REVIEW

Background Norms in the Regulatory State

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After the Rights Revolution: Reconceiving the Regulatory State. Cass R. Sunstein. Harvard, 1990. Pp. xi, 284.

Anyone familiar with the work of Cass Sunstein will expect his book to exhibit wide background learning, sharp analysis, and elegant writing. In these respects, the reader of *After the Rights Revolution*[1] will not be disappointed. And a reader of any persuasion will get a bracing intellectual workout. But many will come away unconvinced by the special blend that Sunstein has brewed up: a pragmatic and overwhelmingly negative assessment of large chunks of the modern regulatory state, combined with a dewy-eyed enthusiasm for others, which he declines to examine in any great detail.

The first two chapters set out to perform two functions. The first is a general demolition, largely based on history, of any presumption in favor of "private ordering"—the principle that most economic and social relations should be defined by citizens' dealings with each other, within a framework of basic entitlements defined and enforced by the state. The second is a natural follow-up: articulation of a list of grounds on which the state may properly and sensibly interfere with private ordering. Sunstein's list appears to include everything under the sun; even the greatest enthusiasts of statism may gag.

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[1] Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard, 1990). All parenthetical page numbers in the text and notes refer to this book.

Sunstein next tackles the failures of the regulatory state, a task he approaches with almost the same gusto as he brought to its justification. But he discerns little systemic pattern and offers less empirical support for what he does discern. He employs a version of public choice theory to argue that agency practice will be distorted in the direction of concentrated interest groups at the expense of diffuse ones. But he does not pursue this argument with much empirical zeal. Sunstein pronounces programs aimed at relief of minorities or women to be flawed due to underenforcement (pp 103-04), for example, without articulating a standard of optimal enforcement and with little or no analysis of legislative or agency strategies, the interests of different subsets of the nominal beneficiaries, or the interests of any groups other than the nominal beneficiaries.

In the last three chapters, Sunstein turns to the courts. Here he appears to see considerable hope, but it is not clear why. He would expand their role in statutory interpretation well beyond the classic function of decoding legislative meaning. That function would be overlain with a set of interpretive canons, ranked in three tiers, and supposed by Sunstein to cure or at least ameliorate the assorted regulatory ills. But he identifies nothing in the courts—apart from their Olympian detachment from the contending factions—that marks them as equipped for the job.

I do not mean to be dismissive of Sunstein's reliance on canons. He argues that disentangling statutory ambiguity requires not merely syntactical presuppositions such as ejusdem generis (pp 151-52), but also broader background norms resting on the Constitution and other substantive grounds (he suggests a Constitutional norm in favor of federalism, for example (p 164)). Among the strongest of the proposed substantive norms is a principle of proportionality, which rejects statutory interpretations that generate extravagant costs for trivial or nonexistent benefits (pp 181-82, 194-98).[2] The frank assertion of the need for "more-than-syntactical" background assumptions is welcome and refreshing, even if Sunstein overstates the pliability of statutes and thus the field open for the deployment of canons.[3]

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[2] See note 20.

[3] Eben Moglen and Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U Chi L Rev 1203 (1990), offer a critique of the proposed canons with which I largely agree. For Sunstein's response to their critique, see Cass R. Sunstein, *Principles, Not Fictions*, 57 U Chi L Rev 1247 (1990). My criticism of Sunstein's treatment of *Chevron U.S.A. Inc. v Natural Resources Defense Council*, 467 US 837 (1984), is already on record in Colloquium: Proceedings of the First Annual Review of the Administrative Process, *Developments in Judicial Review with Emphasis on the Concepts*

But Sunstein's rejection of any canon in favor of private ordering is central to his thesis. Chapter 1 is an explicit demolition of private ordering and chapter 2 is the converse—a celebration of a host of reasons for state interference. Because these chapters really drive the book, they will be the focus of this review.

I.

