RICHARD A. POSNER: FROM PUBLIC CHOICE THEORY TO ECONOMIC ANALYSIS OF LAW (1969-1973)

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Abstract: The aim of the article is to explore how Richard A. Posner began to focus on judges and courts at the turn of the 1960s and early 1970s, when his focus had previously been mostly on regulation, antitrust law, and administrative agencies. We argue that Posner's writings during this short period are critical to understanding his intellectual trajectory as they are the source of the pioneering research program that would be known as economic analysis of law a few years later. We thus emphasize the continuity between Posner's early work of the 1969-1973 period, mostly inspired by public choice theory, and his later work, and show that the former obviously paved the way for the latter.

Keywords: R. A. Posner, economic analysis of law, public choice, judicial decision-making, regulation

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Introduction

Richard A. Posner's early work are most often regarded as early forays into the fields of regulation and antitrust law, heavily influenced by Coase's law and economics (Harnay and Marciano, 2009; 2011). The implicit corollary of this view is that Posner's most significant or 'serious' work begins only with "A Theory of Negligence", an article on courts and judges published in 1972, soon followed by his famous book *Economic Analysis of Law* (*EAL*) in 1973. This also suggests a discontinuity between the pre-*EAL* work of the young Posner, possibly seen as relatively minor writings of a young author still searching for his intellectual path, and the post-*EAL* writings of a more intellectually mature Posner, with his own pioneering research program and whose work would substantially structure and influence the new field of research that would soon become known as EAL, after the name of his book.

By insisting on an alleged discontinuity between Posner's pre-*EAL* and post-*EAL* writings, this view fails to account for how Posner's writings during the short period from 1969 (i.e., the publication of his first articles on antitrust and regulation) to 1973 (i.e., the publication of *EAL*) are critical to understanding the emergence of his later research program on courts and

judicial decision-making. At odds with this view, the aim of this article is to explore how Posner began to focus on judges and courts at the turn of the 1960s and early 1970s, when his focus had previously been on regulation, antitrust law, and administrative agencies. It is argued that, although Posner's initial interest in regulation and administrative agencies made him a public choice theorist, his early writings led him to pay attention, even then, to the issue of judges and courts that would later become the central theme of Posnerian EAL. Doing this, I emphasize the continuity that characterizes Posner's work, from his early writings at the very end of the 1960s until his work in the 1970s. I thus show that Posner's early work on public choice theory and regulation should not be misunderstood as incidental or secondary to his later work on courts, but instead prefigures and paves the way for such work.

The article is organized as follows. Section 1 argues that Posner's work in the field of regulatory economics at the end of the 1960s qualify him as a pioneering public choice theorist. Section 2 examines how these early writings already reflect Posner's interest in courts and judicial decision-making, soon leading him to unambiguously conclude to the superiority of courts and judicial processes over administrative agencies. Section 3 then sheds some light on the way that leads Posner from regulatory economics to the economics of judicial decision-making. The last section briefly concludes.

1. Richard A. Posner, a pioneer in public choice theory

Before taking an interest in the courts and the judicial system, Richard Posner's first academic work deals with regulation and antitrust law. Between 1969 and 1973, he writes no less than 15 articles and books on these topics, several of which have been acknowledged as path-breaking later. In choosing to focus on regulation at that time, Posner is not, however, truly original, but rather in tune with the times. As he himself notes in the introduction of his 1969 article on natural monopoly, "the 1960s have seen an upsurge of scholarly interest in the regulatory field after many years of comparative neglect" (Posner, 1969a, 549). This topic is also directly connected with his professional activity in the 1960s: from 1965 to 1967, Posner work for the Federal Trade Commission (FTC), in the Office of the Solicitor General from 1965 to 1967, and then as a member of the President's Task Force on Communication Policy in 1967. His professional experiences and personal observation of regulatory processes and flaws will therefore inspire and feed his academic work - his 1969 article on the FTC (Posner, 1969c) is exemplary in this respect.

