

## Chapter Nine

# Justice in Regulation

### *Towards a Liberal Account*

Rutger Claassen

In recent decades most Western states have privatized a range of public services and have increasingly chosen to focus on regulating markets instead of providing goods and services themselves. Some claim that Western states have deregulated the economy and increasingly withdrawn from economic life, marking an era of neoliberal governance. However, others claim that privatization has come with more and more intense forms of regulation. We would not be living in an era of 'less state', but of a different kind of state, a 'regulatory state' (Braithwaite 2008; Jordana and Levi-Faur 2005; Moran 2002). Regulation and deregulation are at the core of disputes about the role of the state in the economy. The 2008 experience of collapsing financial markets has only strengthened the sense of urgency surrounding questions of regulation.

This chapter is about the normative question *why and to what extent markets should be regulated*. While regulation has been discussed in law, public administration and economics, it has been relatively neglected in political philosophy. Given its growing importance, this neglect is untenable. A discipline with ambitions to grasp the nature and legitimacy of the state has to come to terms with the regulatory function of the modern state. More philosophical reflection may also be useful for these other disciplines (and ultimately regulatory practice) as well. For the way that standard handbooks of regulation deal with the problem, is rather pragmatic. A first overview of the prevailing legal and economic theories shows that there is a more or less consensus view that centres on a bifurcation of economic and social rationales for regulating markets, with the former having a higher status than the latter (section 1). This raises the question whether these two types of regula-

tion stand in an unresolvable tension with each other or could be integrated into one normative framework. The main goal of this chapter will be to show that a philosophically integrated theory of regulation is possible, and to propose a way of doing so. This challenges the prevailing handbook orthodoxy which simply juxtaposes economic and social regulation without considering the tensions between them.

To work towards this goal, the middle parts of the chapter show why a philosophically integrated theory of regulation never came off the ground, but at the same time why there seem to be no principled impediments for developing such a theory. I will discuss the three most relevant subfields in political philosophy for the regulation question. The first one is that of *theories of justice*. In the second section I discuss Rawls's theory of justice and show how it relegates questions of market regulation to democratic practice. I argue this split renders Rawls's view inconsistent because it tacitly imports and accepts the utilitarian nature of economic theory that Rawls otherwise rejects. The second subfield is the discussion about the *moral limits of the market*. This field focuses on problematic markets that should be prohibited, but does not say much about regulating markets that should be allowed to exist. I will show, however, that when we apply an enlarged understanding of commodification, regulation of markets could also come into the picture (third section). In the fourth section, I address the final subfield: that of *liberal political theories about property*. The three most important currents in liberal theory (modern liberalism, classical liberalism, and libertarianism) do take a position about the legitimacy of regulation. Here we find in philosophical theorizing the same dichotomy between economic and social regulation that is expressed in handbooks of regulation. I argue this dichotomy renders liberal theorizing inconsistent because economic regulation is based on utilitarianism while social regulation relies on a non-utilitarian normative theory.

In the final section, I launch my constructive proposal for a philosophical-liberal theory of regulation. The proposal builds around the liberal concept of autonomous agency. By giving centrality to this concept, I will suggest that we can understand economic and social regulation as emphasizing different aspects of a proper respect for autonomous agency and integrate both of them in a coherent liberal framework. This does require, however, abandoning the utilitarian version of economic regulation theory.

### THE STATE OF REGULATION THEORY

There is a certain tendency in the literature to have an overly broad understanding of regulation according to which almost every state action could be classified as such. To avoid this, I adopt Arnold's definition, slightly sim-

plified by me: regulation is best understood as a 'government-imposed limitation on O's freedom . . . with respect to the standard incidents of full, liberal ownership of  $\phi$  by O' (Arnold 2009, 119).

This definition highlights three characteristics. First, regulation is confined to state or government interventions. (I refer to 'the state' as the regulating agent, even if transnational and supranational forms of regulation have become increasingly important. Most of the arguments can be applied *mutatis mutandis* to international regulation.) This excludes various forms of self-regulation: regulation refers to a public authority interfering with private exercises of ownership. A regulated market has a mixed private-public character, which makes it an intermediate between free (unregulated) private exercises of ownership and exercises of public ownership (public provision). Hence, I am interested here in the regulation of markets, not regulation in a wider sense (which might include regulation of public or quasi-public entities). Second, these interventions have as their object the ownership of an asset ( $\phi$ ) by a (natural/artificial) person. This excludes interventions to uphold that part of criminal law that aims to protect people's fundamental rights (to life and liberty) against assaults by others, since these are not based in property. Third, these interventions limit the freedom of owners. Some rules establish property rights, thus making a market possible in the first place, other rules restrain the use individuals can make of their property. Regulation only refers to the latter.

This definition distinguishes regulation also from the state's other economic functions; that is to provide economic goods and redistribute income or capital. The tripartite distinction of provision, regulation, and redistribution can most easily be explained using the contrasting concept of the market. When providing public goods, the state bypasses the market entirely and becomes itself an economic agent. When regulating, the state accepts the market as the main economic mechanism, but intervenes in order to limit free market activity. When redistributing, the state intervenes after markets have done work to transfer resources from one group to another. To a certain extent, these three roles can be alternatives for reaching the same publicly defined objectives ('the public interest'). The move from a provider state to a regulatory state can be understood as trying to achieve the same public goals through a different constitutive relationship between market and state.

What are the currently dominant normative theories of regulation? Handbooks in law and economics, such as Morgan and Yeung (2007), Ogus (2004), or Barr (2004) and overviews of regulatory principles such as those of Sunstein (1990) or Stiglitz (2009) converge on two central points: (i) they use a basic distinction between economic and social regulation; (ii) economic regulation receives more systematic attention as well as higher status than social regulation.