There are two key elements to Sunstein's attack on private ordering. First, he argues that state coercion, even though aimed at neither force nor fraud by individual citizens, often enhances liberty. Early on Sunstein claims that regulation that counteracts coordination or collective action problems "does not override private choice at all; constraints turn out to be enabling" (p 3). Second, Sunstein attacks the legitimacy of any idea that the common law system of rights could properly serve as a "baseline" for construing statutes. Once one recognizes that common law rights, like statutory ones, are themselves creatures of the state, and thus neither "neutral" nor "prepolitical" (p 20), any interpretive presumption in favor of private ordering within the system of common law rights is invalid. Sunstein's first point is, on examination, as Orwellian as it sounds. The second, to the extent that it is more than the dismissal of a straw man, turns out to depend not only on the validity of Sunstein's list of regulatory justifications but also on a view that the present regulatory landscape manifests "a series of patterns with integrity and coherence of their own" (p 228), the product of considered, other-regarding popular deliberation—liberal republican virtue at work.

Sunstein's redefinition of freedom and liberty proceeds as follows: there is a circularity in viewing individual preference satisfaction as manifesting autonomy, because the preferences themselves are social constructs, "product[s] of available information, of existing consumption patterns, of social pressures, and of legal rules" (p 40). Accordingly, state interference with a decision "to purchase dangerous foods" or "not to purchase cars equipped with seatbelts or to wear motorcycle helmets because of social pressures imposed by one's peer group . . . removes a kind of coercion" (p 40). Similarly, because "[i]ndividual consumption choices often diverge from collective considered judgments," state support for "high-quality broadcasting" is justifiable on grounds of autonomy (p 42).

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of Standing and Deference to the Agency, 4 Admin L J 113, 123-30, especially 129-30 n 67 (1990).

Sunstein further argues that "when preferences are a function of legal rules, the rules cannot, without circularity, be justified by reference to the preferences" (pp 41-42).

There are two problems here. The circularity claim seems to rest in part on a confusion of quite different classes of rights. Sunstein's two examples of rights that would affect preferences are the right of employees to organize and the right of women to be free of sexual harassment in the workplace (p 41). The first is simply an example of private ordering. Preserving the right allows individuals to negotiate in accordance with their values—determined, in the minimal state, largely without interference from the state itself. The second is a substantive state determination of an outcome, decided regardless of employee-employer negotiations and superimposed on classical tort protection against the unconsented use or threat of force, intentional infliction of emotional distress, or invasion of privacy. While it is obviously true that in either case different rules would affect preferences, Sunstein's conflation of the two ignores the way in which the first right's claim to neutrality, based on its recognition of individual autonomy, is stronger than the second's.[4] In the end, Sunstein's argument does not rebut the usual linguistic notion that regulation constrains liberty but rather asserts the truism that the state has the power to influence tastes.

More central, however, is that the whole argument rests entirely on a conceptual confusion. Recognizing the social origins of individual preferences does not support the conclusion that the state enhances autonomy when it thwarts private choice. One may argue that socially constructed preferences are, in some sense, outside or beyond autonomy. And one can even argue that the independent formation of preferences is inconceivable because it would deny the very concept of causality. Where could preferences come from other than society, in the broad sense? The logical upshot of these claims is the extinction of autonomy as a relevant value (or, in a weaker form, a narrowing of its legitimate sphere). But to the degree one calls autonomy a sham, one cannot also invoke it as a basis for state intervention.

Sunstein at moments recognizes that his autonomy arguments prove too much, observing that a general state authority to override preferences on grounds of their social origin "would be a license for tyranny" (p 42), and that a "general regime of deliberate

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[4] Under sexual harassment law, for example, harassment otherwise actionable is not so when it arises from the victim's sexual preference rather than his or her gender. See *Carreno v Local 226, IBEW*, 1990 US Dist LEXIS 13817 (D Kan).

preference-shaping . . . is of course a central characteristic of totalitarian regimes" (p 47). In discussing collective aspirations as a basis for state intervention, he offers some limits (p 60) that I will address in that context.[5] For the moment one may simply say that his theory, if the politically alert public took both its forward thrust and its limits seriously, would greatly weaken the psychic resistance to government interference with daily life.