Posner's overall position is highly critical of governmental regulation. In 1969, building on his past experiences, and now that he has become Associate Professor of Law at Stanford University, he writes his first article on the regulation of natural monopoly, challenging the traditional view according to which "[C]ompetition is […] not a viable regulatory mechanism under conditions of natural monopoly" (Posner, 1969a, 548). In support of his argument, and displaying a very precise knowledge of the economic and legal analyses of the time (as evidenced by the number and variety of footnotes and references), Posner highlights the theoretical inadequacies of the arguments traditionally put forward to motivate the regulation of natural monopoly and documents the inefficiencies of the regulatory process. His

conclusion is unambiguous as to the very unfavorable balance sheet of natural monopoly regulation. Namely:

> « there are different degrees of justification for the various regulatory controls, but in no case do the benefits clearly outweigh the costs. There is no persuasive case for the regulation of specific rates in, or of entry into, natural monopoly markets; yet these have been important areas of regulatory activity, whose principal result has been to promote inefficient pricing and to create unjustified barriers to entry and competition" (Ibid., 618).

Ultimately, he concludes that:

> "[T]he case for limiting a natural monopolist's profits turns out, on careful examination, to be weaker than generally assumed. Moreover, either the cure may be worth little because regulatory agencies cannot clamp an effective lid on monopoly profits, or it may be worse than the disease" (Ibid., 619).

Following up this line, Posner elaborates on his harsh critique of government regulation in other articles published around the same time. His article entitled "Taxation by Regulation", published in *The Bell Journal of Economics and Management Science* in 1971, thus aims to explain regulatory inefficiencies, including "an important phenomenon of regulated industries: the deliberate and continued provision of many services at lower rates and in larger quantities than would be offered in an unregulated competitive market or, a fortiori, an unregulated monopolistic one" (Posner, 1971a, 21). In an article published in 1972 in the *Journal of Legal Studies*, he further develops his critique of the behavior and functioning of administrative agencies, which he models as rational agents maximizing the utility that they derive from their law-enforcement activity (Posner, 1972c). In addition, he also documents his general critique of regulation with case studies of specific industries, including a thorough examination of the reforms at work in the field of health care in the United States at the time (Posner, 1971c) and the cable industry (1972b). In the area of antitrust law, he also offers a highly critical view of the Antitrust Division's regulatory activity, severely criticizing its conceptual toolkit and decisions and making recommendations for revising Section I of the Sherman Act and improving the effectiveness of antitrust law (Posner, 1969b, 1971b).

Although Posner's critique of regulation draws on numerous arguments from several strands of economic and legal literature, it is above all part of the analytical framework of public choice theory. Indeed, even though Posner is not directly interested in the legislative process as such, but in the regulatory process, he conceives regulation as an intrinsically political phenomenon. He is therefore very close to the conception of regulation of the public choice economists whom he regularly refers to[1]. Furthermore, he also embraces the vision of public choice theory by considering the inefficiency of regulation as the direct outcome of the

[1] For instance, in his 1969 article on natural monopoly, Posner explicitly refers to Tullock's seminal 1967 article on tariffs and monopolies. In his study of the reception of Tullock's article, Congleton notes that "Posner was among the first to see the importance of Tullock's contribution for both the theory of monopoly and regulation and for law and economics » (2019, 6, footnote 1). Posner also repeatedly cites Stigler's work (notably, Stigler and Friedland, 1962 and Stigler, 1964).

influence of special interests on political decision-making processes. Hence, between the positive and negative views of regulation ("One, the more familiar, holds that regulation is a device for protecting the public against the adverse effects of monopoly; the other holds that regulation is procured by politically effective groups, assumed to be composed of the members of the regulated industry itself, for their own protection", Posner, 1971a, 22), he adopts the latter without hesitation – even though his aim is also to refine and complete this view. Section 1 of his 1969 article on the regulation of natural monopolies clearly endorses a similar view, devoting an entire subsection to "the political dimension of the monopoly problem" (Posner, 1969a, 590 *sq*) and developing the idea that the private interests of some firms are capable of distorting democratic decision-making and legislative processes. In the same article, Posner also scrutinizes "[T]he forces that have shaped the regulatory process" (Posner, 1969a, 620) and depicts the activities of interest groups as the determining factor in regulation.

