

HUMAN FALLIBILITY AND THE SEPARATION OF POWERS

The limits of human knowledge is one of Hayek's most enduring insights, writes **Jonathan Crowe**

Humans are fallible—and this fallibility is the hardest thing for us to grasp. We have limited knowledge—and the limits of our knowledge routinely prevent us from realising just how much we do not know. Our reasoning processes are vulnerable to various forms of distortion and bias—and these distortions and biases often cause us to overlook our own partiality. We are prone to favour familiar people and concepts over the unfamiliar—and our lack of understanding of other viewpoints prevents us from realising the ways in which we marginalise them. We are susceptible to temptations that lead us to go against our conscience—and these temptations also provide incentives not to scrutinise our behaviour.

Humans are fallible, but the way our society is structured inevitably means that some humans gain power to make decisions that impact on the lives of others. Constitutional principles such as the rule of law and the separation of powers exist to protect people from the flawed decisions of those in positions of power. However, the officials holding these positions routinely struggle to recognise their own fallibility. It is for this reason that the separation of powers—like other constitutional limits—is continually under threat.

This article examines the various forms of human fallibility that underpin the separation of powers. It distinguishes epistemological, psychological, ethical and moral fallibility and examines how each of these human failings is exacerbated by political forces. It concludes with a reflection on the vulnerability of the separation

of powers in modern administrative democracies and a plea for the importance of humility in public life. The separation of powers is integral to modern governance—but we can never take it for granted, because the very reasons that make it important also explain why officials fail to honour it.

Epistemological fallibility

Humans have limited powers of knowledge and deliberation. These limitations apply to all kinds of human decisions, but they are particularly acute at the governmental level. Political actors must make decisions on a daily basis about what laws and policies are best suited to organise the community. However, a human community is a hugely complex institution. It encompasses a large number of individuals with their own diverse preferences and life plans. The short and long term plans of these individuals intersect in many complex ways. These interactions,



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in turn, are sensitive to a vast number and array of environmental influences.

The limitations on the ability of human actors to effectively regulate a complex society play a central role in the constitutional theory of Friedrich A. Hayek.¹ Hayek notes that human knowledge about how to organise social institutions is subject to severe and intractable limitations. This is partly because humans have limited capacity to acquire, store and process complex information. More importantly, however, it is because of the complexity and dynamism of human relations. The task of designing social institutions involves coordinating a diverse collection of human actors, each with their own intricate sets of nested preferences. The process of identifying and aggregating these preferences is therefore deeply complex.

A further challenge is posed by the dynamism of social arrangements. Individual preferences are constantly changing and these changes influence the ways people interact with social institutions. Hayek, of course, does not wish to deny that we can make some headway in studying and predicting the patterns of social organisation. Economics and the other social sciences have developed sophisticated methodologies for this purpose. However, Hayek—a celebrated economist and social scientist himself—wishes to sound a note of caution about such efforts. A comprehensive and accurate picture of social workings is beyond the abilities of even the greatest economists—let alone your average parliamentarian.

Hayek's response to the limitations of human knowledge places heavy emphasis on constitutional values such as the separation of powers and the rule of law. Human attempts to organise society run a serious risk of unintended or perverse consequences. Hayek is therefore highly critical of what he terms *constructivist rationality*: the idea that all worthwhile human institutions can and should be planned by human reason.² He argues that the best way to shield people from these kinds of errors of judgment is through a stable set of general rules placing limits on the exercise of government power. The separation of powers facilitates this by imposing internal checks and balances on the decisions of government officials.

Psychological fallibility

It is not only that humans face serious challenges in obtaining and analysing the information necessary to organise a complex society. The decisions humans make based on the information they have before them also tend to be distorted by various kinds of cognitive biases. One pervasive form of bias concerns the human tendency to favour familiar people and concepts over unfamiliar ones. This gives rise to a range of psychological phenomena, such as in-group bias—the tendency to treat people you know more favourably than strangers—and confirmation bias—the tendency to prefer pre-existing ideas and concepts to rival hypotheses.

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Some of the most influential contemporary work in moral psychology—such as the experimental studies conducted by Jonathan Haidt and Daniel Kahneman—utilises what are known as dual process models of cognition. Dual process models see cognition as involving two types of processes: one kind involves fast, intuitive snap judgments, while the other involves self-conscious, reflective deliberation.³ Many decisions we make in our lives are initially based on snap judgments that may or may not be tempered by more deliberate reflection. These snap judgments are not arbitrary, but are frequently based on rough rules of thumb or heuristics that enable us to deal with complex situations in a manageable way. However, these heuristics, while indispensable to cognition, can also undermine the integrity of our decisions.⁴

The dual process model reinforces the likelihood of distortions such as in-group preference and confirmation bias finding their way into political decisions. These kinds of biases are likely to shape people's political affiliations and reinforce them over time.⁵ This helps to explain why politicians often seem to be motivated more by party loyalty

than by an interest in openly debating specific policy issues: they have a strong cognitive bias towards agreeing with members of their political in-group and endorsing ideas with which they are familiar. Moral psychologists have noted the role of other cognitive biases, such as loss aversion and overestimating the probability of unlikely events, in shaping political choices.⁶

Related issues also arise concerning judicial reasoning. The research in moral psychology I have been discussing suggests that judicial decisions, like other kinds of reasoning processes, will depend significantly upon pre-reflective snap judgments.⁷ A recent study on parole decisions by Israeli judges suggests that even seemingly trivial factors like the length of time since the judges' last meal can significantly affect their decisions.⁸ The cognitive biases affecting government officials therefore strengthen the case for avoiding concentrations of power and making decisions subject to review. The separation of powers responds to this issue by ensuring that no one person or group has a monopoly on the exercise of government authority.

