Democratic Theory and the Regulatory State: why it’s time to end the benign neglect, and how to begin to do so

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Abstract:

With a few obvious caveats, we all recognize that it is unethical for businesses to fail to comply, deliberately or negligently, with legitimate laws and regulations. But it is also, surely, unethical in most cases for businesses to work actively to prevent or weaken legitimate regulations of their activities (especially when these involve the exploitation of socially inefficient market failures). We look to political philosophy for the normative foundations of a concept of “legitimate regulation,” but find little guidance in the most celebrated contemporary theories of justice or democracy. By clearing away some standard assumptions about the autonomy of regulators and the markets they regulate, in political economy, and about the centrality of the relationship between citizens and their elected representatives, in democratic theory, we pose a dilemma for a normative theory of regulation. This dilemma has implications for both government regulators and the businesses they regulate: if these two groups are kept apart, the regulations in an advanced modern economy are likely to be clunky and counterproductive; but if the two groups work too closely together in the process of developing regulation, it is likely to result in what Adam Smith would have called a “conspiracy against the public.” We explore this dilemma; show why it is a problem for contemporary democratic theory; and suggest an initial strategy for addressing it and drawing out some very preliminary implications this would have for our understanding of “corporate political responsibility.”

Keywords: corporate political responsibilities, regulation, democratic theory, market justification, political economy, cost-benefit analysis

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The issues that have always piqued and dominated the interest of business ethicists are those that involve activities that are legal, but possibly unethical. We assume that firms and individuals in the world of business usually have strong ethical obligations to obey the law (with very few exceptions), but also that being in compliance with the law does not always guarantee that one’s actions were ethical. These are uncontroversial truisms. Yet they can mask an interesting range of issues, which have recently received more attention from business ethicists, that arise when we ask the following question: what is
the appropriate, or ethically responsible, role for businesses in the processes that formulate the laws regulating their activities? If it is usually unethical for businesses to fail to comply with laws and regulations, then it is potentially much more unethical for firms to work deliberately to weaken, “water down,” or forestall otherwise just and legitimate laws. As David Vogel puts it, while highlighting the curious neglect of corporate political strategies in debates about CSR, “a company’s political activities typically have far broader social consequences than its own practices.” (Vogel, 2005, p. 171) By affecting the whole industry, a firm’s effects on regulatory changes can have a significantly greater impact than can the irresponsible practices of a single “renegade” firm. But how do we identify and justify the appropriate ways for corporations to engage with regulatory agencies, with courts and administrative tribunals, and with legislators? To answer this question we will surely need to consider the normative and empirical theories that ground the design and justification of law-making and regulation in the democratic state.

So what, if anything, do the central debates in contemporary political philosophy – especially about justice and democracy – say about the regulation of markets and business firms? Strangely, almost nothing. This is so despite the fact (a) that the design and functioning of the institutions and administrative agencies making up the “regulatory state” have been a major topic of research in law, economics, political science, sociology, and public policy for the past half-century, and (b) that contemporary political philosophers have engaged extensively with questions about the institutions and ‘basic structure’ of a parallel (and somewhat overlapping) set of institutions we group under the rubrics of the “welfare state” or the protection and promotion of civil rights. Our aim here is to explain why questions about the regulatory state merit a more central place in theorizing about justice and democracy, and to argue that such questions ought to be unsettling for proponents of most of the prominent theories of justice and democracy developed in the decades since Rawls’s seminal A Theory of Justice (1971). For reasons mentioned above, this unsettled state in political philosophy makes it difficult for

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1 A burgeoning list of citations for work in business ethics on the nexus of business-government relations would date mostly from the past decade. Much of it can be traced to debates spawned by some very different approaches to business ethics originating in the work of Joseph Heath, Andrew Crane and Dirk Matten, and Andreas Scherer and Guido Palazzo; among others.
business ethicists trying to develop compatible theories for the evaluation of responsible business engagement with political and regulatory processes.

