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## Comment on “Excessive Ambitions (II)” (by Jon Elster)

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## **Excessive Skepticism?**

Only with the greatest diffidence would any sensible person undertake a critical commentary on an essay by Jon Elster about institutional innovation.<sup>1</sup> For some years now, Elster has been asking incisive questions and providing subtle answers about the effects of various rules of composition and decision concerning public bodies: Should a constitution be produced by a legislature whose members could benefit from its newly crafted provisions or by a separate body chosen specifically for this purpose? What are the effects of rules of openness or secrecy on the conduct of decision makers—constitution makers, legislators, jurors, etc.—and how do these affect the integrity of the decision process? There is no need to proliferate these examples, because “Excessive Ambitions (II)” itself contains abundant additional examples of Elster’s distinctive contribution.

Furthermore, “Excessive Ambitions (II)” begins from premises that are undoubtedly true. Economists and political scientists do habitually rely on inadequate causal theories. If all the positive results in regression analyses in all the social science journals really did explain all the phenomena they aimed to explain, we would know infinitely more about all those phenomena than we do. To this indictment, Elster adds a dose of wariness about the ability of normative political theory “to identify good outcomes and to design institutions that can track those outcomes,” although I read the essay as principally a critique of the ability of empirical studies to specify the means to achieve admittedly worthy ends.

From this skepticism of social science flows Elster’s caution about institutional design and his basic decision rule: to favor the prevention of bad results and refrain from attempting the achievement of good results. This is an across-the-board prescription that rules out many institutional innovations, some of which might enhance public welfare. Foregoing a wide range of possible social benefits on grounds so general is nothing like refraining from a particular innovation on grounds of ignorance of the likely, specific consequences. It is a very considerable moratorium that is proposed. Although it only applies to the design of institutions, in my view our ignorance alone, great though it may be, does not justify such massive abstemiousness.

I understand and sympathize with Elster’s impulse, which resembles the physician’s injunction to “do no harm,” but harm can be done by inaction as well as action. In what follows, I articulate, briefly, the grounds for my reservations. Most of what I have to say can be summarized under three rubrics. First, the limitation to avoiding harm comes at a higher price than Elster suggests. Second, even in the field of institutional design, it is not wise to

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<sup>1</sup> Or, for that matter, on many other issues. I am, for example, an unabashed admirer of the exceedingly brilliant work by Elster, *Alchemies of the Mind: Rationality and the Emotions* (Cambridge: Cambridge University Press, 1998).

adhere to Elster’s abstemiousness, because there is often an unattractive default position that will be left in place if the decision is to do nothing. Moreover, the criteria for judging alternatives to the default may be no less clear than are the criteria for choosing to do something that seems to be less invasive in the name of merely avoiding harm. The very narrowness of the inquiry to which Elster’s prescription leads could produce one harm in the course of avoiding another. Third, the distinction between avoiding harm and doing good is less clear than it may seem. Along the way, I will mention some other possible objections.

In questioning Elster’s standards for action, I do not mean to imply that there are no occasions in intellectual life when the best formulation may not be a self-abnegating, negative one. After millennia of struggles for a useful concept of justice, the most useful one may well be a statement of what it prevents rather than what it achieves. Ian Shapiro (2012) makes a very strong case for what he calls non-domination as the most serviceable statement. But when it comes to particular institutions, I am inclined to think in terms of better and worse, even if we cannot get to best and worst, and even if we are talking probabilistically, using tools that confine us to judgments “on the whole,” because we will never know everything we need to know and are therefore bound to make mistakes.

Before I go any further, I want to point out an irony and enter a caveat.

There is irony in Elster’s odd invocation of John Hart Ely’s *Democracy and Distrust* (1980) for limiting policy innovation to averting harm rather than promoting welfare in the positive sense. Ely derived his narrow conception of judicial review from what Alexander Bickel (1962) had called “the countermajoritarian difficulty,” namely the predicament caused by the need for unelected judges to pronounce on the constitutionality of legislation enacted by elected bodies. Ely’s response was informed by an acute sense of what was thought to be the fragile state of judicial legitimacy vis-à-vis the political branches. Whether the response was right or wrong, it did not derive from any deficiency of either empirical or normative knowledge.<sup>2</sup> In addition, Ely was not arguing for any general limitation on innovation. Bickel’s point and Ely’s was precisely that wide latitude ought to be accorded to the so-called political branches to engage in as much policy change as they saw fit. The only problem that both writers thought they confronted was the scope of constitutional limitations that could properly be placed on what the other branches did. Ely’s was an attempt to specify some content to those very modest limitations, so that other branches could proceed to innovate as widely as they wished so long as they did not run afoul of Ely’s modest rules of limitation.

It is only fair to add that Elster was borrowing simply the spirit of Ely’s method, not its particular source. Yet the method was not one that Ely was advocating in general but only for the courts in contemplating judicial review.

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<sup>2</sup> Although I myself have tried to make the case that courts do not have the institutional apparatus to be good empiricists. Horowitz (1977).

