

SIMPLER



THE FUTURE OF GOVERNMENT

CASS R. SUNSTEIN

Bestselling coauthor of *NUDGE*

SIMPLER

THE FUTURE of GOVERNMENT

CASS R.



SIMON & SCHUSTER

New York London Toronto Sydney New Delhi



Simon & Schuster
1230 Avenue of the Americas
New York, NY 10020

Copyright © 2013 by Cass Sunstein

All rights reserved, including the right to reproduce this book or portions thereof in any form whatsoever. For information address Simon & Schuster Subsidiary Rights Department, 1230 Avenue of the Americas, New York, NY 10020.

First Simon & Schuster hardcover edition April 2013

SIMON & SCHUSTER and colophon are registered trademarks of Simon & Schuster, Inc.

For information about special discounts for bulk purchases, please contact Simon & Schuster Special Sales at 1-866-506-1949 or business@simonandschuster.com.

The Simon & Schuster Speakers Bureau can bring authors to your live event. For more information or to book an event contact the Simon & Schuster Speakers Bureau at 1-866-248-3049 or visit our website at www.simonspeakers.com.

Designed by Akasha Archer

Manufactured in the United States of America

10 9 8 7 6 5 4 3 2 1

Library of Congress Cataloging-in-Publication Data

Sunstein, Cass R.

Simpler : the future of government / Cass R. Sunstein.

pages cm

1. United States—Politics and government—2009– 2. United States—Economic policy—2009– I. Title.

E907.S86 2013

973.932—dc23

2012048234

ISBN 978-1-4767-2659-5

ISBN 978-1-4767-2661-8 (ebook)



Selected Titles by Cass R. Sunstein

Coauthor

Nudge: Improving Decisions About Health, Wealth, and Happiness

Author

After the Rights Revolution: Reconceiving the Regulatory State

Democracy and the Problem of Free Speech

Free Markets and Social Justice

Going to Extremes: How Like Minds Unite and Divide

Infotopia: How Many Minds Produce Knowledge

Legal Reasoning and Political Conflict

*On Rumors: How Falsehoods Spread, Why We Believe Them,
What Can Be Done*

Republic.com 2.0

*The Second Bill of Rights: FDR's Unfinished Revolution—
And Why We Need It More Than Ever*

Why Societies Need Dissent

For Samantha Power and Richard Thaler

[E]ach agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.

Executive Order 13563, "Improving Regulation
and Regulatory Review"

Over and over the old scouts will say, "The guy has a great body," or "This guy may be the best body in the draft." And every time they do, Billy will say, "We're not selling jeans here," and deposit yet another highly touted player, beloved by the scouts, onto his shit list.

Michael Lewis, *Moneyball*

CONTENTS

INTRODUCTION

THE COCKPIT OF THE REGULATORY STATE • 1

CHAPTER 1

THE MOST DANGEROUS MAN IN AMERICA • 15

CHAPTER 2

DON'T BLINK • 36

CHAPTER 3

HUMAN ERROR • 51

CHAPTER 4

PLATE, NOT PYRAMID • 75

CHAPTER 5

AUTOMATIC FOR THE PEOPLE • 100

CHAPTER 6

INVISIBLE GORILLAS AND HUMAN HERDS • 127

CHAPTER 7

REGULATORY MONEYBALL • 147

CHAPTER 8

ELIMINATING RED TAPE • 173

CHAPTER 9

THE NANNY STATE? • 190

CHAPTER 10

SIMPLIFYING CHOICE ARCHITECTURE • 209

EPILOGUE

THE THREE MOST IMPORTANT THINGS I LEARNED • 215

APPENDIX • 217

ACKNOWLEDGMENTS • 221

NOTES • 225

INDEX • 249

INTRODUCTION

The Cockpit of the Regulatory State

This is a book about making things simpler. In particular, it is about how governments can be much better, and do much better, if they make people's lives easier and get rid of unnecessary complexity. Think, for a moment, about the best computers and tablets. They have all sorts of complicated machinery—machinery that is so complicated, in fact, that it would have been barely imaginable just a decade before. But for users, they are simple and intuitive. They don't require manuals. You can work with them on the basis of what you already know. Government should be a lot more like that.

I am not saying that government should be much smaller. I do believe that in some domains, smaller is better, and government should shrink. But that is not my topic here. To have a simpler government, you need to have a government. The term *user-friendly* isn't exactly user-friendly, but simplicity is friendly, and complexity is not. True, complexity has its place, but in the future, governments, whatever their size, have to get simpler. To understand how I came to these views, to see what progress we have already made, and to know what the future has in store, we need to step back a bit.