The human tendency towards self-interest and partiality represents a deep seated challenge for ethical and political thought.

Ethical fallibility

The psychological bias towards familiar ideas and concepts has deep implications for the role of ethics in guiding human behaviour. A distinction is traditionally drawn in practical reasoning between prudential and ethical considerations. Prudential considerations concern the interests of the person making the decision, while ethical factors concern how the decision impacts on the interests of others. Humans naturally tend to give greater weight to prudential factors than ethical ones, even when the interests concerned are identical. We tend to treat our interests as more important than those of other people.

The moral philosopher Peter Singer argues that what distinguishes ethical reasoning from the mere pursuit of self-interest is the willingness to consider other people's interests alongside one's own. The

very idea of ethics, for Singer, involves adopting a 'universal point of view', according to which 'my own interests cannot, simply because they are my interests, count more than the interests of anyone else.'⁹ Singer recognises, however, that humans typically find it difficult to make impartial decisions between their own self-interest and the interests of others. Some philosophers have regarded the natural partiality of humans as a challenge to the very idea of ethical duties. Friedrich Nietzsche, for example, claims that humans naturally 'feel toward [other people] almost as free and irresponsible as toward plants and stones. That the other suffers *must be learned*; and it can never be learned completely.'¹⁰

Nietzsche's comments reflect a very pessimistic view of the human capacity for compassion that is not shared by many other philosophers. There is no doubt, however, that the human tendency towards self-interest and partiality represents a deep seated challenge for ethical and political thought. The answer is not to give up on ethics entirely, but rather to tread carefully when distributing social power, so as not to give a monopoly to particular social interests. The institutions of constitutional government—including the separation of powers—represent one attempt to recognise human partiality in the design of political institutions. It is because humans tend to prefer sameness to difference and privilege the self over the other that the power of each branch of government must be kept in check.

Moral fallibility

Humans, then, are inclined to prefer prudential to ethical considerations. The pursuit of prudential considerations, however, is itself far from a straightforward matter. Philosophers have long recognised the role of desire in motivating human behaviour. The so-called Humean theory of motivation—an influential view in contemporary meta-ethics—holds that a belief cannot motivate action unless accompanied by an appropriate desire.¹¹ The Humean theory does not mean that humans always act on their most basic or immediate desires, since we may have higher order desires (such as the desire to be prudent or do the right thing) that override our basic urges. However, it does mean that humans must actively cultivate

their higher order desires and seek internal balance in order to act prudently and live well.

The internal struggle between lower and higher order desires has long been a central theme of moral philosophy. Augustine's *Confessions* documents his struggle with the temptations of sex, power and other basic desires, which he comes to realise were pale imitations of the love that he finds in God.¹² This awareness of the basic conflict between human desire and heavenly love also informs Augustine's political philosophy. Augustine distinguishes the transient rewards offered by honour, glory and power in the earthly kingdom from those afforded by the kingdom of God: each has its appeal, but the former pales in comparison to the latter.¹³ It is tempting for political rulers to focus on the goals of glory and power, but this is deeply misguided. Divine law is true law; human law is, at best, a feeble imitation.¹⁴

The practical point of Augustine's reflections can be grasped independently of his theological commitments. Human perceptions of how we ought to behave are distorted in many ways—through limited knowledge, cognitive biases, partiality and the role of desire in motivating action. These distortions may prevent us from treating others well, but they may also prevent us from effectively pursuing a good and flourishing life. We all know what it is like to be tempted to do something that we realise, upon reflection, is not prudent or ethical to do. We all know what it is like to give into these temptations and regret it later on. We also know what it is like to be tempted to assuage our guilt by rationalising our behaviour and pretending that we did the right thing in the first place.¹⁵ This is all part of being human.

Nobody is perfect, but we like to pretend we are better than we actually are. This temptation is particularly strong for people who hold positions of power and are subject to continual scrutiny. Politicians live in constant fear of losing their jobs by appearing to be fallible. It is no surprise, then, that they are loath to own up to their mistakes. Any admission of fallibility is seen as a sign of weakness. The reality, however, is that everyone is fallible. The task of governing human society, in particular, is extremely complex and anyone who is arrogant enough to attempt it is bound to make mistakes all

the time. It may be tempting to deny our mistakes or blame them on other people. However, it is only by acknowledging our failings that we can put in place ways to avoid repeating them in future.