Sunstein's second blow to any presumption in favor of private ordering consists mainly in the observation that the common law distribution of entitlements is neither "neutral" nor "prepolitical" (p 20). Again one must examine the sense in which such words might be used. Natural rights philosophy is obviously not based on any notion that nature itself enforced or established natural rights. Even the rare proponent of private ordering who goes through the exercise of imagining a stateless system for enforcement of rights presents it as theory, not history.[6] Thus no one claims that common law rights are "prepolitical" in any historical sense.

Neutrality, too, may have a variety of meanings. (Sunstein does not state his.) If it means the same as prepolitical, then the common law system obviously comes up short for the same reasons—no matter what the strength of invisible hand explanations for the evolution of case law,[7] the structure is clearly the product of individuals wielding state power and consciously defining entitlements. While Judge Livingston may have been unusually blunt when in 1805 he squarely based his theory for the acquisition of title to wild animals on the goal of affording "the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career [as the fox],"[8] few in this century or the last can have supposed common law rules to be without policy effect or purpose. If that spells non-neutrality, no governmental system measures up, and I doubt if many proponents of private ordering supposed the contrary.

But if neutrality means that the system is, for example, one that might have been created by persons acting under a Rawlsian

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[5] See Section II.C.

[6] See Robert Nozick, *Anarchy, State and Utopia* (Basic, 1974). A rare counterexample is Bruce L. Benson, *The Enterprise of Law: Justice Without the State* (Pacific Research Institute for Public Policy, 1990). To some extent, however, Benson's argument appears to turn on a semantic denial that coercive exercises of power by primitive communities are manifestations of a "state."

[7] Compare George L. Priest, *Selective Characteristics of Litigation*, 9 J Legal Stud 399 (1980), with Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J Legal Stud 51 (1977).

[8] *Pierson v Post*, 3 Cai R 175, 180, 2 Am Dec 264 (NY 1805).

veil of ignorance of their initial endowments of talent or property, and aiming at maximizing their expected welfare,[9] then the common law's claim to neutrality is a serious one. The validity of Sunstein's rejection necessarily depends either on his establishing serious, correctable flaws in the common law, or (what is substantially the same) on his validating a scheme of plausible state intervention that can reasonably be expected to improve matters. One must compare the common law as it works out with the administrative state as *it* works out, not with the administrative state as one might dream it.

Sunstein offers mainly conclusory and abstract arguments for the view that private ordering is fundamentally defective. He argues, for example, that much of the New Deal and modern state intervention is "attributable to a belief that the market creates a kind of coercion from which government must protect its citizens" (p 219). What does this mean? Clearly the market takes scarcity as a fact of nature, and scarcity (like nature) is in a sense coercive. But if Sunstein intends to assert that the political victory of the New Deal somehow established that the market is ill-suited to the task of reducing scarcity, he disregards a couple of problems. First, if we assume that the triumph of a political movement can establish the truth of an idea (as the "marketplace of ideas" metaphor suggests), then the recent repudiations of collectivism in Eastern Europe and even the Soviet Union reverse or at least temper that judgment. Second, the New Deal reading of the Great Depression as a failure of capitalism, which Sunstein evidently embraces, ignores alternative analyses, including ones that point instead to government decisions to shrink the money supply and hike tariffs. In short, Sunstein hits no bull's eyes either in his effort to turn liberty and autonomy into arguments for state intervention, or in his suggestion that enthusiasts of the common law have somehow advanced it under false colors.

II.

In large part, Sunstein's attack on private ordering takes the (nominally) more affirmative stance of presenting theories for state

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[9] Rawls, of course, does not posit that his fictive founders will seek to maximize their own expected welfare, but rather the welfare of the worst off in their society. John Rawls, *A Theory of Justice* 152-56 (Belknap, 1971). The objective imputes a high degree of risk aversion to the persons operating under the veil of ignorance; it would lead them, for example, to prefer an expected income of $30,000 a year with no chance of an income under $20,000 over an expected income of $60,000 a year with a one-in-a-million chance of an income of $19,999.

