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Book Review: After the Rights Revolution: Reconceiving the Regulatory State. by Cass R. Sunstein; Law and Public Choice: A Critical Introduction. Daniel A. Farber and Philip P. Frickey.

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AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE. By Cass R. Sunstein.[1] Cambridge, Ma.: Harvard Univ. Press. 1990. Pp. xi, 284. Cloth, $25.00.

LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION. Daniel A. Farber[2] and Philip P. Frickey.[3] Chicago, Il.: Univ. of Chicago Press. 1991. Pp. 159. Cloth, $34.95. Paper, $13.95.

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These two provocative volumes, the first more constructive, the second more analytic, deal with some of the most important and vexing questions about policy making in our democratic, capitalist state. These questions concern government's ability and ultimate entitlement to interfere with the unrestrained market in furtherance of the public interest.

Cass R. Sunstein has written a short but far-ranging book that is certain to set the tone for many debates over the appropriate role of the welfare and administrative state in the aftermath of the Warren Era "rights revolution." He joins issue with many of the 1980s ideas that are hostile toward the regulatory state, particularly from the law and economics movement, the public choice movement, and the accompanying policy revolution that characterized the Reagan Administration. He then attempts to reconstruct and defend a vision of the liberal, interventionist state from most of these attacks.

Sunstein begins with an all too brief history of government regulation, focusing chiefly on the rise of the modern regulatory state during the New Deal, and continuing through the "rights revolution" of the 1960s and 1970s. For Sunstein as for others, the New Deal is a watershed in the history of regulation. The regulatory regimes established during the New Deal collectively formed a "wholesale assault on the system of common law ordering" and transferred to the federal executive branch much of the regulatory control that had previously been the domain of the states and the courts. Sunstein generally applauds both these developments,

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although he has some reservations about particular regulatory excursions.

He then re-examines the basic economic and political rationales for regulation and the most telling criticisms of it. In the process he develops a model of regulation that is sympathetic to its goals and also accounts for its diversity.

Sunstein generally rejects attacks on regulation "that are rooted in modern welfare economics and in pre-New Deal principles of private right." His principal complaint about welfare economics is that by its nature economics assumes that individual preferences *precede* society and the State. But an important purpose of Madisonian government, and thus of regulation, is to form preferences. When viewed in this fashion, the history of regulatory interference with the market gives much greater cause for optimism. At the same time, however, Sunstein's survey of federal regulatory programs finds ample evidence of failure as well as success. The lesson to be learned is thus not that regulation is inherently bad, but that it is vulnerable to misinterpretation and abuse. Law makers, especially courts, must respond to this knowledge in such a way as to make regulation work, and to minimize the opportunities for harmful self-dealing.

One frustrating part of Sunstein's book is an extremely short section responding to the powerful critiques of post-New Deal regulation during the 1970s and 1980s. For example, Sunstein dismisses in a few sentences the great debate at the boundaries of welfare economics about whether welfare must be measured strictly in terms of current, individual, market-revealed preferences, or whether other indicia of happiness or well-being can be taken into account. In the process of making this argument, however, Sunstein suggests an important point: most of the economic attacks on the regulatory state rest on a premise that restricts the meaning of "welfare" to that which it has within neoclassical economics—a regime in which subjective utilities are presumed not to be interpersonally comparable and the meaning of "welfare" is identified with revealed market preference. However, most of these arguments fall apart when one permits broader measures of welfare, drawing upon data from a wider variety of sources and from disciplines other than economics.

Sunstein also rejects in a short space the contractarian argument that legislative interference with voluntary market transactions is justified only when the changes are supported by unanimous consent. Sunstein suggests that this position depends on a presumption that the existing distribution is "prepolitical, or just, or supported by unanimous consent at some privileged earlier stage." Of

course, contractarian arguments may depend on no such presumption, but simply on notions of reliance, or alternatively, that no matter how unjust or impoverished the current state, only unanimous consent provides reliable evidence that welfare is improved under any alternative state. Sunstein also seeks to counter the broad-based economic argument that regulation is nothing more than rent seeking by noting that an extremely vibrant liberal tradition in the United States suggests that much governmental participation is not rent-seeking at all but good citizenship—people seek regulatory rules because they believe the rules are in the public interest.