One reason theorists of democracy have given little thought to the complexities of the regulatory state may be that political theorists of all stripes tend to operate with a very simple (we will argue, too simple) picture of the relationship between the market and the forum. Nearly all leading contemporary theorists of justice and democracy in what used to be called the broadly “Anglo-American” tradition agree that modern constitutional regimes ought to make use of competitive markets involving private (or at least not-state-controlled) firms. Such markets, it is widely agreed, are justified on the basis of their capacity to establish prices, spur innovation, facilitate free choices of occupation and consumption, and efficiently generate wealth.

There is also widespread agreement among democratic theorists (and business ethicists, for that matter) about the role of government as an autonomous rule-maker and rule-enforcer for such markets. This is not to say that there is no disagreements about the extent to which governments ought to regulate the market, or about how much of the shape of society ought to be determined by the market versus the government – such disagreements have often been at the center of debates in democratic theory. The point is just that, at a more fundamental level, the parties to these debates all agree that democracies ought to include markets and that markets have to be regulated, especially to prevent classical market failures – negative externalities, information asymmetries, market power, the under-provision of public goods, etc. – that undermine the fairness and efficiency of markets. Moreover, nearly everyone agrees that governments, as opposed to non-government actors, must ultimately do most of the regulating. Rawls, for example, writes:

A democratic society may choose to rely on prices in view of the advantages of doing so, and then to maintain the background institutions which justice requires. This political decision, as well as the regulation of these surrounding arrangements, can be perfectly reasoned and just (Rawls 1999: 248). Among the roles regulation ought to play, Rawls includes “preventing the establishment of monopolistic restrictions and barriers to the more desirable positions” (Rawls 1999: 243-244), defining and enforcing property rights (244), “instituting the necessary corrections” to prevent “public harms, as when industries sully and erode the natural environment” (237), counteracting information asymmetries, and ensuring the provision
of certain genuine public goods (240). At the other end of the liberal political spectrum, Milton Friedman would find nothing to disagree with in such a description of the role of governments in a “free-market” economy. Though usually read as an opponent of government interference in the marketplace, Friedman reminds his readers that, “The existence of a free market does not of course eliminate the need for government. On the contrary, government is essential both as a forum for determining the ‘rules of the game’ and as an umpire to interpret and enforce the rules decided on” (1962, p. 15).

Friedman’s metaphor of the government as an umpire highlights a common (usually implicit) assumption about the relationship between governments and market actors. Just as umpires are supposed to be impartial and autonomous authorities on the field, governments are supposed to act as impartial and autonomous authorities over the market. Governments are supposed to make, and enforce, the rules for commerce, without interference from market players. Market players, in turn, are permitted, even encouraged, to pursue their own ends in the marketplace so long as they comply with the rules. In other words, there is a neat and tidy division of labor between regulators and the regulated. The actors in the forum make the rules, the actors in the market play by them or face punishment.

Of course in the real world there is never such a clean division of labor. Market players often gain a significant role in shaping the rules they play under, and political actors are often far from impartial when it comes to the performance of particular firms or sectors in the market. The results are often bad from the point of view of justice and democracy. Our contemporary concepts of “corruption,” “conflict of interest,” “rent-seeking,” and “regulatory capture,” the “revolving door,” not to mention “crony capitalism,” “military industrial complex,” and “the 1%” help us to better understand what goes wrong when the political and economic realms become inappropriately interwoven. Plato’s worries in the Republic about the nefarious influence of money and wealth in politics are as obvious and understandable to us as they were to his contemporaries. The same is true of Adam Smith’s explanation of the economic cost of what we would now call successful lobbying and rent-seeking, even if attempts to secure private rents from public policy – via appeals to national security, job-creation, public
health, etc. – are often less-than-obvious in the moment.²