The value of humility

I have argued that moral and political decisions are affected by at least four distinct kinds of human fallibility: epistemological, psychological, ethical and moral. I wish to conclude with a plea for an important human virtue too rarely exhibited in public life: namely, *humility*. We have seen that it is extremely difficult to organise a large community. Political leaders, nonetheless, routinely pretend that this task is within their grasp. They feel it is their job to run things and fear they will lose their power unless they talk up their abilities. Voters and the media no doubt encourage this mindset by setting unrealistic standards. The kinds of human fallibility discussed in this article, however, make the whole thing seem like a giant confidence trick. Politicians are pretending to be flawless at a job that is very difficult to do even passably well.

James Madison famously wrote that if we were ruled by angels, 'neither external nor internal controls on government would be necessary'.

The culture of denialism about the fallibility of our political leaders fuels complacency about constitutional principles. If our leaders were infallible, there would be little reason to value the separation of powers and the rule of law. James Madison famously wrote that if we were ruled by angels, 'neither external nor internal controls on government would be necessary'.¹⁶ However, we do not live in a community of angels, but one of human agents. The best way to respond to the basic fact of human fallibility is to make sure that no single person or group of people wields an undue share of government power. The power of every official must be limited and subject to review. This is best accomplished by dividing government power among multiple branches and giving each of them the ability to oversee the others.

Political leaders tend to cavil at submitting their initiatives for review by judges. This tendency, at its worst, sometimes leads politicians to rail publicly against judges for thwarting the public will. This fault is not only on one side: judges no doubt sometimes think that things would go better if they were the ones running the government. A reality check is needed on all sides. We are all flawed human beings, so the only proper response is to be humble about our abilities. Furthermore, it is not just that our abilities are limited: the nature of these limitations prevents us from realising how fallible we are. We therefore need to adopt a humble attitude, even when we feel sure our opinion is right. Indeed, it is when we are most secure in the correctness of our views that a dose of humility is most sorely needed.

It is not just that our abilities are limited: the nature of these limitations prevents us from realising how fallible we are.

This kind of humility would require political leaders to welcome limitations on their power. It would require them to acknowledge that, like everyone else, they are prone to mistakes and welcome oversight and advice that will guard against their failings. Legislators who take this humble attitude would not try to insulate their decisions from judicial review by utilising privative clauses and similar measures. They would not seek to delegate wide powers to the executive without judicial oversight. Judges, for their part, should be open to reforming appointment processes, widening the pool of appointees and other modest changes. No branch of government should cling to power or resist reasonable scrutiny. Too much power for anyone is a dangerous thing. Humans may harbour a desire for power, but unlimited power is not something we should want if we fully comprehend the extent of our fallibility.

Endnotes

- 1 See particularly Friedrich A. Hayek, 'The Use of Knowledge in Society', *American Economic Review* 35 (1945), 519-530; Friedrich A. Hayek, *Law, Legislation and Liberty* (London: Routledge, 1982), vol. 1, ch. 1-3.
- 2 Hayek, *Law, Legislation and Liberty*, vol. 1, ch. 1.
- 3 See, for example, Jonathan Haidt, 'The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment', *Psychological Review* 108 (2001), 814-834; Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011).
- 4 Compare Cass Sunstein, 'Moral Heuristics', *Behavioral and Brain Sciences* 28 (2005), 531-573.
- 5 Jonathan Haidt and M. A. Hersh, 'Sexual Morality: The Cultures and Emotions of Conservatives and Liberals', *Journal of Applied Social Psychology* 31 (2001), 191-221.
- 6 Kahneman, *Thinking, Fast and Slow*, ch. 25-31.
- 7 For discussion, see Jonathan Crowe, 'Pre-Reflective Law' in *New Waves in Philosophy of Law*, ed. Maksymilian Del Mar (Houndmills: Palgrave Macmillan, 2011), 103-122; Jonathan Crowe, 'The Role of Contextual Meaning in Judicial Interpretation', *Federal Law Review* 41 (2013), 417-442.
- 8 S. Danziger, J. Levav and L. Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions', *Proceedings of the National Academy of Sciences* (2011), www.pnas.org/cgi/doi/10.1073/pnas.1018033108
- 9 Peter Singer, *Practical Ethics*, 2nd ed. (Cambridge: Cambridge University Press, 1993), 12.
- 10 Friedrich Nietzsche, *Human, All Too Human*, trans. M. Faber and S. Lehmann (London: Penguin, 1984), 71 [section 101].
- 11 See, for example, Michael Smith, 'The Humean Theory of Motivation', *Mind* 96 (1987), 36-61.
- 12 Augustine, *Confessions*, trans. G. Wills (London: Penguin, 2008).
- 13 Augustine, *The City of God*, trans. H. Bettenson (London: Penguin, 1984), bk V, ch. 15-17.
- 14 Augustine, *On Free Choice of the Will*, trans. T. Williams (Indianapolis: Hackett, 1993), bk 1, ch. 6.
- 15 For further discussion, see Jonathan Crowe, 'Levinasian Ethics and Animal Rights', *Windsor Yearbook of Access to Justice* 26 (2009), 313-328.
- 16 James Madison, 'The Federalist, No. 51' in Alexander Hamilton, James Madison and John Jay, *The Federalist* (Cambridge, MA: Belknap Press, 1961), 356.