Sunstein then concludes that the case against the minimalist state and in favor of regulation is strong, and rests on three fundamental points. First, individual preferences are not simply given, or inherent in the human constitution, but are determined by the existing legal regime. As a result, defending the existing, antistatist legal regime by reference to individual preferences involves us in a circular argument. Second, regulatory programs are much more necessary than some economists believe to solve free rider and collective action problems. Third, on other grounds than number one, private preferences need not always be respected, since they can and should be overridden by the collective will; further, preferences are determined by what the market makes available. For example, some tribes of American Indians placed only a low value on alcoholic beverages offered to them by European traders until the traders succeeded in establishing a "consumption history."

Sunstein's assessment of why and how regulation fails begins with a survey that finds wide disparities in the relative success stories of various regulatory regimes. Sunstein cites rule making by the Consumer Product Safety Commission and the Occupational Safety and Health Administration (OSHA) as having particularly unimpressive records. But there are more successes than failures in his story. Moreover, the failures can be explained. In some cases the regulation was badly-intentioned from the beginning—usually nothing more than a wealth transfer passed at the behest of a rent-seeking interest group. Other cases can be explained by a failure to diagnose the problem or by rigid legislation that either constrains private firms' ability to find the optimal solution or submits them to an unrealistic timetable. He cites automobile emission control standards as an example of such difficulties. Other failures result from unanticipated consequences or system-wide effects that result from regulation that was intended to be local or specific. Related to this is a failure of one set of regulatory statutes to coordinate with another set. Still other regulatory failures result from changed cir-

cumstance or obsolescence: the regulation may have been well designed for the problem that was perceived to exist at the time the regime was passed. However, subsequently either the problem changed or information has become available that has changed our perspective about the problem.

In addition to these numerous causes for the conceptual failure of regulatory regimes, Sunstein cites several instances of what he calls "implementation failure"—situations where the regulatory statute may have been well designed for the problem confronted, but the agency delegated the task of establishing and enforcing the regulatory regime has not performed the task well.

The second half of Sunstein's book is concerned with issues of statutory interpretation, designed to enable both legislative drafters and courts—primarily the latter—to establish regulatory regimes that work in the public interest. To this end, Sunstein concludes that the interpretive task "inevitably requires courts (and others) to develop and rely on background principles that cannot be tied to any legislative enactment." However, reliance on such principles is both inevitable and "a potentially valuable part of the fabric of modern public law."

Sunstein proposes principles of statutory interpretation designed to account for regulatory failure without being hostile to the general enterprise of regulation. His basic disagreement with the strictures imposed by public choicers on statutory interpretation appears to be that they begin the process with unabashed hostility toward most regulation in general. This hostility leads public choice to such conclusions as that legislation should be viewed as no more than contracts, or "deals" between the legislature and special interest groups, in which the interest groups are entitled to get what they bargained for and no more.

The centerpiece of Professor Sunstein's book is chapter five, which presents a set of interpretive principles for the reconstructed regulatory state, designed to take many of the criticisms of public choice and the general doctrine of regulatory failure seriously, but not so seriously so as to undermine all trust in regulation. Some of the principles are orthodox and seem quite uncontroversial: if the federal government wishes to preempt state law, it should state so clearly; statutes that raise constitutional doubts should be construed narrowly. Others are more venturesome: "statutes that embody mere interest-group deals should be narrowly construed," and "[c]ourts should construe statutes so as to increase the likelihood that decisions will be made by officials who are politically accountable and highly visible." Clearly, such principles place rather high

burdens on courts, and require them to look far beyond the text. Other proposed principles are far ranging, with implications that can only be imagined, and with a content that is frustratingly ambiguous. For example, Sunstein urges that the law that one must show a discriminatory intent to make out an equal protection clause violation should give way to the view that a statute need have only a disproportionate, discriminatory impact to "raise constitutional doubts." Certainly Sunstein would not argue that all statutes with a disparate impact are unconstitutional. So the phrase "raise constitutional doubts" must mean that some will survive and some will not—but this leaves an extraordinary amount of room for judicial discretion.