Both Rawls and Friedman (and, again, any serious contemporary theorist of political economy) take seriously the ever-present threat of corruption when market and forum meet. Indeed, the way in which their visions of a “realistic utopia” diverge fundamentally can be traced in large part to how they interpret and prioritize the dangers of economic influence on politics, and of political influence on the economy. Friedman (1962) champions capitalism in large part because it “promotes political freedom [by separating] economic power from political power and in this way enables the one to offset the other” (p. 9). Most of his political writings place a heavy emphasis on the costs, in terms of economic efficiency and individual freedom, of what he saw as the wrong kind of meddling in the market. Whereas Friedman is mostly concerned with the way politicians and bureaucrats corrupt the economic system, Rawls worries more about the way the economic system can corrupt the political system and its ability to create and sustain a just society. In but-a-handful of sentences across his three books on justice, Rawls dismisses the very possibility of capitalism in a just society – even welfare-state capitalism – in part because he cannot see how the high concentration of economic power foreseeable in a capitalist economic system will not also lead to a high degree of political inequality (an unequal worth of political liberties) favoring the wealthy.³

In short, using Friedman and Rawls to stake out the right and left of the market-democracy spectrum, we find a shared assumption that the proper functioning of both democratic governance and a market economy requires that the individuals and organizations operating within these two systems stick to highly circumscribed roles with respect to each other; and that if they do not, then either system is likely to corrupt the

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² This is evident in the current debates about net-neutrality, whatever the best policy in this market turns out to be. The telecom conglomerates, which enjoy oligopoly powers in the market for Internet service provision, are against net-neutrality because it will prevent them from leveraging their market power as ISPs into greater market power as providers of content. Their public argument is that without net-neutrality, they could attract more investment, which in turn would drive more innovation. Now it is almost certain that it would attract more investment and raise the value of their shares, given the rents available from extending market power into new markets. It is not obvious that consumers will benefit, however.

³ See Rawls 1971: 278; 1999: xv; 2001:2137-139,149. Rawls rejects both capitalism and bureaucratic, centrally planned socialism – the “only two ways of coordinating the economic activities of millions,” according to Friedman (1962: 13). Rawls thinks he can nevertheless remain committed to a system using government-regulated markets and firms not controlled directed by the state, because he thinks this basic plumbing can operate within certain proposed models of liberal socialism and so-called property-owning democracy (Rawls 1971: 265-284; 2001: 135-179). Thus Rawls remains within the market-democracy consensus because he thinks there are viable non-capitalist market systems compatible with justice and democratic equality.
other. Moreover, we can generally predict, as reliably as we can predict anything in political science, some of the specific ways one set of institutions will corrupt the other. Rawls is hardly courting controversy when he assumes that highly concentrated economic power will enable those in possession of it to be “more equal” than others in democratic decision-making. And generations of political scientists and economists have now explored various ways even well-intentioned politicians and regulators are prone (though not doomed) to erring in their task of drafting and enforcing the appropriate “rules of the game” for markets and businesses. These kinds of problems are (as Rawls said of value pluralism) a *fact of life* in market democracies. Unintended consequences of regulatory interventions are difficult to predict, and there are so many opportunities for actors on both sides to seek mutually beneficial private arrangements to the detriment of the public. More campaign funding for a politician, or the potential for a higher-paying future job in the private sector for a civil servant, can lead to a very profitable regulatory reform for a business or business sector. Such conflicts of interest are corrosive even when the conflicted individuals themselves are consciously trying to act with the most public-spirited of intentions. To adapt an oft-quoted passage from Smith’s *Wealth of Nations*: when regulators and the regulated meet, even for merriment and diversion, the conversation often ends in conspiracy against the public.⁴

How can we protect democracy from such conspiracies? The strict division of labor assumed by many democratic theorists does so by limiting the interaction between regulators and the regulated. This strategy follows Smith’s solution to the problem of collusion among competitors: “though the law cannot hinder people of the same trade [or, we might now add, regulators and the regulated] from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary” (Bk. 1, Ch. 10, Para. 82). So long as regulators and the regulated are kept apart—confined to their distinct roles and acting autonomously of one another, inside and outside the “Beltway,” so to speak—the risk of conspiracy against the public can be minimized. Insofar as current societies fall short of such a clean division of labor, we ought to work to re-establish it. Or so, at least, is the thought that seems implicit in much democratic theory. It is a thought that forecloses any further or deeper philosophical

⁴ The original passage is from Bk. 1, Ch. 10, Para. 82: “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”
consideration of the relationship between governments and businesses. It is a thought, we contend, that is deeply mistaken.

