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Unhelpful Abstractions and the Standard View

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Consider this question: *Are you in favor of the regulatory state?* That is an impossibly abstract question. True, many people (including many economists) are skeptical about the Occupational Safety and Health Administration. Many other people (including many economists) do not believe that the Environmental Protection Agency should issue more stringent regulations for ozone and sulfur dioxide. But most of those skeptics do not oppose the regulatory state as such, and they do not even ‘lean’ against it. After all, the common law is emphatically a regulatory system insofar as it establishes rights of private property and the rules of contract and tort law. Under reasonable assumptions, a competitive system works best if there are rules against violent crime and also against fraud; it probably should have some kind of antitrust law as well. As Friedrich Hayek wrote, “An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other” (1944, 29). Whatever they say, few people, and few economists, are against the regulatory state as such.

Now consider two other questions. *Do you favor tighter workplace safety regulations? Do you favor more aggressive controls on air pollution and water pollution?* These questions are also pretty abstract. It makes no sense to favor (or to oppose) tighter workplace safety regulations or more aggressive environmental controls as such. We need to know what workplace safety and environmental regulations would achieve, and at what cost. True, we could imagine a person, or an economist, purporting to believe that both kinds of regulations are objectionable as such. But in view of the diversity of potential regulations, and the likelihood of at least some

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market failures in both domains, it would be a bit a priori—a little like a grunt—to say ‘no’ to both questions. The same is certainly true for a ‘yes.’

To be sure, it would be possible to give direct answers to some abstract questions about regulation. Consider two: *Do you favor legalizing marijuana? Should prostitution be banned?* For such questions, we can imagine intelligible responses, on the ground that some kind of welfare analysis, made intuitively or on the basis of expertise, could support it. But those who say that they want to legalize marijuana and prostitution have not declared any kind of position on the regulatory state. They need not have any particular views on the common law, on the Sherman Act, on occupational safety standards, or on clear air regulation.

Now consider this question: *Are you in favor of the welfare state?* That question may be slightly better than the regulatory state analogue, but it too is unhelpfully abstract. From the far right to the far left, Americans, and American economists, favor some kind of welfare state. A ‘no’ answer is probably a kind of posturing, not anything real. Perhaps we could stipulate a general ‘yes’ in response to that question, but if so, the answers would not tell us anything.

Better tests would be these questions: *Do you think that the Earned Income Tax Credit should be increased? Do you believe that the government should ensure that all Americans have access to health insurance?* It is true that some people, including some economists, would answer ‘yes’ to the first question (as I would), while others would disagree. But from the answers to the first question, we would have no logical commitment to an answer on the second question, where people, including economists, also disagree (largely for empirical reasons).

In this light, it seems unhelpful, even a recipe for confusion, to puzzle over the question whether economists (or others) ‘like,’ or ‘lean toward,’ both the regulatory state and the welfare state, or neither, or one but not the other. But there is a more fine-grained position on something like that question, and I believe that many (not all) economists would support it. The position is this: *The regulatory state should restrict itself to the correction of market failures, and redistributive goals are best achieved through the tax system.* Let’s call this (somewhat tendentially) the Standard View (Kaplow and Shavell 1994). The Standard View is an abstraction, to be sure, but it has real bite, and it is a productive way to understand the relationship between the regulatory state and the welfare state. It suggests that the two have altogether different functions. For regulations, we should fix market failures, with careful attention to cost-benefit analysis, and when our goal is redistribution, we should use taxes and transfers. The Standard View cautions that when we think about occupational safety regulation or the Clean Air Act, we do best to maximize net benefits, while leaving redistribution for the tax laws.

The Standard View leaves some important open questions. How do we define market failures? Should we include “behavioral market failures,” as empha-

sized by behavioral economics—as, for example, in the forms of myopia, limited attention, and unrealistic optimism? In my view, we should (Sunstein 2013). How, exactly, should we understand the idea of redistributive goals? To answer that question, we need to separate strictly empirical questions from strictly normative ones. If pursuit of redistributive goals would have harmful effects—by, for example, hurting the very people that one is trying to help—redistributors must proceed with caution. This is so even if on strictly normative grounds, there is a compelling argument for ensuring that morally irrelevant differences (such as family background or even talent, as determined by the “natural lottery”) are not turned into systematic sources of social disadvantage (Rawls 1971).

Objections might be raised to the Standard View even if it is correct on its own terms. Suppose that a regulation would help poor people a great deal and not hurt wealthy people so much; suppose too that the tax system would be more efficient as a redistributive tool but that it is unavailable as a practical matter. What then? On these assumptions, should regulators pursue distributive goals through regulation? In my view, cases of this kind—which are admittedly quite rare—do raise a problem for the Standard View. There are also questions about whether the Standard View is correct on its own terms (Sanchirico 2000), though it appears to have largely survived critical scrutiny (Kaplow and Shavell 2000).

My conclusion is that it is not fruitful to puzzle over the question whether economists and others ‘favor’ or ‘lean’ toward the regulatory or welfare state, and that it is better to begin by emphasizing that the first should be designed to handle market failures, and that the second should be designed to respond to economic deprivation and unjustified inequality. In short, the Standard View is the appropriate starting point. True, it leaves open many questions, and it also runs into reasonable objections; but at least it can be said that those are the right questions and objections to explore.

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