intervention. He divides these into eight types; in general, they seem to me an odd taxonomy. Specific issues are tossed into categories they don't seem to fit (auto traffic control as a cure for market failure (p 51)); labels proliferate for what most people would more simply call paternalism; the workings of the market are misconceived; and some theories have a distinct totalitarian potential (as Sunstein himself notes (pp 42, 47)). This last point is alarming. Although Sunstein himself would never apply his theories to any totalitarian purpose, ideas have consequences beyond their author's goals. "Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back."[10]

The eight categories of motives for state intervention are (in Sunstein's words): (1) market failures; (2) public-interested redistribution; (3) collective desires and aspirations; (4) diverse experiences and preference formation; (5) social subordination; (6) endogenous preferences; (7) irreversibility, future generations, animals and nature; and (8) interest group transfers and "rent-seeking." I will address them in order, except for categories 3, 4 and 6, which I treat as a group because they all seem to me strained efforts to justify paternalism without relying on the (apparently dreaded) word itself.

A. Market Failure

Here, of course, there can be no dispute in principle. The most ardent market enthusiasts recognize at least the central problems of monopoly and externalities, and thus the dispute moves on to practical assessments of the scope of the failures and the likelihood that a politically feasible intervention will improve things.

The only curiosity lies in some of Sunstein's examples. He sees problems of transaction costs or coordination in littering and traffic: individual littering may be in the litterer's rational self-interest but "above the social optimum" (p 50); automobile traffic without direction would result in chaos (p 51). But so long as the highway or potentially littered land is owned, whether by the state or a private party, the owner can usually adopt a suitable rule. State intervention in such instances exists only in the rather specialized sense that when the state owns the land (the justification for which may

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[10] John Maynard Keynes, *The General Theory of Employment, Interest and Money* (7 *The Collected Writings of John Maynard Keynes*) 383 (Macmillan, 1973).

itself turn on a market-failure contention), it makes rules as would a private owner.

The point may seem trivial, but it calls attention to Sunstein's having overlooked a critical feature of market failures: they often depend on a government failure—sometimes incurable because of practical difficulties—to define property rights in such a way as to reduce transaction costs to an acceptable level. For example, Sunstein invokes a market failure/coordination argument to support government assignment of broadcast frequencies. But a simple rule of prior appropriation by use, with fixed property rights in the frequency used, would supply coordination and, for a time, did.[11]

Sunstein stretches the market failure notion still further by stuffing it with the issue of seatbelt use:

> Similarly, compulsory seatbelt laws might be understood as a device to overcome the social pressures imposed on (especially young) people not to buckle up. Here the shield of the law removes psychological pressures and thus helps people do what in fact they want to do. (p 51)

This quotation echoes Sunstein's familiar argument about the social formation of preferences, with the concomitant shift in the idea of autonomy. What it has to do with the failure of markets is not apparent. Sunstein seems to have broadened the notion of market failure to encompass virtually any imperfection in human life.

B. Public-Interested Redistribution

For the most part, Sunstein believes that tax and benefit programs are more suited to openly redistributive policies than is regulation. He argues that market actors respond to regulation in ways that tend to defeat any redistributive purpose, citing primarily rent control and minimum wage legislation (p 56). Without

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[11] For a significant period, parties secured exclusive right in frequency by use coupled with government licenses issued essentially automatically. See Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J L & Econ 133, 139-43, 147-48 (1990). The system collapsed into chaos when a district court held, in *United States v Zenith Radio Corp.*, 12 F2d 614 (N D Ill 1926), that the Department of Commerce had no power to assign exclusive wavelengths, and the acting Attorney General of the United States approved that view. See 33 J L & Econ at 141, 147-48. Acquisition of title by use may entail some inefficiencies, see Stephen F. Williams, *The Requirement of Beneficial Use as a Cause of Waste in Water Resource Development*, 23 Nat Res J 7 (1983), but so long as it results in enforceable, exclusive, and transferable rights, further coordination by government is unnecessary.

completely renouncing redistribution as a basis for state regulatory intervention, he is highly skeptical and appears not to rest his overall confidence in the regulatory state on this justification.