Regulators cannot and should not be isolated from those they are regulating if the regulations are to be fair, efficient, and epistemically “smart.” Regulators cannot regulate well without access to information and knowledge that is held primarily by experts employed in the very companies being regulated. One can imagine that, in the early days of the industrial revolution, dangers in need of regulation were easy to spot and understand – the factories springing up across the country used hot steam to drive heavy machines that could easily crush a man, woman, or child. The lighting was often dim, and the poor ventilation was evident to anyone with unobstructed nostrils.

The regulatory challenges facing modern societies are not nearly so obvious and easily understood. Consider the complexity of the financial sector, or the knowledge needed to evaluate pharmaceuticals or to encrypt data. Successful regulation in these and many other arenas requires expert knowledge, and, perhaps now more than ever, the leading experts in any given field are typically employed by firms competing within the market rather than by government labs or agencies. This is especially true in the case of rapidly advancing technologies requiring high levels of expertise to understand: from Internet security and biotechnology, to driverless vehicles, and international supply-chain management. Smart and effective regulation cannot be developed without input from, and coordination with, the firms being regulated. In short, regulators are unavoidably and epistemically dependent on those they are tasked with regulating. And even when regulators do possess advanced general expertise of their own, efficient regulation and enforcement nonetheless requires significant and on-going input and cooperation with specific firms about their processes, products, modes of compliance, and about unintended perverse consequences of existing regulations. As the equivalent of “referees,” “performance-enhancing-drug testers,” and “video-replay judges,” officials have to be in or near the arena of commerce to ensure compliance and to learn about the consequences of regulatory policies and laws.

In short, in many cases governments do not have “the experts”, and in others there exists no single expert or team of experts on either side who has all of the relevant knowledge and a commitment to the public interest: the needed expertise can only emerge via processes of interaction between regulators, the regulated, and other potentially effected parties who, in turn, draw on other kinds of expertise. Thus the neat
division of labor presupposed by many a democratic theorist is untenable. But, as we have seen, relaxing the division comes with the risk of corruption. At each of point of contact between actors and institutions from each realm, there is a risk of one system corrupting or contaminating the other. Recognizing the epistemic dependence of regulators on those they regulate allows us to appreciate that the conditions which foster phenomena like regulatory capture, rent-seeking, and various sorts of conflict of interest cannot be solved simply by buttressing the autonomy of regulatory agencies; or at least, that won’t look like a viable solution if we also desire regulations that make markets more just and efficient.

In short, we seem to be condemned to wiggle between two rather uncomfortable horns of a dilemma: build a Chinese wall between the regulators and regulated, and condemn ourselves to a regulatory regime that will increasingly take on for real all of the criticisms of outdated, bureaucratic, counterproductive, red-tape-generating, job-destroying regulation that are already red-meat for the pro-business lobby; or have regulators and those they regulate collaborate more closely to develop and monitor systems of regulation that can respond quickly to experience and technological change, but which thereby become vulnerable to being tailored to the interests of the firms and of the individual public officials – at the expense of the public interest (say, through higher prices, reduced choice, lower pollution standards, decreased consumer protection, diminished worker health and safety codes, the erosion of privacy rights, etc.). Is there any viable, institutionally sustainable alternative to these two sharp horns? How can we have the smart regulation necessary for efficient markets in an age of technological change without “conspiracies against the public”?