Now the caveat. After long and diligent inquiry, Elster is testing out the propositions he has advanced. After much less long and only modestly diligent consideration, so am I. But I am less sure of my conclusions than it may appear. Inescapably, we are engaged in argumentation, which has a certain necessary rhetoric. The rhetoric should not be taken to mean that I think the conclusions I advance are as inescapable as the rhetoric is firm. Just in case anyone in the fraction of the scholarly community that reads this needs reminding, many of the arguments are preliminary and assuredly vulnerable to rebuttal. After all, this is just a commentary.

I

Is it really easier to avoid harm than it is to produce positive improvement? Many of Elster's examples incline the reader to agree that it is. Efforts to reduce biases among decision makers have undoubtedly had, overall, salutary effects. And Elster's arguments about jury secrecy and openness, as well as the benefits and costs of secrecy and publicity at various stages in the deliberations of legislatures and constituent assemblies, are exceedingly parsimonious and compelling.

Yet it is possible to overinterpret the benefits. Consider Elster's case of the female juror who noticed that the plaintiff in a personal injury case, wearing high heels, did not so much as wince as she stepped down from the witness stand (p. 17). This datum, adduced to show the benefits of gender diversity among jurors, may or may not have proved what it is said to have proved about the plaintiff's pain. Does back pain always show up in the way women walk in certain shoes? Was the plaintiff taking pain killers? Observers often draw inferences from small cues that turn out to be miscues. And if that was true in the high-heel case, then, despite its benefits in general, the heterogeneity of jury composition may have imparted a false special authority to the female juror's observation.

Or take a more consequential example. As mentioned earlier, for more than a decade and a half, Elster has been arguing that constitutions should not be made by legislatures, who, after all, could benefit from the provisions they choose to incorporate in the document, but rather should be made by a separate constituent assembly populated by members who will not so benefit in the future. If all one cared about was the conflict of interest manifested in the two roles of legislator and constitution maker, this is an inarguable proposition. The special benefits for legislators are a form of rent seeking that is exceedingly undesirable. But is conflict of interest the only, or the most important, issue in planning for a new constitution? (I am not referring here to the particular provisions that ought, or ought not, to be included in a constitution, but only to constitutional personnel and process.)

If a constitution is to be made by a body whose members are ineligible to serve later as legislators, such a requirement precludes the service of a large number of knowledgeable people who might wish to serve later in the legislature. (The argument would also apply to

later service in the executive.) At this level, the debate revolves around the weights attached to the two sets of consequences: conflict of interest and the exclusion of capable people. But there is much more to it. In a world in which aspiring authoritarians cut constitutional corners or even overthrow democratic constitutions, a completely different argument comes into view. The experience of making a new constitution can itself provide practice in democratic decision making for politicians and, perhaps more important, can commit them to the instrument they have themselves produced, so that they will be reluctant to overthrow that constitution in the future. Beyond that, experience in constitution making can provide antagonists engaged in the constitutional process with an understanding of each other’s interests, aspirations, and sensibilities that can carry over into the legislative process. I have recently made the argument that precisely these were the benefits of Indonesia’s protracted, in-house constitutional process after the fall of Suharto, benefits that, I have argued, could not have been obtained in a different process in what was then, at best, a shaky democracy (Horowitz 2013). So here is a case, which is unlikely to be unique, in which Elster’s approach of focusing merely on avoiding particular harms, excluding as it does a full consideration of benefits, can itself produce harmful results.

## II

There is another case to be made against Elster’s argument “against positive institutional design, aimed at creating institutions that will (or tend to) produce good decisions, select good decision-makers, or create good decision-making bodies.” Elster points out that the criteria for judging goodness in these properties are often indeterminate, and sometimes it is impossible to know if they have been satisfied. Let us assume that this is so. Yet, what is left unsaid is that there is usually no choice but to make such determinations in spite of the difficulties, for there are default settings to which institutions will revert if we do not try to choose better ones. If we do not attempt to decide whether one electoral system is better than another under given conditions, it is not as if no electoral system will be chosen. If there are elections, there will be a system, and it behooves us to make the best choice we can in the face of our (relative) ignorance. And so on with other institutions.

Our ignorance is real, but it is far from complete. In the case of electoral systems, we know a good deal about the incentives created by various systems, and we can make informed, if imperfect, on-the-whole, judgments about how politicians will react to one of them compared to another. And in any case, as I have said, it is not as if there is a choice: there *will* be an electoral system.

The same applies to another of Elster’s illustrations of decisions in which judgment needs to be suspended, in which, in other words, we need to treat the choice as if it were a matter of indifference. Not that it may turn out to be a matter of indifference, for it may make a considerable difference, but the state of our knowledge is, in his view, simply inade-

quate to adjudicate the difference. Here I refer to whether a judge or a jury is the preferable decision maker in civil cases. Again, I want to suggest that our ignorance is not so complete as to foreclose a choice. And, of course, again there is a default position, so there must be a choice made. Decades ago, England abolished the civil jury; the United States has not; and other countries have moved in the opposite direction, adopting juries, which they did not use previously (Vidmar 2000). So there are two methods of comparison: longitudinal and cross-national. Now, to be sure, there are many intervening variables: in the cross-country comparison, cultural differences, differences in the legal institutions that surround the judge or jury, differences in evidence, burden of proof, and other legal rules; and, in the longitudinal comparison, everything that is associated with changing times. Despite all of these difficulties, does it make sense to forego judgment on a matter so fundamental to the way justice is dispensed—a matter that, in the United States, has given rise to claims of lottery justice?