C. Collective Desires and Aspirations; Diverse Experiences and Preference Formation; Endogenous Preferences

I group these three categories together because they all strike me as rather elaborate ways to cloak in fancy dress what is primarily paternalism. Sunstein never explains his reluctance to embrace blunt, frank paternalism, but the aversion is plain (see p 51).

Sunstein's model for the first item—collective desires and aspirations—is the demand for government regulation favoring such "meta-preferences" as "high-quality broadcasting" and subsidies for the arts (pp 58-59). Sunstein breaks the issue down into four "closely related phenomena": (1) "citizens may seek to fulfill individual and collective aspirations in political behavior, not private consumption"; (2) as political actors, people may seek to fulfill altruistic or other-regarding impulses; (3) a political decision may represent preferences about preferences, that is, an aspiration to higher tastes; and (4) people may wish to make precommitments to protect themselves against moments of temptation, after the manner of Ulysses's resistance to the Sirens (p 58). For such reasons, he tells us, "people seem to favor regulation designed to secure high-quality broadcasting even though their consumption patterns favor situation comedies" (p 58).

Not surprisingly, Sunstein does not identify a single person actually holding such a view. (I love to imagine a citizen protecting himself from the siren song of Roseanne Barr by having the FCC tie him to the mast of round-the-clock MacNeil/Lehrer.) Political pressure for high-quality broadcasting seems readily explicable on two grounds Sunstein never mentions. Many may believe government pressure will bring them more programs they like (a quite self-regarding view), and many may think such programming is good for others (plain old paternalism). These two grounds seem likely to work in comfortable unison in many a citizen or politician. (In addition, many may fear being thought philistine.) With these simple and obvious explanations available,[12] it seems extraordinary

[12] Hazlett argues that the legislative decision to allocate frequencies in accordance with a "public interest" standard arose from the established broadcast industry's effort to prevent expansion of the spectrum and the resulting dissipation of rents in existing licenses. Hazlett, 33 J L & Econ at 152-58 (cited in note 11). If this is indeed the explanation, the public interest standard itself would be mere window-dressing, but its emergence as the

to reach for the rather schizophrenic character who "as an individual" loves sitcoms but "as a citizen" prefers Brahms. Despite the empirical shakiness of the whole enterprise, Sunstein argues that it is strong enough to support not merely help for preferred activities but bans on unpreferred ones.

Obviously aware of some of the hazards of this extension, Sunstein notes three categories of cases where the argument is "much weaker." First, "if the particular choice foreclosed has some special character—for instance, some forms of intimate sexual activity—it is appropriately considered a right" (p 60). Second, "some collective desires might be objectionable or distorted" (p 60). Third, "some collective desires might reflect a special weakness on the part of the majority," so that state intervention "might remove desirable incentives for private self-control, have unintended side-effects resulting from 'bottling up' desires, and prove unnecessary in light of the existence of alternative remedies" (p 60). The first two limits seem to be instances of the classic bureaucratic maneuver—refer the issue to another department, with no criteria of judgment. (I would be interested to know who runs that department.) The third sounds like an answer that might apply to most instances of this type of intervention: state preclusion naturally dulls the individual's capacity for choice.

Sunstein has in fact captured an important truth, but stretched it to the breaking point. Both the soldier who voluntarily risks his life for his country and the civilian who sacrifices leisure for less dramatic causes indeed display a kind of collective aspiration that is part of a country's being a country. And genuine collective action problems will require government intervention, such as taxation to support an army that necessarily defends the nation as a whole, not just citizens who might hire military services in the market. But to extend the "collective action" or "public goods" model to every activity that may confer some vaguely characterized public benefit—that is to say, every activity—is to embrace a true Leviathan.

