subjected to hyperbolic claims from the left and the right, and met with senators who agreed that he would be an excellent choice but refused to vote for him.⁴⁴

The net result is that multimember legislatures cannot be expected to have fully rational policy preferences. Actual legislators are often irrational. And even under ideal circumstances in which every individual legislator is fully rational and well-informed, the work product of the legislature as a whole would be characterized by messy compromises, forged as a result of circumstances that should have no real relevance to good policy.

As a result, government can only improve upon the rationality of its citizens by adopting an institutional framework that deemphasizes the legislature. Congress can make broad delegations of authority to the President, who can then adopt a disciplined approach that ensures that policies are developed in a rational and orderly fashion. As the cockpit of the administrative state, OIRA is the institutional embodiment of this solution. Pursuant to a series of executive orders that generally direct the use of cost-benefit analysis, OIRA guides regulatory agencies in the reasoned use of their essentially open-ended grants of authority from Congress. Sunstein's optimistic view of the capacity of government to improve upon citizens' decisions seems to be informed by his experience within the executive as the head of OIRA. He assures readers that "[w]ithin the *executive* branch in the U.S. government, the long-standing requirement

change the methods used to estimate cost of fiscal measures). There is little reason to believe that a durable consensus on such issues will form, or that it will trump partisan or political preferences on particular policies.

⁴² See CASS R. SUNSTEIN, *VALUING LIFE: HUMANIZING THE REGULATORY STATE* (2014) [hereinafter *SUNSTEIN, VALUING LIFE*]; CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* (2013) [hereinafter *SUNSTEIN, SIMPLER*].

⁴³ *SUNSTEIN, SIMPLER*, *supra* note 42, at 4–6 (stating that he would gently tell staffers who focused on political concerns, "That's sewer talk. Get your mind out of the gutter."); see also *SUNSTEIN, VALUING LIFE*, *supra* note 42, at 6 ("[M]y role was to help implement the law through regulations and . . . I was usually not involved in the enactment of legislation by Congress.").

⁴⁴ *SUNSTEIN, SIMPLER*, *supra* note 42, at 18–26.

of attention to costs and benefits can produce a . . . safeguard against serious mistakes.”⁴⁵ Elsewhere, he writes that “consideration of ‘politics’ is not a significant part of OIRA’s own role.”⁴⁶

Even assuming that OIRA does its work well, this institutional context is troubling. OIRA technocrats escape the irrational results created by voting and from the “sewer talk” of the political process only because their work is largely insulated from democratic accountability. OIRA can guide executive agencies toward rational rules only because Congress has cut itself out of the process by which these legally binding rules are made.⁴⁷ The substantive weight of this rulemaking is undeniable. Much executive rulemaking is true lawmaking, in the sense that it is the agency’s rule that makes conduct unlawful, not any statute enacted by Congress.⁴⁸ Sunstein himself also emphasizes how enormously consequential these rules can be when he claims that the regulatory work overseen by OIRA during the early years of the Obama Administration created annual benefits of \$91.3 billion in inflation-adjusted dollars.⁴⁹ Few statutes have consequences

⁴⁵ SUNSTEIN, WHY NUDGE?, *supra* note 8, at 120–21 (emphasis added).

⁴⁶ SUNSTEIN, VALUING LIFE, *supra* note 42, at 44.

⁴⁷ Perhaps more troublingly, some have argued that OIRA’s involvement in squelching particular agency rules has actually subverted clear statutory commands from Congress. The congressionally enacted Clean Air Act requires that national ambient air quality standards be based on public health instead of cost–benefit analysis. *See Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 471 (2001). As the head of OIRA, Sunstein wrote a letter that had the effect of postponing an effort by the Environmental Protection Agency to set standards on ozone emissions. While commentators focused their criticism on the seemingly political nature of the decision (the delay put off the controversial rule until after the 2012 presidential election), it is also striking that Sunstein’s own justification seems to be based on the costs of compliance. *See* Cass R. Sunstein, *The Backstory of Obama’s Ozone Rules*, BLOOMBERG VIEW (Dec. 3, 2014, 4:00 PM), <http://www.bloombergview.com/articles/2014-12-03/the-backstory-of-obamas-ozone-rules> [<http://perma.cc/J7NB-PK8A>].

Sunstein himself has acknowledged the concern that OIRA’s involvement in the regulatory process accords significant authority to the President, as opposed to the agencies that Congress intended to empower. *See* Cass R. Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267 (1981). *But see* Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609 (2014) (arguing for a more nuanced understanding of the effect of OIRA’s cost–benefit analysis).