Elster says that “insuperable causal problems” prevent us from deciding “whether judges or juries perform best in civil trials.” Here, again, the narrowness of his criterion, which seems to be “truth-tracking and error-avoidance,” might appear to pre-judge the answer. In the United States, however, the jury has historically served as an element of democratic decision making (Carrington 2003). If the difference between having a judge decide and having a jury decide were, cast in Elster’s terms, a matter of indifference, the criteria employed would miss the aspect of democratic participation and would not meet Elster’s standard of reforms that “can’t hurt and might help” (p. 5). A change along the lines made in England might hurt a great deal if made in the United States. This is another case in which the simplicity of Elster’s project comes into conflict with the broader range of issues relevant to the task of institutional design.

Elster wants to insulate decision makers from the effects of self-interest, passion, prejudice, and cognitive bias—and stop there. This is, of course, an abstemious agenda only if these categories are narrowly conceived. But even if they are, where is the evidence that our knowledge is more likely to extend to these categories than it is to, say, the incentives of politicians or of judges and jurors? What reason is there to think that we know what works when it comes to reducing the effect of passion any better than we know what would improve the use of reason in decision making? It is hard to believe that Elster’s indictment of our considerable empirical deficiencies does not also extend to the particular attributes of institutional design that he regards as open to innovation.

### III

Finally, on negative versus positive amelioration, there is the instability of the categories. I am skeptical of the distinction in general, but I shall mainly confine myself to a few of Elster’s own examples. He favors measures to promote the “active aptitude”—that

is, the attention to duty—of legislators through the use of certain prohibitions (pp. 21-22). In what way is that a merely negative reform? Or, in a brief mention of the American constitutional convention, Elster speaks of “discard[ing] unworkable arrangements and adopt[ing] feasible ones” (p. 17). Did this avoid harm or produce good results? He also writes approvingly of the American constitutional rule excluding illegally obtained evidence as intended “to induce other agents [the police] to behave in socially desirable ways, even at the expense of a good decision in the given case . . . (p. 19).” Surely, this rule does not meet the criterion of a measure that “can’t hurt and might help.” Indeed, it has been an exceedingly controversial rule, and the controversy has revolved precisely around the question of whether it is normatively good and, if so, whether it is empirically supported.

These are problematic examples for the consistency with which Elster can apply his admonitions. Perhaps that is because negative and positive are so frequently just functions of the way in which policies are described. Is an electoral change to a proportional system designed to promote more opportunities for small parties to win seats (positive) or to eliminate an allegedly unfair seat bonus favoring large parties that is produced by the existing system (negative)? The two are different ways to describe the same phenomenon.

#### IV

I have just a few closing thoughts.

If we were to follow Elster’s advice and abstain from positive amelioration in institutional design, we would lose many opportunities to ameliorate based on the identification of past errors. Error correction would need to wait until it was obvious that things were so bad that a change “can’t hurt and might help,” but by then much harm might have been done by a dysfunctional design. The narrow criteria for innovation build in a significant time lag, during which interests in the status quo may have become deeply embedded, thwarting even those changes that meet Elster’s criteria. Passage of time affects the politics of adoption.

There is also a doubt that nags at me concerning the scope of Elster’s field of action for his prescription. If the source of Elster’s caution is lack of empirical knowledge and lack of normative conviction, why confine its application to the design of institutions? Why not apply similar cautions to policy innovation in general? Thinking about this issue would call into question the narrower enterprise, too, because it would encounter the response that the “can’t-hurt-might-help” standard, if employed broadly, would produce far too much stasis—and that, although our ignorance is great, it is not perfect. Because we do not know everything—and in fact know much less than most ardent partisans of their own particular subject claim—that does not mean that we know nothing. And if this is true in general, why is it not true of the particular case of institutional design? After all, how have we discerned which changes can’t hurt and might help? Unless we have unfailing intuition, a rare gift, we know (or think we know) what can’t hurt and might help from experience with changes that

met that standard and with many others that did not. Why stop gaining that knowledge now? Is the reason that constitutional processes are so fundamentally important that they must be walled off from risk taking (within reason) that is otherwise a normal part of public policy innovation? If so, that case needs to be made.

These speculative questions, provided by Elster's stimulating essay, incline me to end on a note of agreement with the overall enterprise. There is a need for a discussion of the metaprinciples of institutional design, for proposals in this field proliferate willy nilly, without serious reflection about the subject in general. Elster has begun this discussion, and at the moment he is practically alone in carrying it on. In this enterprise, he deserves to have much more company. More than that, he deserves much gratitude for setting the agenda by putting his own proposals out in so clearly elaborated a fashion.

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