Arnold, N. Scott. *Imposing Values: An Essay on Liberalism and Regulation.*
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Imposing Values is a critique of regulation from the perspective of nonlibertarian
"classical liberalism." More precisely, the book focuses on regulatory regimes
that currently exist in the United States (viii), and it criticizes a subset of such
regimes, which Arnold terms the "modern liberal regulatory agenda" (132–33),
encompassing the following:

A. Regulation of the employment relation
  1. Mandatory terms or conditions of employment, specifically, laws man-
     dating a minimum wage and overtime pay, the law requiring equal
     pay for equal work, and the law requiring firms to grant family and
     medical leave
  2. Antidiscrimination laws
  3. Occupational health and safety regulation as imposed by OSHA
  4. Laws regulating employer and union behavior in the collective bar-
     gaining process
B. Consumer products and services regulation
  1. Mandated or forbidden features of consumer products and services,
     especially medical products
  2. Occupational licensure laws
C. Some environmental regulation [namely, the Endangered Species Act and
   the provisions of the Clean Water Act that authorize wetlands regulation].

Arnold structures his analysis as follows. He distinguishes between "modern
liberalism" and "classical liberalism." Modern liberalism is exemplified by the
work of John Rawls, Ronald Dworkin, Joel Feinberg, Bruce Ackerman, John
Maynard Keynes, Paul Samuelson, and John Kenneth Galbraith (3). "Classical
liberals" include F. A. Hayek, Milton Friedman, James Buchanan, Robert Nozick,
Richard Epstein, Randy Barnett, Loren Lomasky, Jan Narveson, Tibor Machan,
Douglas Rasmussen, and Douglas Den Uyl (4). Both groups are liberals: they
share the basic conviction that individuals have fundamental political and per-
sonal rights that limit government, such as the right to free speech or the right
not to be incarcerated without a fair trial (17). However, by contrast with modern
liberals, classical liberals believe in fundamental property rights and are suspi-
cious of governmental intervention in civil society (15, 18).

Arnold stresses that neither modern liberalism nor classical liberalism is a
single, comprehensive position. Rather, each is a cluster of "inclinations" (15)
and mid-level principles, which can be grounded in a variety of fundamental

philosophical views. For example, Kantians can be found in both camps, as can utilitarians (14–15).

Arnold draws a distinction within the family of classical liberal views, namely, between "libertarians" and "nonlibertarians." "Libertarians are classical liberals who believe in the minimal state and nothing more extensive than the minimal state" (25). Nonlibertarian classical liberals accept certain rationales for governmental intervention that could, in principle, justify some governmental programs going beyond the minimal state—in particular, preventing "negative externalities" (28–36, 140); solving a genuine "public goods" problem (22–28, 140); or blocking transactions that are involuntary because of "ignorance" on the part of one of the parties (139). Moreover, nonlibertarian classical liberals believe—or at least are willing seriously to entertain the possibility—that some existing governmental programs (beyond the minimal state) are in fact justified by these rationales.

Arnold's critique of the modern liberal regulatory agenda takes the form of a dialogue between modern liberals and nonlibertarian classical liberals. He identifies three kinds of arguments that could persuade a nonlibertarian classical liberal to accept some element of that agenda: "common ground," "convergence," and "conversion" arguments (6–11, 133–34). A common ground argument appeals to some principle accepted by both groups. ("For instance, a modern liberal might successfully argue that a certain public good can best be secured or a certain negative externality . . . can best be dealt with by government regulation. Since securing public goods and dealing with negative externalities are proper functions of government on both modern liberal and classical liberal views, classical liberals could join in supporting this regulation" [6–7].) A convergence argument shows that a governmental program is justifiable both in light of modern liberal principles and in light of nonlibertarian classical liberal principles (even if not justifiable in light of principles shared by both views). Finally, a conversion argument in favor of some governmental program concedes that the program may not be justifiable with reference to classical liberal principles, but seeks to show that an exception from those principles should be made. Because the nonlibertarian classical liberal properly understands her principles as "heuristic devices that serve as fallible guides for thinking about questions of social policy" (8), not exceptionless rules, she should be willing to entertain conversion arguments.

According to Arnold, none of these three strategies succeeds. Chapters 5 and 6 reject common ground and convergence arguments for the modern liberal regulatory agenda. Chapters 7–10 are more detailed discussions of employment law, antidiscrimination law, health and safety regulation, and land use regulation, concluding in each case that a conversion argument is unsuccessful or at least can be reasonably rejected. (The first four chapters of the book set the stage for this analysis—differentiating between modern and classical liberalism, exploring their views about private property, setting forth the trichotomy of arguments, etc.)