In 2008, I had my first date (or maybe predate interview) with my now-wife, Samantha Power. Offering a little test (in case it really was a date), she asked me, "If you could have any job in the world, other than law professor, what would it be?" As I later learned, she was hoping to hear that I would play in the E Street Band with Bruce Springsteen or start at shortstop for the Boston Red Sox. Instead I said, apparently with a dreamy, faraway, what-could-possibly-be-better look, "Ohhhh, OIRA."

Her answer: "What the heck is OIRA?" (She might have used a four-letter word other than "heck.") Miraculously, I got a second date.

OIRA (pronounced o-eye-rah) is Washington-speak for a little office with a big impact: the White House Office of Information and Regula-

tory Affairs. OIRA was created in 1980 by the Paperwork Reduction Act. (Yes, there is such a thing.) Under the Paperwork Reduction Act, no federal agency is allowed to collect information from the American people, or to make you fill out a form, unless OIRA allows it to do so. In 1981, President Ronald Reagan gave OIRA an even more important role, which is to oversee federal regulation. By executive order, President Reagan also said, in a controversial and crucial provision, that “regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society.” He charged OIRA with responsibility for ensuring compliance with that edict.

In that very year, I happened to be working as a young lawyer in the Department of Justice. By a stroke of luck, I was heavily involved in the legal work that established what has turned out to be OIRA’s enduring role. I was even able to participate in the drafting of the all-important cost-benefit provision. For nearly three decades, heading OIRA had been my dream job.

From 2009 to 2012, I ended up as administrator of OIRA. In that position, I helped to oversee the issuance of nearly two thousand rules from federal agencies. Under President Obama’s direction, I promoted simplification, including the use of plain language, reductions in red tape, readable summaries of complex rules, and the elimination of costly, unjustified requirements. I argued in favor of the use of “nudges”—simple, low-cost, freedom-preserving approaches, drawing directly from behavioral economics, that promise to save money, to improve people’s health, and to lengthen their lives. Also under President Obama’s direction, I promoted a disciplined emphasis on costs and benefits, in an effort to ensure that the actions of government are based on facts and evidence, not intuitions, anecdotes, dogmas, or the views of powerful interest groups.

In this book I describe the large-scale transformation in American government that took place while I was OIRA administrator. I explore initiatives designed to increase simplicity—some now in effect, others on the horizon, still others for the distant future. As we will see, initiatives of this kind can be used not only by governments all over the world but by countless private organizations as well, including businesses large and small, and indeed by all of us in our daily lives. Each of us can benefit from simplicity, and all of us can make things simpler.

The Cockpit

The OIRA administrator is often described as the nation's "regulatory czar." That is a wild overstatement. The president leads the executive branch, and the United States has no czars (really). But the term does give a clue to the influence and range of the office. OIRA is the cockpit of the regulatory state.

The office oversees federal regulations involving clean air and water, food safety, financial stability, national security, health care, energy, agriculture, workplace safety, sex and race discrimination, highway safety, immigration, education, crime, disability rights, and much more. As a general rule, no significant rule can be issued by any of the nation's Cabinet departments—including the Department of Transportation, the Department of Treasury, the Department of State, and the Environmental Protection Agency—unless OIRA says so.

Of course, OIRA does not work on its own. On the contrary, the OIRA administrator works for the president, and many others in the Executive Office of the President have important roles. For example, the OIRA administrator works under the director of the Office of Management and Budget, a Cabinet member whose principal concern is usually the budget, but who may have something to say about rules. In addition, the chairs of the National Economic Council and the Domestic Policy Council (both with offices in the West Wing of the White House) might have a strong view about federal regulations. Their positions count.

On scientific issues, the head of the Office of Science and Technology Policy is central. On economic matters, the Council of Economic Advisers has a lot of technical expertise and is indispensable to federal rulemaking. The Office of the Vice President may have important information to add. The White House is managed by the president's chief of staff, and under any president, the chief of staff is immensely important, because he is in charge of ensuring fidelity to the president's priorities. OIRA is part of a team, not a free agent, and the unambiguous leader of the team is the president.