Posner's adherence to the theoretical framework of public choice is therefore unquestionable, as he adopts its main hypotheses, concepts and tools, and quotes several of its main representatives, whom he mentions several times (e.g. Buchanan and Tullock, 1962; Tullock, 1967). Although a lawyer by training and through his early professional experience, there is therefore no doubt that he is also a public choice scholar. However, his analysis does not simply duplicate the public choice analysis of the political market developed by the other pioneers of the public choice current. Indeed, as already mentioned, Posner is interested in regulatory processes - and not in the legislative decision, which interests him only insofar as it is likely to influence regulatory processes. His work therefore actively contributes to extend early public choice theory, along with other major authors in the field of the economic theory of regulation and administrative agencies (e.g. Stigler and Friedland, 1962; Stigler, 1971) whom he repeatedly cites in his writings.

2. Comparing administrative agencies with courts and observing the superiority of judicial processes

At the turn of the 1960s and early 1970s, Posner's first work is therefore closely connected to the public choice movement, which could lead us to consider him as a public choice scholar. However, his work on regulation is already interspersed with frequent, albeit occasional, remarks on courts and judges, reflecting his early interest in the subject. From his earliest writings, he observes certain similarities in the functions and methods of administrative agencies and courts. For example, in his 1969 article on natural monopoly, he notes that "regulatory agencies stand in much the same relation to regulated firms as courts to litigants: they sit in judgment on records and submissions prepared by the private parties that appear before them" (Posner, 1969a, 620). In the same manner, he notes that "[I]f a competitor or customer of the regulated firm complains about a specific rate – that it is unjustly low […] or unjustly high […], the agency will hold hearings and, *proceeding much like a court*, decide whether the complaint has merit" (Ibid., 593, emphasis added).

The observation of the similarities between agencies and courts will soon lead Posner to develop an in-depth comparison of judicial and administrative decision-making processes (Posner, 1969c). The most systematic comparison between the two institutions is developed in his 1969 article on the FTC, in which he discards the conventional argument of the superior expertise of the administrative agencies often used to entrust them with regulatory missions and insists on the inefficiency of administrative agencies (Posner, 1969c, 52). Using a public choice argument, he explains this inefficiency by the dependence of administrative agencies on political power. The reasoning is developed substantially, with a detailed and very pedagogical summary (almost a textbook of public choice!) of how the political market works and how special interests play out to the detriment of the general interest in Congress (Ibid., 82-83). The activity of the FTC is then reconsidered through this prism: if the FTC is inefficient, it is because it is dependent on Congress, which is itself responsive to special interests. Accordingly, "the ability of the FTC to promote the public interest is impaired by its dependence on Congress" (Ibid., 82). Furthermore:

> "[The FTC] seems guided more by solicitude for parochial interests than by consideration for the general welfare. The Trade Commission has acquired a constituency of business groups that includes numerous associations of retail dealers, food brokers, wholesale grocers, auto-parts jobbers, and others. It promotes their interests, as we have seen, with little regard for the larger social interest in competition and efficiency" (Ibid., 83).

Following this classical public choice approach, the inefficiency of the FTC – and of regulatory agencies more broadly – therefore results from the fact that, like private economic agents, the staff of administrative agencies pursues its own particular interests (Ibid., 84). It thus also derives from the inadequacy of the control and incentive mechanisms that are applied to regulators. Indeed, the private gain of FTC members is not aligned with the social gain that their activity provides to consumers and they are not submitted to market discipline. Ultimately, "the performance of regulators is extremely difficult to evaluate, which makes it possible for them in many instances to bend their regulatory duties to the service of personal interest" (Ibid., 85).