Chapters 11–12 turn to the problem of "imposing values." These chapters, in effect, ask: What is the import, for the modern liberal, of the fact that the modern liberal regulatory agenda is not justifiable from the perspective of classical liberalism? Does this fact undermine the legitimacy of the agenda within the framework of modern liberalism itself?

Imposing Values deserves credit for acknowledging that a robust concern for individual property rights might be reconcilable with a fairly wide range of governmental programs. To this extent, at least, the book is admirably nondogmatic. Arnold certainly does not take the position that all existing regulatory regimes in the United States, other than employment regulation, antidiscrimination law, health and safety regulation, and land use regulation, are in fact justified by classic liberal lights. But, at a minimum, Arnold believes, those other regimes are less clearly problematic, and thus they are not the focus of the critique provided by *Imposing Values* (125–32; see also 69–116). This includes "informational" regulation, for example, prohibitions of false or misleading advertising, or the requirement that goods or services be accompanied by various kinds of disclosures; the regulation of the securities markets and the financial sector; the regulation of insurance; "mandatory seat belt laws, motorcycle helmet laws, laws prohibiting or limiting gambling, prostitution, surrogacy contracts, and laws prohibiting the use of recreational drugs" (131); and the bulk of environmental law, including limitations on air and water pollution and hazardous wastes.

Arnold is also certainly correct that regulatory programs in the United States are vulnerable to a range of pathologies and that a sober and serious assessment of any particular program should be sensitive to these pathologies. Interest groups exert pressure to advance their own narrow aims. Firms and unions are better organized than consumers and taxpayers. Governmental officials are vulnerable to "tunnel vision" or to capture by groups. Legislators posture to secure reelection, enacting statutes that fail to promote a sensible balancing of the costs and benefits of regulation (e.g., statutes that require environmental preservation or the elimination of health and safety risks with little regard for cost) (331, 271–74). Where regulatory programs do have net benefits in the aggregate, the distribution of benefits may be terribly unfair (329–46).

But *Imposing Values* has a number of substantial flaws. First, insufficient work is done to motivate nonlibertarian classical liberalism—to show that this is a normative view worthy of serious consideration. On the one hand, Arnold declines to justify or specify the view by appealing to foundational principles, such as utilitarianism (15, 143). Rather, as mentioned, he sees classical liberalism generally, and its nonlibertarian variant more specifically, as a cluster of mid-level principles flowing from a variety of more foundational axioms. Yet Arnold articulates the principles constitutive of nonlibertarian classical libertarianism at a high level of specificity, sufficiently so that one must ask, is it really the case that a wide range of authors in the classical liberal tradition would assent to these principles? Why believe that reasonable utilitarians, Kantians, natural rights theorists, and so forth would converge upon this particular framework for evaluating governmental programs?

For example, Arnold tells us that "classical liberals allow that it can be appropriate for the state to provide public goods," meaning inter alia that "each individual in [the] population believes that the benefits of having the good outweigh her share of the cost" (144). He then proceeds to explain that an individual's "benefit" is to be understood in terms of her dispositional rather than conscious preferences, her actual rather than idealized preferences, and her collective and altruistic as well as egoistic preferences; that public goods

provision is justifiable absent universal benefit, as long as the vast majority of the population would benefit; and that what needs to be justified is some level of state provision of the public good, rather than the specific level actually provided by the state (144–63).

This last proviso allows Arnold to claim that nonlibertarian classical liberals should see the U.S. government's military programs as being a genuine public good. He concedes that "many people favor having a military . . . [but] would favor a much smaller military at greatly reduced cost," but he responds: "That option is not on the table because of the nature of the question under discussion, namely, the rationale for state provision of national defense. The public goods apparatus answers the question of why the state should provide national defense. Principles of representative democracy explain—and ultimately justify—why we have the levels of defense spending that we do" (163). However, Arnold does not demonstrate that other nonlibertarian scholars in the classical liberal tradition understand the public goods justification for government in the particular manner that he does, or at least that they should do so, given their foundational commitments.

Second, the formulation of the nonlibertarian classical liberal principle regarding negative externalities—a key aspect of the view, which Arnold repeatedly brings to bear in discussing the justifiability of regulatory programs—is problematic. "Classical liberals want to limit the negative externalities that might warrant government intervention to boundary crossings of third parties as defined by the common law," allowing that such "boundary crossings" can be blocked by regulatory means as well as tort suits (31; see also 142). But the project of characterizing tortious conduct as a "boundary crossing," rather than as faulty conduct, is unworkable. (See Stephen R. Perry, "The Impossibility of General Strict Liability," *Canadian Journal of Law and Jurisprudence* 1 [1988]: 147–71.)