This looks like a largely empirical question. And the empirical dimensions of business-government relations have been the subject of intense investigation, across the academy, over the past half-century; especially in political science, public policy, law, economics, and sociology. The pursuit of political and business interests through the exploitation of legally permissible interactions between “referees” and “players,” we hasten to add, supports multi-billion-dollar industries refining the techniques of successful lobbying, campaign finance, public relations, and marketing. None of the examples or mechanisms of dubious business-government relations mentioned in the preceding paragraphs should strike the reader as novel, or even controversial, within regulatory studies. This is the stuff of introductory textbooks in several disciplines. But
not in texts of contemporary political philosophy, curiously enough; and usually not in
textbooks of business ethics either. And in particular, with very few notable exceptions, not in the kinds of democratic theorizing that is carried on by philosophers or philosophically minded political theorists. Should philosophers be concerned about this?

Leading democratic theorists of a philosophical sort still take as their primary challenge the justification, or the conditions of legitimacy, for something as general as democracy itself (say, against contemporary rival theories of government like “epistocracy”). They may also, or instead, see their primary task as one of identifying and justifying abstract principles (say, of political equality, public reason, mutual concern and respect, individual and group rights, the common good, or legitimate authority) that will be the appropriate ones to be used in the design, reform, and evaluation of the decision-making and governance institutions. Since the emergence of the deliberative democracy paradigm in the 1980s, and continuing still with some of the successors to this model, democratic theorists have concentrated heavily on the roles, rights, obligations, and virtues of citizens in the process of decision-making. It is assumed that democratic theory can help us understand how institutions could be reformed to facilitate what we want out of a democratic system: namely, a healthy and informed debate and deliberation that respects citizens’ equal political rights and arrives at better forms of public policy and public administration (as evaluated, say, by a theory of justice). Deliberative and post-deliberative democratic theorists retain hope that in the right kind political culture, guided by the right kinds of institutions and norms, ordinary citizens can become sufficiently well informed to be able – through collective deliberation, debate, and decision-making – to make wise and just decision about major public policies and laws, and about the elected officials who write them.

Yet most of what has the force of law in modern democracies is not written or even directly decided upon by citizens, or even by their elected representatives. The lion’s share of law-making and law-enforcement in modern constitutional democracies is conducted by civil servants tasked with regulating industry and commerce. And there is no realistic alternative to this arrangement in a modern democratic state. Consider, in the

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5 For notable exception, see Richardson (2002), Arnold (2009), and the works of Cass Sunstein from both before and especially after his stint as President Obama’s “regulation czar,” e.g., Sunstein (2013) and (2014).
6 e.g. Estlund 2008, Landemore 2013.
7 e.g. Talisse 2009, Gaus 2011
case of the US Federal Government, the contents of the *Federal Register* which records all proposed and final rules and regulations, as well as notices of upcoming regulatory processes, and Executive Orders. In 2013, a year many will remember as characterized by gridlock in the U.S. Congress and in which “nothing got done,” the *Federal Register* was **80,462 pages long.** And the *Federal Register* obviously does not include state or municipal regulations. Very few of these laws and regulations, or the problems they are meant to address, can be well understood by most ordinary citizens, or even by their elected representatives. It would take a person working eight hours a day about four years just to read the 2013 *Federal Register* from cover to cover, let alone to understand it, or to evaluate the regulations and regulatory options it records (meanwhile, four more *Federal Registers* would have been published).

The monumental role of the bureaucracy in law making is often framed as a kind of “democratic deficit” – citizens and their elected officials are not well-placed to oversee and evaluate, let alone to understand or debate, the vast majority of what has the force of law in modern democracies. Does normative democratic theory offer a democratic solution to this deficit? Looking at the most prominent theories in the field, it is not clear how it could. These theories are preoccupied with how we ought to bridge gaps of preferences, interests, knowledge, and accountability between citizens and their elected representatives. They tell us little, if anything, about how to understand and bridge the potentially much larger gaps of knowledge, interests, etc, between both citizens and elected officials, on the one hand, and regulators, on the other; or in turn, as discussed earlier, between the regulators and the businesses they regulate.