Nonetheless, OIRA's authority to slow down or even to halt regulations—to say no to members of the president's Cabinet—gives the administrator a major role in shaping their content. Suppose, for example, that OIRA believes that there is a better way to save lives on the highway. Perhaps a new

approach would be more lenient, more stringent, simpler, or just different. If that is what OIRA thinks, it has a real opportunity to work with the Department of Transportation to explore that possibility. And if OIRA thinks that a rule—involving, for example, clean water—should not go forward, it is possible that the rule will not see the light of day. (After I had been in the job for a few years, a Cabinet member showed up at my office and told my chief of staff, “I work for Cass Sunstein.” Of course that wasn’t true—but still.)

OIRA also has a big role in shaping the president’s agenda. With the support of the president and other high-level officials, it can help move the government in different directions. It can refuse to approve complex or expensive rules. It can certainly nudge. It can protect small businesses, perhaps by encouraging agencies to exempt them from expensive rules. It can promote new rules to protect human rights and food safety, to prevent sexual violence, or to produce big increases in the fuel economy of cars. It can support efforts to protect against terrorist attacks. It can ask agencies to deregulate—to eliminate outmoded and costly regulatory requirements. It can promote efforts to prevent distracted driving, to prohibit discrimination on the basis of sexual orientation, or to use electronic health records (potentially saving both money and lives). In multiple ways, it can help save lives.

As it happens, I have known President Obama for many years, ever since 1991, when he started to teach at the University of Chicago Law School (my professional home for over a quarter of a century). A year or so before that, a friend of mine on the Chicago faculty said that we should consider hiring a sensational *Harvard Law Review* editor with whom he had been working. I remember the conversation well, in part because of the young editor’s unusual name. Chicago ended up hiring Barack Obama, who became a colleague and a friend. Blessed by that bit of good fortune, I was privileged to get my dream job.

Regulatory Moneyball, Not Sewer Talk

Here is a possible approach to regulatory issues, one that can be tempting to some government officials: Ask which groups favor or oppose a proposed rule, who would be satisfied and who distressed, and whether a particu-

lar approach could be chosen that would please some without displeasing others. These questions are not exactly irrelevant; public officials need to answer them. But they are far from the most important matters. On the rare occasions when members of my staff pointed out the views of interest groups, I responded (I hope with humor, but also with a point), “That’s sewer talk. Get your mind out of the gutter.”

As OIRA administrator, I sought to focus instead on these questions: What do we actually know about the likely effects of proposed rules? What would be their human consequences? What are the costs and benefits? How can government avoid reliance on guesses and hunches? What do we know about what existing rules are actually doing for—or to—the American people? How can we make things simpler?

Science is often indispensable to answering these questions, and scientific experts, inside and outside the federal government, are indispensable too. To resolve disputes about the likely effects of rules, economists are essential. Some of the most helpful insights come from cutting-edge social science, including behavioral economics, which attempts to study how people actually act, rather than how standard economic theory supposes that they act. We have started to incorporate the resulting findings, and we need to do far more.

The plea for empirical foundations may seem obvious, a little like a plea for sense rather than nonsense, or for a day of sunshine rather than brutal cold. If so, think for a moment about *Moneyball*, the best-selling book (and Oscar-nominated film) about Billy Beane, who worked with his statistics-obsessed assistant, Paul DePodesta, to bring the Oakland Athletics into the top tier of baseball teams. In a short time, Beane and DePodesta transformed baseball itself, by substituting empirical data for long-standing dogmas, intuitions, and anecdote-driven judgments.

Consider this exchange:

“The guy’s an athlete, Bill,” the old scout says. “There’s a lot of upside there.”

“He can’t hit,” says Billy.

“He’s not that bad a hitter,” says the old scout.

"Yeah, what happens when he doesn't know a fastball is coming?" says Billy.

"He's a tools guy," says the old scout. . . .

"But can he hit?" asks Billy.

"He can hit," says the old scout, unconvincingly.

Paul reads the player's college batting statistics. They contain a conspicuous lack of extra base hits and walks.

"My only question," says Billy, "if he's that good a hitter why doesn't he hit better?" . . .

Over and over the old scouts will say, "The guy has a great body," or "This guy may be the best body in the draft." And every time they do, Billy will say, "We're not selling jeans here," and deposit yet another highly touted player, beloved by the scouts, onto his shit list.¹

Too much of the time, those thinking about regulation have been a lot like old baseball scouts in the era before Billy Beane. Scouts said that someone is "a tools guy" or that he "has a great body." Those seeking or resisting regulation say, "The public is very worried," or "Polls show that the majority of people strongly favor protection against air pollution," or "The industry has strong views," or "The environmental groups will go nuts," or "A powerful senator is very upset," or "If an accident occurs, there will be hell to pay." In government, I heard one or more of these claims every week.