Under the rubric of "diverse experiences and preference formation," Sunstein argues for state intervention to offset pressures toward "homogeneity and uniformity" that may arise from private ordering (pp 60-61). One example he offers is the "Prevention of Significant Deterioration" program of the Clean Air Act, which protects high quality air in those areas where it still exists. But

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chosen window-dressing could be attributed to its intuitive appeal to the people mentioned in the text.

later he cites the same program as a classic interest-group transfer, arising from a regional battle in which Eastern interests sought to retain industry, and he concludes that the program "is not a sensible antipollution scheme" (pp 85-86). Of course one may support government preservation of specific types of diverse experience with a public goods rationale, if there is little or no cost to making the experience available to all once it exists, *and* if there is no practicable way of excluding extra users. But even if reserves of pristine air meet this test, Sunstein's own assessment of the program shows the risks. Once the logs start to roll, the actual government intervention may bear little relation to government intervention as the high-minded may picture it in public policy seminars.

Sunstein's second main example is, again, high-quality broadcasting. His sole pass at empirical support for the idea of undue homogeneity is to hypothesize a community with only five radio stations, with 85 percent of the listeners favoring popular music and 15 percent preferring classical music or news (p 185). He argues that without state intervention the latter tastes may not be satisfied at all. But the hypothesized number of stations is strikingly small under modern conditions, where 64 percent of households received nine or more TV signals as of 1984,[13] let alone radio signals that are characteristically far more numerous.[14] Moreover, a frequency's time is far from indivisible, so that the feared total shut-out of the classicists seems improbable; Sunstein points to no evidence of its having ever occurred.

That state action may enhance diversity is conceivable, but the burden of proof would seem to be on the advocate of that view. In a market, any esoteric taste may be satisfied so long as the would-be customers are willing to pay the cost. Of course, demand for some items may be too low to elicit a supply at prices the demanders are willing to pay; government mandates could expand the market and make economies of scale possible, so that the tastes would be satisfied. But if that mere possibility is an adequate ground for state intervention, it effectively licenses state allocation of resources down to a micro level. Experience does not suggest that such intervention works toward anything remotely like optimal satisfaction of consumer demand, much less a preservation of diversity.

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[13] *Fairness Doctrine Report*, 102 FCC2d 143, 205 (1986).

[14] See id at 202, 204 (9,766 licensed radio stations in 1985, as against 1,208 TV stations).

Finally, Sunstein invokes "endogenous preferences" (pp 64-67). Although he seems to cluster a number of points here, the dominant theory is that the individually perceived costs and benefits of conduct change as a result of the conduct itself. The costs of escaping addiction rise as the use persists (p 64), and the inconvenience costs of using seatbelts decline as the habit develops (pp 65-66). This is all well and good, but Sunstein gives the game away when he characterizes it, oxymoronically, as an "intrapersonal collective action problem" (p 65). Individuals know these facts. The expected effects explain why most people don't touch drugs and must play a role in some people's readiness to start using seatbelts. The driving force for intervention here is nothing so fancy as "endogenous preferences," but simply a view that some people won't decide correctly for themselves. It will not surprise the reader to learn that Sunstein also invokes the theory to support subsidies for the arts and public broadcasting (p 65).

What seems to be going on in all three of these theories is that many state interventions based in part on paternalistic and in part on highly self-regarding purposes are reformulated under highfalutin terms that don't yet carry the relatively modest stigma of paternalism or the more severe stigma of self-interest. Although Sunstein suggests limits, they are vague. Why not use the plain old word for the plain old thing?

D. Social Subordination

Sunstein here identifies a number of ways in which the market is a highly imperfect cure for private discrimination on racial and various other grounds. Though one may quarrel with some assertions, the general conclusion is not widely disputed. What is missing is any sophisticated assessment of the effects of anti-discrimination law in the private sector. For example, Sunstein cites the Heckman and Payner study[15] suggesting that Title VII of the Civil Rights Act of 1964 accounted for a dramatic surge of black employment in South Carolina (pp 80-81). But he fails to note either their observation that, controlling for individual differences, blacks were not underrepresented in South Carolina before 1960 in any industry other than cotton textiles,[16] or the fact that cotton textiles evidently were unique in South Carolina in being subject to a

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[15] James J. Heckman and Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 Am Econ Rev 138 (1989).