So we have identified at least three “governance gaps,” to put it rather crudely.

1. The one that has haunted contemporary democratic theory (citizens v. elected officials)

and the following two gaps “below” and “above” the regulators, which have held prominent places on the research agenda of the social sciences but now require the attention of political philosophers:

2. the gap “above,” between regulators, on the one hand, and *elected officials and citizens*, on the other, which many be wider than many of the gaps between citizens and elected officials that democratic theorists have traditionally worried about; and
(3) the gap “below,” between regulators and *those they regulate* which, we have argued, cannot be as wide, or as “safe,” as many democratic theorists and champions of a market economy have presupposed.

If a democratic theory of government is to be relevant in a modern constitutional democracy and market society, it must be able to grapple with these gaps—the necessary but dangerous “narrowness” of the third, and the (perhaps also necessary) “width” of the second. It must grapple with the problem of how citizens, their elected officials, and the judiciary, can guide and oversee the creation and enforcement of just, fair, and efficient regulation of commerce despite large asymmetries in the knowledge and expertise necessary to craft such legislation, and the dangers of corruption and conflicts of interest that arise from that fact that much of the necessary expertise is employed by the very industries in need of regulation. (There are, of course, similar and equally challenging questions about how citizens and elected officials can oversee responsibly *other* kinds agencies in the welfare state, the just system, the armed forces, etc., but our more specific focus here is on the regulation of the market and on market actors like business firms.)

This is a very uncomfortable space for philosophically minded democratic theorists for a number of reasons. Again, laws developed by people situated too far from the details of the problem they are meant to address are embarrassingly likely to be counterproductive. Those developed by officials too close to the details of the problem are more likely to be “biased” (perhaps unconsciously, but predictably, given familiar cognitive biases and heuristics) and against the public interest. Deliberative democratic theory and its current successors are very keen on the “epistemic” qualities of a good democratic system: i.e., on its ability to learn and adapt. Regulatory theory is also now keen about responsive, “smart,” and self-correcting models of regulatory design, often involving innovative mechanisms of self-regulation and co-regulation involving non-governmental organizations. But for regulatory law to be responsive in this way, more discretion is needed at the level of the regulatory agency, and thus less-well-defined parameters must be enacted at the level of elected representatives. In short, the fairest and most efficient (and “smartest”) regulation may have to come from a process that most

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8 e.g. Cohen (1986), Estlund (2008), Landemore (2013)
9 For useful conceptual and empirical surveys of old and new regulatory approaches see, e.g. Baldwin, Cave, and Lodge (2010), Balleisen and Moss (2010), and the evolving Tobin Project: www.tobinproject.org.
political philosophers would think of as “less democratic,” given their traditional focus on the deliberation and decisions of individual citizens.

In this short conference paper we have set out primarily to highlight a number of challenges and dilemmas that empirically informed normative theorists will have to negotiate if they are to provide principles for identifying and justifying appropriate (just, legitimate, democratic, etc.) institutions for regulating business and the interactions between business, public administration, legislatures, politicians, and the judiciary. Of course we have no magical theory – or institutional designs – to pull out of a hat to accomplish this. What we have tried to suggest very quickly here is that in order to get serious about this problem we will have to rethink and replace a number of long-standing, assumptions about supposed divisions of labor between business and government, elected officials and bureaucrats, and citizens and elected officials.