Daniel Farber and Philip Frickey's book is a first rate introduction to the public choice literature for someone who does not have a technical background in economics and who looks at public choice through a lawyer's eyes. The entire thrust of *Law and Public Choice* is that there is something that can be characterized as a "jurisprudence" of public choice: that the public choice literature has something important to say to legal policy makers such as legislators and judges. Not all of those engaged in public choice inquiries would agree with this proposition. Many regard public choice as a purely theoretical endeavor that has or should have little obvious impact on legal policy making, at least at this stage. But Farber and Frickey are correct and the critics wrong. Neoclassical economists in general have disdained applied economics—and the application of economics to legal policy generally takes the form of applied economics. If public choice as an enterprise is worth carrying on in some sense different than, say, chess is worth carrying on—not merely because it is fun and intellectually stimulating, but because it helps us to conduct our affairs better—then the admixture of law and public choice is inevitable.

Farber and Frickey's opening illustration suggests one of the most pervasive problems in the public choice literature: its uncritical readiness, even enthusiasm, to accept public choice theories as an explanation for certain phenomena without considering the alternatives very seriously. The authors cite a series of studies which over an extended period asked people the same question: "Would you say the government is pretty much run by a few big interests looking out for themselves, rather than for the benefit of all the people?" In 1964 fewer than one-third answered yes, but by 1982 sixty percent did. One might look at that evidence in a variety of ways. Farber and Frickey appear to follow the public choice consensus in regarding it as proof of a general, increasing cynicism about govern-

ment, which implicitly reveals the need for some theory to explain why government so often works poorly. But there are alternatives. For example, one might observe that 1964 was the high point of President Lyndon B. Johnson's popularity, while 1982 was mid-way through the first Reagan administration. Perhaps people in general are more cynical about government during Republican administrations than during Democratic administrations. The numbers also say nothing about whether this change in attitude is linear or cyclical. Did we start with some very high number—perhaps at the time of the Revolution—which has been declining ever since? Mancur Olson's thesis, that nations begin with good government but gradually fall victim to special interest groups, would suggest this. Alternatively, would the numbers have been low after, say, the Teapot Dome Scandal and Watergate, but high after Appomattox or the end of Franklin D. Roosevelt's first term?

The numbers also fail to say much about people's perceptions with respect to government intervention in the market. 1964 was near the high point of regulatory liberalism and the emergent "Great Society" of the Kennedy-Johnson years, when the Warren Court was in its ascendancy and agency regulation had not yet been debunked very much in the popular literature. By 1982 the deregulation movement, which had begun during the Carter administration, was well underway. Perhaps the cynicism expressed in these numbers really expresses a negative reaction to government *withdrawal* from certain areas of economic activity—a prominent part of Reagan campaign rhetoric—rather than a negative response to affirmative government intervention. In short, the numbers may prove precisely the opposite of what they are intended to prove. Perhaps people as a group feel best about government when it has expansive wealth transfer programs whose articulated goals are to eliminate poverty, democratize higher education, and eliminate discrimination. On the other hand, they equate *de*regulation—or the government withdrawal from certain areas and re-entrustment of these to the market—with special interest legislation.