Admittedly, Congress can limit presidential control by delegating power to “independent” agencies, which enjoy some measure of insulation from OIRA interference. *See* Cass R. Sunstein, *Financial Regulation and Cost–Benefit Analysis*, 124 YALE L.J. F. 263, 268 & n.25 (2015) (noting that OIRA process does not apply to independent agencies, and has not been applied to rules from the Internal Revenue Service). Congress can also mandate that these agencies achieve the same substantive results by requiring that the agencies conduct a cost–benefit analysis for any new rule, and by exposing that analysis to judicial review. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (applying searching review of agency cost–benefit analysis). But while these measures would limit presidential interference, they would do little to shift lawmaking authority back to Congress.

⁴⁸ *See* Aneil Kovvali, Note, *Seminole Rock and the Separation of Powers*, 36 HARV. J.L. & PUB. POL’Y 849, 854–55 (2013) (observing that many statutes do not create binding norms, but rather empower administrative agencies to create them).

⁴⁹ SUNSTEIN, SIMPLER, *supra* note 42, at 34. The quantification of costs and benefits is the central theme of VALUING LIFE, *supra* note 42. OIRA’s efforts to formalize and improve upon cost–benefit

anywhere near that order of magnitude. The institutional context that inspired Sunstein's optimism thus fits uncomfortably with separation of powers values.

The point should not be carried too far. The administrative state is here to stay, and that's a good thing (for the most part, anyway). But Sunstein's implicit efforts to address it are unpersuasive, particularly with respect to nudging.

Sunstein emphasizes a norm of "government by discussion": a principle that the regulatory process should solicit and incorporate a wide variety of views.⁵⁰ By incorporating widely dispersed information and analysis of alternatives, the norm encourages regulators to replicate the results of the legislative process at its best.⁵¹ To the extent that the constitutionally prescribed lawmaking process is simply designed to improve the quality of decisions—a view Sunstein appears to endorse⁵²—government by discussion is a viable substitute. But legitimacy is not simply about the quality of decisions—it is about the decisionmakers themselves. A choice by an isolated technocrat cannot have the same moral force as votes cast by elected officials. In addition, many foundational values of our government find expression in the institutional structure of Congress. For example, the Constitution does not always guarantee federalism-respecting *results*, but rather a federalism-respecting process in which the specially constructed Senate safeguards the interests of individual states.⁵³ While executive orders can encourage administrative agencies to achieve federalism-respecting results,⁵⁴ they are not in step with the inherently procedural nature of the guarantee.

Aside from applying the concept of government by discussion, Sunstein suggests that government can be directly responsive to the concerns of citizens by designing regulations that are tailored to their

analysis do open up new avenues of congressional control. Congress could insist that the total cost of all rules administered by an agency in a given year must not exceed a set sum.

⁵⁰ SUNSTEIN, VALUING LIFE, *supra* note 42, at 14–15. The phrase is drawn from the work of Amartya Sen.

⁵¹ *Id.* at 45–46. This concept is also reflected in the Administrative Procedure Act, which generally directs that agencies afford notice and consider public comments before promulgating legislative rules. See 5 U.S.C. § 553 (2012). This statutory requirement is limited in scope, and agencies can evade it by reinterpreting existing rules in novel ways to achieve new regulatory outcomes. Their evasions bode ill for Sunstein's government-by-discussion norm.

⁵² See SUNSTEIN, WHY NUDGE?, *supra* note 8, at 121.

⁵³ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551–53 (1985) (concluding that state and local governments are protected by the federalism-respecting structure of Congress, instead of specific rules on the appropriate scope of federal regulation).

⁵⁴ Beginning with the Reagan Administration, executive orders have required agencies to consider certain federalism implications of rules. See Exec. Order No. 12,612, 3 C.F.R. 252, 252–56 (1988).

preferences. For example, Sunstein notes that citizens appear to fear death from cancer more than death from other causes, and will incur greater costs to avoid it.⁵⁵ He suggests that on certain assumptions, it may be appropriate for government to respect the special strength of this concern when designing regulations.⁵⁶

If fully accepted, this framing would have broad implications. Americans have a deep fear of tyranny—one that commentators have likened to a fear of cancer in the sense that it causes Americans to take unusually costly precautions.⁵⁷ Unlike many of the “preferences” that Sunstein seeks to encourage, Americans have demonstrated the seriousness of their intent to avoid despotism by adopting a hugely expensive institutional structure in which powers are separated. And they adopted this structure through a process that demanded seriousness of intent, namely the ratification process in Article VII of the Constitution. The risks addressed by this structure may seem remote, and any individual regulation may have only a miniscule marginal impact on the likelihood of their realization. But Sunstein has indicated that this type of risk cannot be ignored. Global warming’s costs will not be fully realized for decades, and any individual ton of carbon will have only a miniscule impact on the problem. But Sunstein supported both the estimation of a “social cost of carbon” and its use in evaluating the benefits of carbon-reducing regulation. Applying this outlook to administrative rulemaking would lead to serious skepticism of the executive lawmaking involved.