[16] Id at 158.

state law requiring strict racial segregation.[17] Thus the South Carolina evidence may suggest that the key successes of Title VII lie more in federal foiling of state-government racism than in government correction of the racism that survives market constraints.[18]

E. Irreversibility; Future Generations; Animals and Nature

As the subheading suggests, this is something of a melange. Quite rightly, in my view, Sunstein argues for bringing animals within the circle of beings whose suffering or pleasure counts in any effort at "utilitarian" calculus (pp 68-69). In other respects, however, Sunstein shows some tendency to reformulate an elite paternalism into the language of market failure. For example, he concludes that "[s]ince markets reflect the preferences of current consumers, they do not take account of the effect of transactions on future generations" (p 68). He then proceeds to classify effects on future generations as "a kind of externality" (p 68).

The premise is false. Any competent owner of a resource must take "user cost" into account—the cost (in discounted current value) of forgoing the returns that could flow from some alternative future use.[19] One may argue that market discount rates are either unethically or inefficiently high, but it is far from clear what would follow from such a finding. It certainly would provide no reason to think that the influence of future generations will be stronger in the political market, where their vote is nil, than in the economic market, where it is merely discounted at prevailing interest rates. Indeed, when firms withhold a commodity in expectation of a rise in scarcity, and therefore price, legislators commonly revile them as speculators. What appears to be at stake in reality is that the political market may favor a different trade-off in values from that which would emerge in the economic market. This diver-

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[17] Id at 143; see An Act to Compel a Segregation of the Races Laboring in Textile Manufacturies, 1915 SC Acts No 69 at 79. See generally Richard A. Epstein, *The Anti-Discrimination Laws in Employment Markets: A Legal and Economic Analysis* (Harvard, 1991).

[18] See also Walter E. Williams, *The State Against Blacks* (New Press, 1982) (detailing ways in which government intervention on nominally neutral grounds has tended to injure blacks); Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U Chi L Rev 235, 251-52 (1971) (noting that interventions such as minimum wage laws are in part a source of need for anti-discrimination laws).

[19] For the classic exposition, see Harold Hotelling, *The Economics of Exhaustible Resources*, 39 J Pol Econ 137 (1931). Of course, to the extent that Sunstein is really speaking of resources such as the atmosphere or the spotted owl, for which exclusive property rights are unmanageable and which are therefore held in common, the absence of property rights creates a clear market failure and a prima facie case for government intervention.

gence of outcomes has nothing to do with any intergenerational conflict and is in itself no reason to think that the values prevailing in the political market are superior. They may be, but to think clearly on the subject requires one to pass up a synthetic ground for assuming the point.

F. Interest-Group Transfers and "Rent-Seeking"

Sunstein recognizes that "narrow parochial interests" sometimes play a role in legislation and agency activity. But he objects to any view that all government action must be so classified (pp 70-71). Who could dispute his objection to so broad a view? Not I. But it is also true that an alertness to the likelihood is mighty handy in approaching state interventions. Insofar as Sunstein disparages the likelihood of self-regarding impulses or inflates the role of generous, other-regarding purposes, he tends to blunt that alertness. Passages such as this one exemplify the book's unresolved tension. Most of the time Sunstein is keenly alert to the practical failures of the administrative state. Only when he contrasts it with the common law and the minimal state does he touch up its warts. Then we suddenly find eye-popping testimonials to the regulatory state's "series of patterns with integrity and coherence of their own" (p 228). In his heart Sunstein would like to compare the common law as it is with the administrative state as one might dream it. His head declines to go along, saving the book's honesty at the price of its consistency.

III.

Where then should private ordering stand in statutory interpretation? Sunstein's reason for denying it any force at all rests primarily on the contention that the New Deal and the statutory surge of the 1960s-70s effected (and reflected) a "rights revolution." It was part of this revolution to see that state intervention often enhanced autonomy even as it imposed constraints, and that private ordering was neither "neutral" nor "prepolitical." Moreover, with the broad panoply of theoretical bases for state intervention that Sunstein embraces, it is possible to see the regulatory state as legitimate heir to private ordering's former claim to offer an integrated and coherent system, so that there is no longer any role for a common-law rights baseline as a default position. I have tried to express my difficulties with these arguments.