At the risk of American parochialism, one practical and potentially promising strategy for this rethinking is to start with the official statement and rationales for regulation and regulatory oversight by the executive branch of the US Federal Government, which officially houses most of what we could call federal regulatory agencies. (Of course, the same strategy could be pursued with the official line on regulatory oversight in any constitutional democracy.) In the US, the most concise and telling documents of this kind are a series of Executive Orders, especially the one issued by President Carter and updated by his successors in that office, culminating with President Obama’s “Sunstein-crafted” Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review. Among other things this three-page document states “General Principles of Regulation,” rules for “Public Participation” in the development of regulations, the special role for “Science” and objectivity, and – intriguingly for democratic theory and for responsible business participation in the process – guidelines for the mandatory “Retrospective Analysis of Existing Rules” on regular basis. Like its predecessors, this Executive Order relies heavily on cost-benefit analysis as a necessary tool for both initial and retrospective approval of all federal regulation. “It must identify the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative... It must measure, and seek to improve, the actual results of regulatory requirements.” Now political philosophers have had a fair bit to say about cost-benefit
analysis, with Elizabeth Anderson (1993) and Henry Richardson (2002) leading a wholesale critique; and with a minority, including David Schmidtz (2001) and of course Sunstein (2013; 2014) himself, offering a defense. To date, however, most philosophical analyses of cost-benefit analysis have been in the context of large-scale public policy and public-expenditure questions: should we invest this portion of the health care budget on prevention or treatment? should we build a new freeway or high-speed rail link from A to B? should our city build this new stadium for a professional sports franchise? and so on. In many such debates, cost-benefit analysis is seen as a technocratic alternative to democratic deliberation or interest-group-dominated public hearings; and a dubious one at that, given its alleged inability to draw qualitatively significant distinctions (or to deal with a plurality of values that cannot be reduced to dollar values). One hypothesis to explore on the way to a normative theory of regulatory oversight in a constitutional democracy, however, is that cost-benefit analysis may play a role as a tool for evaluating proposed or existing regulations for market designs and commercial activities that is different from the role it plays in public policy decision-making. In the context of regulation, where the existence of a market failure has already been established – that is, where it has already been shown that some particular market is not producing an efficient ratio of public “benefits” to “costs” – some role for cost-benefit analysis of the proposed regulatory “fix” is surely indispensable. But even further, whenever it is possible to obtain objective information about the total costs and benefits of a regulatory intervention in a market (and that is a big “whenever”), then cost-benefit analysis conducted by the oversight agency of the executive branch (in the US this is the White House Office of Information and Regulatory Affairs, OIRA, created in 1980) holds out the possibility that senior administrative and elected officials will be able to spot more quickly proposed or existing regulations that had been crafted within regulatory agencies further on down the org chart, and that cater to the interests of particular parties in ways that amount to Adam Smith’s “conspiracy against the public.” In other words, it may not be a “first-best” theory for justifying public policy decisions, but it may be one of the better “second-best” proxies for detecting corrupted regulation, either before it can be enacted, or during regular “external audits” If so, it may be part of a very complex institutional answer to the prickly dilemma described earlier. It could tell us (in part) how a government and its citizens can get the benefits of “smart” regulation developed through the necessary collaboration by the regulators, the regulated industries, and other interested parties, on
the one hand; along with the possibility of securing some degree of autonomy between the “referees” and the “players,” on the other.

At this stage in our project, this is merely a normative hypothesis. But it illustrates the way in which reflection on the real, concrete challenges of regulatory oversight in a constitutional democracy with a market economy can lead to norms and principles relevant to institutional design and justification. For example, if cost-benefit analysis can find a well-justified role in a system of regulatory oversight (possibly a role we would not want to accord it for other kinds of public policy decision-making, say, in welfare-state institutions like education or civil rights), it also points immediately to the kinds of obligations this will generate for responsible business actors when they engage with civil servants and elected officials. Among other things, it highlights the importance of the obligation to provide accurate data (and to enable others to collect accurate data) on the relevant social costs of production, including negative externalities, under various actual and proposed regulatory regimes. To be sure, this obligation is not one we typically see in lists of the beyond-compliance obligations of “socially responsible corporations.” But if we ask better questions we should expect to see some novel answers.

At this point in our research project we are merely trying to make a case for the relevance of some neglected questions at the intersection of political philosophy and business ethics, and for why some standard simplifying assumptions in theorizing about justice, democracy, and political economy are likely to get in the way of potentially promising ways of answering these questions.

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