In a short space Farber and Frickey review the recent history of public choice thinking, and then present chapters on the two main branches of public choice theory. One branch owes its origins to James Buchanan and Gordon Tullock's *The Calculus of Consent*[5] and Mancur Olson's *The Logic of Collective Action*,[6] and is devoted mainly to the study of interest group organizing and activities, voter behavior, and various phenomena that have become an

5. U. Mich. Press, 1962.
6. Harvard U. Press, 1965.

almost inherent part of the legislative process, such as log-rolling, committees with powerful agenda-setting chairs, and the like. The second branch of public choice is commonly identified with Arrow's General Possibility Theorem, and is concerned with determining mathematically the conditions under which democratic voting can produce efficient, stable outcomes. To date, the first branch of public choice literature has had a greater impact on policy than the Arrovian literature has, and the coverage of this introductory volume reflects that influence.

After this presentation, the Farber-Frickey book turns to two broad issues where public choice and public law have managed to find each other. The first concerns judicial review of economic regulation. The second is the general issue of statutory interpretation.

Farber and Frickey discuss the work of a small but influential group of legal scholars who are eager to use public choice as the basis for a broad revision of the federal constitution. This revision would basically reverse the attitude that the Supreme Court has taken toward economic regulation since the Court Packing controversy of 1937, and restore a regime of economic scrutiny somewhat akin to the regime we know today as the *Lochner* Era. The vehicle of choice for this transformation is not the due process clause as it was in *Lochner v. New York* (1905), however, but most often the takings clause of the fifth amendment. Likewise, while the *Lochner* Supreme Court articulated its concerns in terms of a liberty of *contract*, the central articulated concern today is *property* rights.

In brief, public choice theory teaches that small, single-minded interest groups will have their way with legislatures and compel special interest legislation that will transfer wealth away from others for the special interest group's benefit. The purpose of the takings clause (as well as some other clauses) of the Constitution is to prevent this from happening. Thus courts should look closely at wealth transfers that benefit special interest groups. By contrast, "where the beneficiaries [of legislation] are substantially more diffuse than those regulated by a statute," no taking should be found. Statutes in this latter category are not likely to be the product of rent seeking or special interest capture.

This public choice approach to the takings clause stands the traditional liberal view of government interference with private property precisely on its head. Under the traditional theory a court considered whether the group victimized by a statute challenged under the takings clause was unique (that is, having interests that the community at large did not share), and relatively isolated in the political process. If so, group members might be branded as the

victims of an unconstitutional attempt to transfer wealth away from them for the benefit of the public at large, or at least of some larger and more powerful interest group. This view of takings jurisprudence followed closely the Warren Court's development of the equal protection clause to protect "discrete and insular" minorities from unjust discrimination at the hands of the majority. The purpose of the takings clause was to "spread the cost of operating the governmental apparatus throughout the society rather than imposing it upon some small segment of it."[7] In short, in liberal takings jurisprudence the isolated minority is the victim; in public choice jurisprudence the well-defined, small minority becomes the rent-seeker, who robs the much more diffuse general public of its property rights.

The problem faced by the "applied" legal policy maker is that each version of the takings story seems to account for some situations where we might wish to strike down a statute, and neither version accounts for everything. Suppose a city council representing ten thousand people passes an ordinance preventing any development on the land of a half dozen neighboring property owners, in order to protect the view from a public park across those property owners' land. Would the liberal view (taking) or the public choice view (no taking) be more sensible? Suppose the only three apartment building owners in a town lobbied for and obtained an ordinance preventing any further apartment buildings from being built. Would the liberal view (no taking) or the public choice view (taking) be more sensible? Simply put, not all forms of legislation addressable under the rubric of takings fall into one category or the other, although the liberal view seems to explain more recent Supreme Court decisions than does the public choice view. Further, in many cases a court would likely not be able to distinguish one kind of "legislative failure" from the other.

Farber and Frickey conclude with a fairly deep skepticism about the public choice approach to takings clause jurisprudence, although for different reasons than those outlined above. They note first that the domain of "property rights," which are covered by the takings clause, is much narrower than the domain of special interest economic regulation. For example, a minimum wage statute might qualify as an inefficient, socially harmful acquiescence to a narrow special interest group, but it is difficult to attack minimum wage statutes under our current conception of the takings clause. Indeed, as Farber and Frickey note, any revision of the constitution to forbid all inefficient rent-seeking implies judicial review over a domain

7. Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 75-76 (1964).

and of an intensity that exceeds the current doctrine by a large order of magnitude. Carried to its logical conclusion, such a view would require the near abdication of legislatures and agencies, and would result in a form of government by judiciary which we have not as yet seen.