Third, Arnold's views regarding national defense undermine his claim that the programs belonging to the modern liberal regulatory agenda do not satisfy the public goods principle, as he has specified that principle: "There are simply too many citizens who are not net beneficiaries of these laws for any of these regulations to be represented as a state solution to a public goods problem. . . . FDA and CSPC bureaucrats, plaintiff's attorneys who practice employment law, Fish and Wildlife Service (FWS) personnel who enforce the ESA and OSHA inspectors, these and other enforcers of the modern liberal regulatory agenda do not enjoy the broad public support that, for example, the military has in liberal societies" (188).

Particularly in the aftermath of the Iraq war, the claim that the U.S. military enjoys "broad public support" is laughable. What Arnold means to say (consistent with his understanding of the public goods principle) is that there is broad support for some military rather than no military at all, taking into account individuals' collective and altruistic as well as egoistic preferences. But presumably there is broad support for some level of regulatory protection from dangerous drugs, consumer products, and workplaces; for some level of governmental intervention to stop the disappearance of endangered species and ecosystems; and for some governmental measures to prevent employment discrimination against groups (leaving open the particular form of such measures,

e.g., whether they should bar disparate impact as well as discriminatory treatment, and the range of groups protected, e.g., whether women, disabled persons, and the aged, not merely racial minorities, should be protected).

Fourth, there is a large literature in applied economics that estimates the costs and benefits of various regulatory programs, but Arnold's lengthy discussion of each element of the modern liberal regulatory agenda does not draw upon this literature in anything like a systematic way. One would have thought that a reasonably comprehensive review of existing evidence regarding the actual effects of employment law, antidiscrimination law, health and safety regulation, and land use regulation would be critical in determining whether a "conversion argument" for these programs can succeed.

Finally, Arnold's discussion of "imposing values" in chapters 11 and 12 is unconvincing. Assume that the reader is persuaded by the analysis in the preceding chapters. She agrees that classical liberals, even those of the nonlibertarian variant, could reasonably reject the modern liberal regulatory agenda. If this reader is a modern liberal, her response might be: "So what? *I* believe that these programs are justified." In chapter 11, Arnold seeks to counter this response, suggesting that modern liberals (as well as nonlibertarian classical liberals) should recognize three conditions for the legitimacy of a regulatory program (at least a program concerning which there is persisting reasonable disagreement), namely, a democracy condition, a public justification condition, and a transparency condition. The first condition requires the program to have been enacted by "the elected branches of government" (356). The public justification condition demands, inter alia, that public arguments be provided in favor of the program which are "sufficiently atheoretical so that they could be found persuasive by nearly any liberal, classical or modern" (365). The transparency condition says: "If legislators wish to change . . . the scope of government, an intellectually serious and responsible effort should be made to identify the beneficiaries and victims . . . of the legislation and to explain the manner in which they either benefit or are harmed. . . . All this has to be done in a public context, such as in a Senate or House committee report or in legislative debate" (387). Chapter 12 then reviews selected regulatory programs, concluding that most fail to meet these criteria for legitimate "value imposition."

But it is untrue that modern liberals would generally accept Arnold's three criteria. Remember that modern liberalism, like classical liberalism, is compatible with a range of fundamental commitments. In particular, modern liberals might be Rawlsians or deliberative democrats, but they might also be utilitarians (350) or for that matter nonutilitarian consequentialists, for example, prioritarian or egalitarian consequentialists. A consequentialist modern liberal would presumably recognize some form of democracy requirement (monarchies and dictatorships haven't worked out so well). But that requirement might well allow for legislative delegation of power to administrative agencies, which is arguably quite beneficial. (See Jerry Mashaw, "Prodelegation: Why Administrators Should Make Political Decisions," *Journal of Law, Economics, and Organization* 1 [1985]: 81–100.) And why would a consequentalist modern liberal accept a public justification condition? It is highly speculative that constraining the particular kinds of arguments offered to justify legislation in fact produces better outcomes. Finally, consequentialist modern liberals would presumably accept some form

of transparency requirement (it seems plausible that public airing of the costs and benefits of regulatory programs tends to improve the quality of these programs), but they might well deny that transparency requires a special kind of legislative history. Why not say that a program is sufficiently transparent, by modern liberal lights, if its impacts have become public in some manner? By this standard, the very fact of vigorous and continuing debate about the modern liberal regulatory agenda—a debate prosecuted by classical liberals and other critics of these programs, such as Arnold himself—means that the programs satisfy the transparency requirement now, whether or not they satisfied it at their date of enactment.

In short, Arnold's "imposing values" argument is a nonstarter. *Imposing Values* therefore fails to realize its ultimate ambition—to offer a nonsectarian case against the modern liberal regulatory agenda, showing not only that classical liberals should reject it (by virtue of the failure of common ground, convergence, and conversion arguments), but that modern liberals should as well (by virtue of the failure of the democracy, public justification, and transparency requirements).

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