One may then return to the Constitution itself. Sunstein recognizes that its framers were largely driven by a desire to prevent

government excess, arising from the power of factions (pp 13-18). From that concern flowed the Constitution's central precept—checks and balances. As the fear of factions led the framers to establish multiple barriers to any exercise of government power, it seems logical enough to read the Constitution as expressing a preference for minimizing state interferences in private ordering, especially the sort of discretionary ones so common in the regulatory state. I am not persuaded that the developments Sunstein discusses, or the theories he advances, are strong enough to overturn that implied preference.

Getting down to cases, Sunstein raises the issue of whether, in a workers' compensation scheme, it is proper to infer a private right of action against an employer who dismisses an employee who files a compensation claim (pp 207-08). He argues that disallowing such a claim would utterly defeat the scheme, but predicts that a judge giving a special position to private ordering would do so, because the statute is silent on the issue.

This example assumes that if a presumption in favor of private ordering is to play any role in statutory interpretation, it must be one of nuclear force. On the premise that denying the implied right would be fatal to the statutory scheme, which seems convincing, it is hard to imagine any sensible judge taking that course. Similarly, in speaking generally of historic uses of such a presumption in favor of private ordering, Sunstein says that these uses often "grossly distorted the meaning of the relevant statute" (p 6). Who could approve the use of any interpretive canon to distort a statute, much less to distort it "grossly"? Who could favor reading "[a]ll gaps and ambiguities . . . against application of the statute" (p 141; see also p 207)?

There is a curiosity here, because Sunstein favors an interpretive canon of "proportionality," which he would apply to health and safety regulations lest utterly extravagant costs (sometimes including costs measured in terms of health itself) be incurred in their name (pp 181-82, 194-98). In applying this canon, Sunstein is ready to find proportionality in the face of statutory language seeming to point the other way, succumbing to a temptation that the Reagan-appointed judges on the D.C. Circuit have resisted (assuming they felt the temptation).[20]

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[20] Thus Sunstein speaks approvingly (p 182) of a panel decision that held that § 112 of the Clean Air Act, requiring standards providing "an ample margin of safety," authorized the EPA to balance costs and benefits. *Natural Resources Defense Council v EPA*, 804 F2d 710 (DC Cir 1986). (He actually cites *Natural Resources Defense Council v Thomas*, 805

If canons are necessarily as forceful as Sunstein assumes (or, perhaps more truthfully, if judicial freedom of maneuver is as great as he advocates), a canon in favor of private ordering would indeed be troubling. But a canon can range in force from a 700-pound gorilla to a humble tie-breaker or the source of a default position.[21] A private ordering canon need not be tested on an all-or-nothing basis. As to a tie-breaker role for private ordering, Sunstein has not overcome the natural inference from the constitutional structure.

F2d 410 (DC Cir 1986), but the cite must be an error, as that case did not involve § 112 of the Clean Air Act.) Sunstein's approval of the panel decision seems an implicit disapproval of the unanimous en banc decision, *Natural Resources Defense Council v EPA*, 824 F2d 1146, 1164-66 (DC Cir 1987), which held that costs could be considered only in deciding whether to impose a standard more stringent than one that would achieve an "acceptable" safety level, itself determined without regard to cost. Further, he condemns the D.C. Circuit's refusal to use proportionality or some kindred doctrine to find a de minimis exception in the Delaney clause for cosmetic additives (pp 198-99). See *Public Citizen v Young*, 831 F2d 1108 (DC Cir 1987). (The latter is evidence of the thinking of only one Reagan appointee, as only one was on the panel.)

[21] Indeed, in places Sunstein seems as a matter of political science to embrace such a mild background norm, saying, for instance, that "[a] presumption in favor of a system of voluntary arrangements, operated within the basic institutions of private property, tort, and contract, thus emerges quite naturally from the guiding criteria of autonomy and welfare" (p 46).