On statutory interpretation, an important public choice story is that statutory "intent," particularly insofar as it is contained in official legislative history, is largely manufactured. Legislative bodies use it to rationalize or disguise what they are doing at least as often as they use it to explain a statute's meaning. From this point one can develop two different views about how the judge interpreting a statute is to proceed. First, he should look to the natural meaning of the language itself, and ignore other statements of statutory intent, including legislative history. Alternatively, the judge should interpret the statute in such a fashion as to correct its public choice biases. Farber and Frickey explore mainly the first; Sunstein's book explores mostly the second.

Farber and Frickey note that the argument for discarding legislative history, Congressional reports, and other sources for a statute's meaning other than the statutory language itself makes sense, if at all, when the statutory language is clear on its face. When that language is ambiguous, then the statute may have no meaning apart from the expressions of intent manifested in collateral documents. In particular, the authors attack Justice Scalia's notion that, while statutory language is often drafted in a public-regarding sense, legislators pack reports and other legislative history with all kinds of statements favoring the particular special interests that have claimed their souls. Justice Scalia apparently thinks this is a daily occurrence. Farber and Frickey appear to believe that it virtually never happens. One might easily presume the truth to be somewhere in the middle. Likewise, Farber and Frickey's argument that the public choice case against legislative history "misfires" when statutes are ambiguous does not adequately consider the argument that statutory language may sometimes be intentionally made ambiguous in order to create consensus—the hope being that courts will later look to the collateral documents to determine the statute's true meaning.

Farber and Frickey mix an admirable understanding and sympathy for the contributions of public choice scholarship to jurisprudence with an appropriate skepticism about public choice's more normative and far-ranging conclusions. On the one hand public choice scholarship is sophisticated, its models are elegant, and much of it seems to describe things that we observe daily in our

highly imperfect political process. On the other hand, many public choice theories do not stand up well under rigorous empirical testing. Legislatures in fact exhibit far more stability and far less chaos than the Arrovian literature predicts. Although the theory of capture by special interest groups certainly accounts for some statutes, it seems quite unable to account for others. The ideology of elected representatives continues to be a better predictor of voting behavior than economic self-interest or the desire to be re-elected. As Sunstein's book tellingly reveals, most of one's attitude toward regulation is predetermined by the baggage, whether liberal or neoclassical, that one carries into the process. Public choicers have convinced mainly themselves.

The lack of empirical robustness in the public choice literature is critical for the legal policy maker, because he or she is interested largely in applied public choice. An elegant model that simply fails to account for the data is not of much use to someone who is looking at an existing institution and considering how to change it. Both Sunstein and Farber and Frickey take what seems to be the correct approach to this problem. If one is going to "apply" public choice theory at all in the realm of legislative and agency decision making, the application should be at the margin and not the center. Nothing that public choice theory has established to date justifies the wholesale abdication of legislative regulation in favor of the unregulated market, or even a substantial remodeling of our political and administrative institutions. What public choice should encourage, however, is increased sensitivity to the possibility of capture and an approach to statutory interpretation designed to make statutes reflect, as much as possible consistent with their language, public rather than private interests. Farber and Frickey appear to agree with this view. They conclude that "public choice can make a real . . . contribution to the legal system—not at the level of revolutionary new constitutional doctrines, but more modestly, by improving the implementation of existing statutes and the process for enacting future legislation." For Farber and Frickey this premise yields a case for a modest kind of judicial activism, which they characterize as nothing more than a "sensitivity to the forces that warp political outcomes." This should lead judges to enforce "structural and procedural constraints on those aspects of the democratic process that public choice suggests are most vulnerable to malfunction."