

Review of Free Markets and Social Justice

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Book Review by Peter Berkowitz

A review of Free Markets and Social Justice by Cass R. Sunstein. New York: Oxford University Press, 1997. 416p. \$35.00.

In politics as in political science and legal scholarship, the world sometimes seems to be divided into those who think that for the sake of efficiency as well as justice markets must be free from regulation by morals and those who believe that, considerations of efficiency notwithstanding, justice demands that morals govern markets. In his instructive and admirably balanced new book, Cass Sunstein contends that, for all concerned, this is a bad way for the world to be divided.

Sunstein sets out to show the superiority of a third view: markets and morals exercise a reciprocal influence on each other, and a respectable political science and a responsible jurisprudence must grasp the complicated relationship between them. In support of his thesis, Sunstein examines a remarkable range of ideas and issues: the ambiguity of preferences; the need to devise empirical measures of human well-being to solve problems of adjudication and public policy that arise in the modern welfare state; the complex origins, the pervasive influence, and the political regulation of social norms; why markets alone cannot put an end to discrimination; free speech issues raised by the Internet; constitution making in Eastern Europe; the relation among property rights, democracy, and constitutionalism; neglected consequences and complicated trade-offs in the regulation of the environment and health; and the project of using the legal system to democratize America. In making his case, Sunstein is conscientious about introducing qualifications to his claims, drawing out problems of implementation inhering in his reforms, and identifying dangers associated with his programs, though occasionally he blurs the distinction between openly acknowledging a difficulty and responding to it by scaling back his theoretical ambitions or revising his political programs.

The two crucial and connected points, to which Sunstein returns again and again, are that markets are complex institutions and that morals are an irreducible element of social and political life. It is not exactly that there is no such thing as a free market or that morals are everywhere, but that free markets cannot be understood in isolation from beliefs and practices, especially beliefs about what is just and good for human beings and practices that prepare or prevent one from participating effectively in commercial, democratic society. Moreover, because they depend on and are partly constituted by law, free markets are not only more complex but also less autonomous than they sometimes appear. For example, the

law of property provides rules of entitlement and the law of contract establishes rules of transfer. And these fundamental legal rules are themselves not made by markets but, rather, play a constitutive role in making market relations possible and efficient.

Sunstein has a practical motive for bringing into focus the array of background conditions necessary to make markets work. He wants to show that current market thinking is insufficiently attuned to the harmful effects of background conditions that are unjust. But he makes this point as a friend of markets, and in the same spirit he seeks to show that current thinking about social justice is inadequately alert to the benefits markets confer. Indeed, for those who are inclined to see nothing but selfishness and exploitation in market relations, his message is that more appreciation must be mustered for the role that markets play in promoting the prosperity that is one of the key preconditions for a life of liberty.

Another leading theme of Sunstein's book is that legal controversies and disputes about public policy often turn on empirical questions that seldom receive the attention they deserve. Sunstein practices what he preaches, displaying a refreshing command of facts and figures. Although he occasionally disappoints by drawing back from making the prescriptions he thinks judges and government officials should be capable of issuing, Sunstein does offer a respectable assortment of ideas for making the law, on the basis of better empirical research, more responsive to the claims of efficiency as well as social justice. For example, on the grounds that human well-being is to a significant extent capable of empirical measurement and should be taken account of in policy planning, regulatory reform, and democratic deliberation by the people, Sunstein recommends that "the American government should compile and distribute an annual 'quality of life' report, including among other things, per capita income, poverty, housing, unemployment, average weekly earnings, inflation, child mortality, longevity, subjection to violent crime, literacy, and educational attainment" (p. 123).

Sunstein, in short, envisages an active, energetic, and big government that both respects the requirements of the market and plays a major role in securing the material well-being, and promoting the autonomy, of its citizens. Given the precarious balancing act that he has set out to perform, it is perhaps not surprising that the lucidity with which he presses his cases sometimes works to obscure a certain slippage in his argument. So, for example, while he is right that much which is treated as natural or inscribed in the order of things is in fact a function of custom and law, he occasionally wrongly implies that beliefs and practices that can be shown to have a human origin or to have undergone an alteration in history are therefore proper objects for state action. Similarly, he sometimes argues that if a preference is indirectly or inevitably affected by law, then the law is justified in directly regulating it. But from the fact that law affects the formation of a preference it is invalid to infer that "it is fully legitimate for government and law to try to shape preferences in the right way, not only through education, but also (for example) through laws forbidding racial discrimination, environmental degradation, and sexual harassment, and through efforts to encourage attention to public issues and to diverse points of view." (p. 5, emphasis added). Gliding on

occasion too quickly over the imperfect but necessary distinction between regulating behavior and regulating belief, Sunstein sometimes understates the importance of considerations that compel caution when it comes to putting government in the business of preference regulation: The cumbersome apparatus of government may be poorly suited to the complex task of forming preferences; even if it could form preferences effectively, government may be in a bad position to determine which preferences are the right ones; and using government to form directly the right preferences is rarely more than a short step away from using the organs of the state to supervise thought.

Sunstein himself emphasizes that inviting government to form the right preferences involves "serious risks of overreaching" (p. 20). In fact, in his discussion of "the project of norm management" (p. 59), he confronts the concern that using the law to make men and women moral invades individual liberty. He replies that government action designed to alter norms can be justified to promote liberal ends, such as material welfare or personal autonomy. Government, he stresses, should use the least intrusive means available, beginning with the simple provision of information and including campaigns of persuasion; taxing or subsidizing choices; imposition of time, place, and manner restrictions on particular activities; and, on some occasions, if necessary, straightforward coercion through legal prohibitions (pp. 56-57). Despite his forthright acknowledgment that the regulation of beliefs by government involves dangers, Sunstein in this case may not give the dangers their due. For while he is right to point out that a project is not invalidated just because it is liable to abuse, it also needs to be noted that to win support for a project it is not sufficient to show that in principle it may yield benefits. In short, Sunstein does not quite manage to dispel the anxiety that what he delicately refers to as "norm management" must be implemented and enforced by what others would be inclined to call "thought police."

Sunstein's enthusiasm for norm management is one expression of his commitment to using law to promote democracy: "few matters deserve higher priority than institutional changes designed to increase the democratic character of the modern state " (p. 318). To this end, he proposes three general reforms which, he convincingly argues, would promote efficiency as well as democracy: more education, the replacement of command-and-control regulation with economic incentives, and decentralization.

At the same time, Sunstein's own extended analysis of the presuppositions and background conditions that make markets work leads one to wonder whether every "increase in the democratic character of the modern state" would be good for democracy. The powerful arguments that Sunstein himself develops to show that free markets depend upon legal regulations and social restraints, and that market practices must always be evaluated with a view to "human interests" or "human purposes" suggest, contrary to John Dewey's principle, that more democracy is not always good for democracy.

Indeed, by refusing to treat free markets as ends in themselves and through the subtle assessment of markets' vices as well as virtues, Sunstein invites the thought that democracy, like markets, has vices as well as virtues, and more democracy, like more freedom in the marketplace, does not automatically guarantee greater efficiency or greater human well-being. His general approach also encourages the supposition that democracy is good in terms of the human purposes that it serves, and that sometimes regulation and restraint is what is required for democracy's defense.

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