On this basis, the comparison made by Posner between administrative agencies and courts is clearly in favour of the latter. Indeed, unlike administrative agencies, courts are independent and impartial from political power, which puts them in a position to better perform most of the tasks that are traditionally entrusted to regulatory agencies. In particular, according to Posner, independent courts could fulfill the two main missions of the FTC (monopoly regulation and consumer fraud) in a more satisfactory manner than the FTC. Indeed, they perform a single adjudicative task. By contrast, the FTC's dual adjudicative and executive role makes it more sensitive to the specificity of individual cases and thereby possibly biased and unable to defend the general interest (Posner, 1969, 53). The very same idea is developed at length in Posner's article on the behaviour of administrative agencies, arguing that "the combination of prosecution and adjudication in a single agency contaminates adjudication" (Posner, 1972c, p. 323). Furthermore, Posner adds, there is no sound reason to entrust the fight against consumer fraud to the FTC rather than to the courts, as the latter are fully

capable of performing this task and "the FTC is doing little that is not within the competence of courts" (Ibid., 70). Thus, if the fight against consumer fraud is entrusted by the government to an administrative agency rather than to the courts, it is for political reasons and in order to induce a form of redistribution between groups. Ultimately, Posner notes that:

> "[T]o be sure, expertise is not the only reason for entrusting administration of a statute to an administrative agency rather than to the courts. Another reason is that a newly created agency can be expected to give a more sympathetic interpretation to a statute intended to break with common law traditions. Given its head, an agency probably would develop stricter standards of what constitutes unlawful deception than would the courts. It would be more likely to define its mission as one of consumer protection, narrowly conceived, rather than as the neutral resolution of disputes between sellers and buyer" (Ibid., 67).

It should be noted that this idea of greater impartiality and lower sensitivity of courts to special interests will be developed in several other articles by Posner in the 1970s (see e.g. Posner, 1974; Landes and Posner, 1975).

3. From the economics of regulation to the economics of courts and judicial decision-making

As a public choice theorist, Posner endorses the negative view of public intervention of this approach. As already mentioned, he unambiguously shares the view that a reduction in regulatory intervention is necessary, because of the costs and inefficiencies of administrative agencies. However, he departs from the classic deregulation recommendations made by a growing number of economists at the time (on the spread of the anti-regulatory ideas in the economics profession from the 1960s onwards, see e.g. McGraw 1975, 171 sq and Peltzman, 1989) and does not argue for mere deregulation on the grounds that market outcomes are preferable to regulation and would improve social welfare. On the contrary, Posner makes more innovative suggestions based on his observation of the superiority of courts over administrative agencies. Hence, rather than deregulating, he recommends substituting judicial decision-making for administrative decision making, urging "that more attention be given to reliance on market processes, and on the system of judicial rights and remedies that provides the framework of transactions in the market, as an alternative to the Trade Commission" (Posner, 1969c, 88).

Promoting courts as a superior alternative to administrative regulation then logically requires Posner to more precisely investigate the reasons for such superiority. In his view, while the main problem with administrative agencies is their dependence on political power, the strength of the courts stems symmetrically from their independence. Independence derives from the fact that judges are insulated from the classical incentive system, as they enjoy a life tenure that makes them unconcerned about the effects of their decisions on their future careers (see e.g. Posner, 1969c, 89). According to Posner, this particular situation allows them to be neutral, and immune to special interests: unlike "an administrative agency that conceives its

mission as one of protecting the gullible from being misled", "a court (…) views its mission as the impartial resolution of disputes between an old and a new seller" (Ibid., 71).