V. PREFERENCES REVISITED

Less abstractly, the justification that the government can tailor regulations to individual preferences depends on the government’s ability to discern citizens’ preferences and to advance them with greater success than citizens themselves. While there are contexts in which this is plausible, nudging falls into a somewhat different category.

Nudges are only effective where a person’s choices do not reveal a consistent preference for one outcome over another. Pat can “nudge” Susan from Bowdoin to Amherst only because there are circumstances under which she will choose Bowdoin and circumstances under which she will choose Amherst. Pat is not facilitating a hidden preference for Amherst

⁵⁵ SUNSTEIN, VALUING LIFE, *supra* note 42, at 97–101.

⁵⁶ *Id.* at 101 (asserting that respect for autonomy may lead regulators to accept citizens’ concerns, but would not require regulators to do so if those concerns are uninformed).

⁵⁷ See ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 193 (2010).

over Bowdoin; Pat is advancing a preference for Amherst instead of a preference for Bowdoin for Pat's own reasons.

In the realm of public policy, such reasons can be quite powerful. When citizens have contradictory preferences—for healthy living and peanut butter cookies, for example—the government might reasonably choose to advance the preference that avoids social ills.⁵⁸ In the midst of an obesity epidemic with profound societal consequences, nudging a citizen away from cookies might be justified on the ground that it avoids harm to others. But it cannot be justified on the ground that it is what the citizen himself wants. The grounds for privileging a preference for healthy living over a preference for cookies are extrinsic to the citizen.

Nudging is uniquely vulnerable to this line of attack. Other policy innovations have also garnered attention in recent years. President Obama's 2011 order governing the review of new regulations introduced explicit calls for the analysis of "equity, human dignity, fairness, and distributive impacts."⁵⁹ But such considerations can be justified quite easily by reference to the limits of private ordering. While private individuals and entities have a profound ability to organize themselves to reach desirable outcomes, issues of equity, fairness, and distributive impacts can call for government intervention.

The work of Ronald Coase provides a useful framework for this point. Suppose that a doctor builds an office next door to a food manufacturer.⁶⁰ If the manufacturer runs his machines, they will create noise and vibrations that will make it impossible for the doctor to practice medicine in her office. If the doctor is successful in forcing the manufacturer to provide the peace and quiet needed to practice medicine, the manufacturer will be unable to produce food. From this situation, Coase drew two powerful insights.

First, any harm is reciprocal.⁶¹ It is possible to argue that the manufacturer's noise is interfering with the doctor's work, but it is also

⁵⁸ Along these lines, President Obama's executive order of September 15, 2015 wisely emphasized public rather than private rationales, encouraging agencies to deploy behavioral science insights to improve "public welfare, program outcomes, and program cost effectiveness," and stating that "behavioral science insights can support a range of *national priorities*, including helping workers to find better jobs; enabling Americans to lead longer, healthier lives; improving access to educational opportunities and support for success in school; and accelerating the transition to a low-carbon economy." Exec. Order No. 13,707, *supra* note 7, at 56,365 (emphasis added).

⁵⁹ Exec. Order 13,563, *supra* note 7, at 216.

⁶⁰ This example is drawn from *Sturges v. Bridgman*, (1879) 11 Ch. D. 852 (Eng.), which Coase analyzed in his famous essay, "The Problem of Social Cost." See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON., 1, 8–10 (1960).

⁶¹ Coase, *supra* note 60, at 2.

possible to argue that the doctor's demand for quiet is interfering with the manufacturer's work.

Second, if the costs of a transaction are low enough, the doctor and manufacturer will arrive at an efficient outcome regardless of which one the law favors.⁶² If the doctor would create more value with a right to quiet than the manufacturer would with a right to make noise, but the law favored the manufacturer, the doctor would pay the manufacturer to abstain. This conclusion, now known as "Coase's Theorem," suggests that private individuals can organize themselves to achieve efficient outcomes, at least where transaction costs are manageable.

But even if bargaining were cheap, the "distributive impacts" of a regulation would remain relevant. If the doctor lacks the cash to pay the manufacturer to desist, the manufacturer may end up running his machines, thus destroying value. Admittedly, if transaction costs were zero, the doctor could borrow against the future value of practicing medicine. But the prevention of harms to human dignity will not result in new cash flows that can be borrowed against. As a result, such harms will only be prevented if the person impacted is already wealthy enough to pay the necessary bribes. Here, regulatory consideration of "human dignity" is necessary, and interacts with the need to consider "distributive impacts."⁶³

As a result, when regulators base their decisions on distributive impacts or human dignity concerns, they are acting on a justifiable suspicion that the behaviors observed in the real world do not reflect real underlying preferences. As demonstrated above, the same cannot be said when regulators respond to "behavioral market failures."⁶⁴

Coasean reasoning also supports regulatory policy in a different way, since it is built on the insight that "harm" is a flexible concept.⁶⁵ The

⁶² *Id.* at 8–10.