None of these points addresses the right question, which is what policies and regulations will actually achieve. As we shall see, we keep developing better tools for answering that question. All over the world, regulatory systems need their own Billy Beanes and Paul DePodestas, carefully assessing what rules will do before the fact and testing them after the fact, and occasionally depositing some highly touted rules, beloved by regulators, onto the shit list.

We're not selling jeans here.

Doing, Not Doing, Undoing

Between 2009 and 2012, a lot of new rules were established. As we will see, they are saving both lives and money. (Admittedly, some of them are pretty complex.) But a lot of potential rules, favored by one or another influential group, never saw the light of day. And at the same time that new rules were being issued, a number of existing rules were streamlined, simplified, or eliminated.

Insisting on careful analysis of costs and benefits, we issued historic rules to increase the fuel economy of cars and trucks, in the process saving consumers billions of dollars, increasing energy security, and making the air a lot cleaner. (It is a parenthetical benefit, but a big benefit nonetheless, that people will have to spend a lot less time going to gas stations; that makes life a bit simpler.) We took unprecedented steps to increase safety on the highways and to combat distracted driving. We adopted rules to allow HIV-positive people to come into our nation. We issued many new safeguards for airline passengers—among other things, banning more-than-three-hour delays on the tarmac and requiring airlines to disclose hidden fees, to pay higher penalties for overbooking flights, and to provide adequate food and water after a two-hour tarmac delay.

We made refrigerators, dishwashers, clothes washers, and other appliances far more energy-efficient. We imposed strict limits on air pollution from power plants, saving thousands of lives annually as a result. We promoted numerous steps to improve nutrition in schools and to reduce childhood obesity. We increased cigarette taxes and required graphic health warnings to be placed on cigarette packages. We took strong steps to combat discrimination on the basis of disability, sex, and sexual orientation.

While doing all this, we refused to issue a large number of rules favored by progressive groups, generally on the theory that they could not be justified, especially in an economically difficult time. Indeed, the Obama administration issued fewer regulations in its first four years than did the Reagan, George H. W. Bush, Clinton, and George W. Bush administrations in their first four years. We closely monitored the number and the cost of rules, and when we declined to proceed, it was often to reduce cumulative burdens and to ensure against undue complexity in the system. In a highly controversial but unquestionably correct decision, the president himself

told the Environmental Protection Agency that he did not support finalizing an air pollution rule that would reduce ozone emissions.

Wherever the law allowed, we insisted on careful consideration of benefits and costs. We focused on economic growth and job creation, and we sought to ensure that regulation did not compromise either of those goals. We recognized (and this is a critical point, sometimes overlooked by progressive groups) that when high costs are imposed on the private sector, it is not only some abstraction called “business” that pays the bill. Consumers may pay too, in the form of higher prices—and higher prices are especially hard on people who don’t have a lot of money to spend. Workers may be harmed as well, through lower wages and hours and possibly fewer jobs. High costs on large businesses can hurt many people. Small businesses create a lot of jobs, and when they are faced with excessive regulatory burdens, the economy and numerous human beings are going to suffer.

We were not only interested in issuing smart regulations. We were focused on deregulation too. For now and for the future, sensible deregulation is a high priority; it should be a continuing part of modern government, and it is a crucial part of Regulatory Moneyball. To that end, we initiated a historic “regulatory lookback,” designed to scrutinize rules on the books to see what could be streamlined, simplified, or removed. The lookback has already eliminated a large number of costly and pointless rules and requirements, in the process saving billions of dollars and taking away tens of millions of hours in annual paperwork burdens. I expect that these numbers will be a lot larger before long.

In fact “retrospective analysis” of existing rules, meant to assess what is working and what is not, has become a standard part of American government. This development is attracting worldwide attention, and it probably counts as the most important innovation in regulatory policy since President Reagan first created the OIRA process more than three decades ago. It is a central feature of a simpler government.

No matter who occupies the White House in the coming decades, much of the transformation will endure. It will endure in large part because it has no obvious political tilt. To be sure, many regulations split people along political lines. But many do not, and Democrats and Republicans, liberals and conservatives, left and right—all should be able to support careful analysis of costs and benefits and continuing scrutiny of rules on the books.