Exploring the reasons for the superiority of courts over administrative agencies therefore leads Posner to pay attention to the issue of judicial decision making in his earliest work. It can thus be argued that this work has paved the way for what was to become EAL's research program in the 1970s: the analysis of judicial decision-making by judges insulated from political pressures. Of course, Posner is not the only one interested in judges from a political economy perspective – at about the same time, Tullock publishes his *Logic of the Law* (1971) and Coase (1960) and Calabresi (1961) have already emphasized the importance of judges and courts for economic efficiency since almost a decade. But, undeniably, Posner is the first to push the economic analysis of judicial decision-making so far and so systematically. This starts as early as 1972 with the publication of his milestone article, "A Theory of Negligence" (Posner, 1972a), in which he develops his first analysis of judicial decision-making explicitly assuming that judges are rational economic agents. The article is published in the first issue of the *Journal of Legal Studies*, which Posner launches the same year and which will publish several path-breaking articles for the EAL movement. In 1973, this article is followed by the publication of the first edition of *Economic Analysis of Law*, published by Little Brown and Company (Posner, 1973a). From this date onwards, Posner will publish numerous articles that will form the basis of what came to be known as the economic analysis of law and fuel his thought for the next editions of *EAL* (Schäfer and Vatiero, 2023, this issue). It is beyond the scope of this short article to give a full account of the whole and the richness of Posner's work (alone or with co-authors) on judges and judicial decision-making in the 1970s. However, it is worth recalling that, in these years, Posner will develop the theory of the efficiency of the common law, in its twofold normative and positive versions (Posner, 1973a). In the wake of his intuitions of 1969 and 1970, the core idea is that judges pursue an efficiency objective – as opposed to the redistributive practices of administrative agencies. In this rich body of work, Posner's aim is therefore to understand, from an economic point of view, the way in which judges produce their decisions (Posner, 1973a, b; Landes and Posner, 1976).

However, it would be wrong to claim that the publication of *EAL* in 1973 marks Posner's break with public choice theory. It would also be erroneous to consider that, until 1973, Posner was a public choice theorist and that, after 1973, he specialized in the economic analysis of law. Quite the contrary, he does not abandon his previous interests after 1973, but continues to actively publish in the field of regulation and administrative agencies along with his new topics on judges and judicial decision-making. Hence, his work in the 1970s will still add major contributions to public choice theory, including several landmark publications in the field of regulatory economics (Posner, 1974; Posner, 1975). Posner's strong influence in the field of regulation, antitrust law and law enforcement agencies and, more generally, his contribution to the history of public choice, have since been acknowledged on several occasions, as he is praised as one of the pioneers of public choice in several articles on the history of the movement (e.g. Shughart and McChesney, 2010, 393; Congleton, 2019) and in leading textbooks in this field of research (e.g. Mueller, 2003; McChesney, 2004).

Furthermore, the broadening and renewal of the classical topics of public choice are other significant and groundbreaking contributions of Posner to the field in the 1970s. Indeed, his work at that time is also an attempt to reconcile and combine the approaches of public choice and economic analysis of law. This is particularly true of his 1975 article on judicial independence, written for a conference on the economic analysis of political behavior taking place in April 1975 and published in a special issue of the *Journal of Law and Economics* gathering the papers and comments from that conference – all signed by the great names in public choice theory. The article, co-authored with William Landes, specifically aims to explain the puzzle of independent judges within a public choice framework. The question is to understand why self-interested legislators refrain from infringing on judicial independence and forgo the short-term gains that such infringement would provide. Landes and Posner's answer is fully consistent with the conventional public choice framework: legislators have an interest to respect judicial independence because it increases the value of their decisions to interest groups in the political marketplace.

Conclusion

The aim of this article was to show that the roots of Posner's economic analysis of law and interest in the study of courts and judicial decision-making can already be found in his early writings at the turn of the 1960s and early 1970s. I argue that Posner's writings during this short period are critical to understanding his intellectual trajectory as they are the source of the pioneering research program that would be known a few years later as economic analysis of law. I also highlight the continuity between Posner's early work of the 1969-1973 period, mostly inspired by public choice theory, and his later work, and show that the former paved the way for the latter.

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