⁶³ Exec. Order 13,563, *supra* note 7, at 216.

⁶⁴ *See supra* Part II.

⁶⁵ In his other writings, Sunstein has made the same basic point. Article III of the Constitution limits federal courts to consideration of genuine cases or controversies, a requirement that federal courts have held requires plaintiffs to have suffered an actual injury. Sunstein has suggested that judicial efforts to enforce this requirement by denying claims of injury are based largely on contestable assumptions:

In classifying some harms as injuries in fact and other harms as purely ideological, courts must inevitably rely on some standard that is normatively laden and independent of facts. . . . When blacks challenge a grant of tax deductions to segregated schools, they believe that the grant is an injury in fact, not that it is purely ideological. When an environmentalist complains about the destruction of a pristine area, he believes that the loss of that area is indeed an injury to him. When we deny these claims, we are making a judgment based not on any fact, but instead on an inquiry into what should count as a judicially cognizable injury.

Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188–90 (1992) (citations omitted). Courts have shown some willingness to reinvent

regulatory state has been built on a series of broadening observations about the nature of harm, as government actors realized that conduct which seemed harmless actually wrought harm on a broad set of individuals.

The point relates to the enumerated powers analogy developed above. The federal government has power only over specific areas, such as interstate commerce. In a classic case, the Supreme Court held that this power extended to a farmer's decision to grow wheat for personal use, innovatively reasoning that, when it was understood in the context of a complex market, the farmer's seemingly isolated acts contributed to the harms wrought by excess supply.⁶⁶ Similarly, obedience to the Harm Principle as an appropriate limit on government does not require commitment to an unduly narrow vision of harm that ignores the complex consequences of behavior.

The point applies directly to some of the examples of good policy used by Sunstein. Sunstein touts straightforward disclosure requirements for products, including labels for cars that clearly disclose their level of fuel efficiency⁶⁷ or labels for cigarettes disclosing risks.⁶⁸ But selling a product without adequate disclosure of its costly failings can be seen as a harmful activity. Standardization of the required disclosure can also be understood as a way to prevent the sellers of goods from imposing information processing costs on consumers.⁶⁹ Sunstein himself develops more unusual concepts of harm, noting that a decision not to wear a seat belt has an impact on the social costs of wearing a seat belt for others by delaying the change in the social meaning of seat belt wearing from "cowardice" to "prudence."⁷⁰ Since a decision not to wear a seat belt can cause this type of harm to others, a rule requiring its use would be justifiable even under the Harm Principle.⁷¹ In sum, even if such policies seem salutary or

Article III concepts of harm, though such changes are often controversial, or narrowly limited by later rulings. *See supra* note 33.

⁶⁶ *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942).

⁶⁷ *See* SUNSTEIN, *WHY NUDGE?*, *supra* note 8, at 65–67.

⁶⁸ *See id.* at 120.

⁶⁹ Many legal rules can be justified by this type of harm. *See generally* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1 (2000) (suggesting that doctrines that limit variation in property interests control third-party information costs).

⁷⁰ SUNSTEIN, *WHY NUDGE?*, *supra* note 8, at 60.

⁷¹ This is particularly true if the rule or its enforcement is tailored to the harm. For example, a temporary rule that expires once the social norm has had a chance to take hold, or a rule that is not harshly enforced (so that its primary force is moral or normative instead of coercive), would be precisely addressed to the harm. *See* Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 *U. CHI. L. REV.* 291, 347–48 (2014) (suggesting that a temporary seat belt regulation could change the social meaning of seat belt usage, thus addressing this type of harm with minimal imposition on freedom).

uncontroversial, they do not support Sunstein's rejection of the Harm Principle.

CONCLUSION

To borrow Sunstein's terminology, behavioral insights may be more persuasive when brought to bear on governmental means rather than ends. Behavioral insights might be useful to regulators as they decide *how* to structure rules that are effective and place minimal burdens on those who are bound. But it is troubling when they are offered up as a reason *why* regulation is needed. When regulators violate the Harm Principle, they inevitably impose their own preferences instead of advancing the preferences of the citizens who are bound. Even if this does not result in a clear injury, it exceeds typical understandings about the reach of government power, and requires a problematic institutional structure. Given the flexibility of the Harm Principle and the broad governmental role it authorizes, there is little reason to abandon it.