'Economic regulation' refers to regulation on the basis of the theory of market failure (Bator 1958; Herzog 1999; Cowen 1988). While obviously an umbrella term (there are several theories of market failure), they all start with the neoclassical idea of a perfectly competitive market. Such a market only comes into being when some highly restrictive assumptions are met: resources are privately held, and decisions about resources are up to their owners; there is no force or fraud; there is sufficient competition; consumption is private and does not affect others (non-rivalry); transactions are costless; and utility functions are monotonic (Coleman 1985, 70; Gauthier 1986, 86–87). A market that satisfies these conditions is Pareto-optimal. No further transactions can be made without making at least one of the market participants worse off. Pareto-optimality is taken as a sign of *allocative efficiency*. Resources are used to maximally satisfy individual preferences of market agents. For these reasons the model of perfect competition is taken as a normative benchmark.

Deviations from this model are classified as a market failure. Since the assumptions are so restrictive, almost all authors recognize that deviations abound. There are no perfect markets in reality. These deviations are systematized into different categories, such as monopolistic competition, information asymmetries, public goods, and externalities. This gives rise to different forms of regulation. For example, monopolistic competition may give rise to anti-trust regulation, information asymmetry between producers and consumers to labelling requirements, non-excludability, and non-rivalry (the characteristics of public goods) to direct state provision, externalities to prohibitions, taxes, or subsidies. In all of these cases, markets do not function well on their own terms and regulation is expected to remedy this failure and restore Pareto-optimality.

These theories have been criticized on the grounds that often either voluntary solutions can remedy the market failure, so that government intervention is unnecessary, or government intervention gives rise to government failure, so that regulation is more costly than letting market failure persist. Both reasons (however legitimate) do not dispute the claim that the existence of a market failure is a *necessary*—albeit not sufficient—ground for government regulation.

Social regulation is distinguished from economic regulation because it refers to all grounds for regulating *other* than inefficiency. This is a merely negative definition; beyond this there is little agreement what should fall in this category. One common idea is that efficiency considerations are to be complemented with equity considerations. *Distributive justice* then becomes a second ground for regulating, in a dichotomous efficiency/equity theory.

Some would exclude redistributive measures from regulation, because it is done *ex ante* or *ex ante/post* to actual market processes. Their idea is that initial holdings are morally arbitrary; we may redistribute to bring about a

more just initial allocation from which free exchanges can take place. This does not necessitate any regulation of the exchange relationship itself. However, this ignores the distributive impact of the exchange process (Dietsch 2010).

Another often-mentioned category is *paternalism*: human agents often act irrationally and therefore make decisions which go against their own best interest. To optimize welfare, governments in many situations could help individuals reach their preferred outcomes. No attempt is made to link these two additional grounds in a systemic fashion to the economic theory of market failure, or to integrate all three of them in a unifying framework. Some have urged an even more expansive understanding of social regulation. This has led to a variety of frameworks that go beyond economic regulation (Stewart 1982; Sunstein 1990; Trebilcock 1993; Bozeman 2002; Soule 2003; Prosser 2006; Feinbuck 2010). Each of these theories relies on different normative grounds and organizes the material in different ways. Nothing like a canonical theoretical framework has emerged, that is comparable to the theory of market failure for economic regulation.

Despite the fact that there is no accepted underlying unifying purpose, several categories of social regulation are fairly widely recognized (Arnold 2009, 132). Most theories recognize that the employment relation is a prominent item. Legislation about the terms of employment, minimum wages, anti-discrimination legislation, health and safety standards reflects our understanding that labour is more than a standard commodity (Radin 1996). Consumer protection is also an important component of social regulation. The sale of some (e.g., medical) products may be prohibited or subject to prior approval. This kind of regulation reflects a distrust of consumers and producers agreeing voluntarily about the riskiness of products. Third, environmental regulation is often included. Natural values are hard to quantify in an economic framework, but nonetheless they deserve state protection, according to proponents of social regulation.

Finally, note that economic and social reasons are most often presented as both distinct and complementary. They are *distinct* in that social reasons do not rely on an efficiency rationale while economic reasons do not rely on a social rationale (even though some economists do attempt to draw social regulations into an economic framework). They are *complementary* in that one can accept one and reject the other. Often, this means every sensible person is thought to accept economic regulation; some in addition will endorse some or all of what is in the 'social' category. Thus, Morgan and Yeung write in the context of social regulation: 'the task of prescribing substantive visions of values that regulation can legitimately pursue is controversial, given the pervasiveness of moral disagreement and value pluralism that characterizes modern societies' (Morgan and Yeung 2007, 36). The organizing idea of the handbooks seems to be that economic regulation is

academically well-established and politically non-controversial whereas social regulation is controversial and should be left to politics. Later in this chapter I will show how this bifurcation can be overcome, by integrating economic and social regulation into a unified liberal framework. If my efforts there succeed, then the current inequality in status between economic and social regulation is itself a very controversial and ultimately untenable view.

Until now, there have been few attempts in political philosophy to develop a coherent normative regulation theory that could challenge this currently dominant mixture of a generally accepted economic theory supplemented with an underdeveloped theory of social regulation. In order to understand why, let's turn to our first subfield: theories of justice.

### REGULATION BETWEEN JUSTICE AND DEMOCRACY

Since the publication of John Rawls's landmark *Theory of Justice* the standard move in this field has become to make a sharp split between principles of justice and their application in concrete contexts. Whereas the best definition of the principles was thought to be the work of philosophers, application should be left to others. These others can be academics from other disciplines (lawyers, economists, etc.), but the more principled view often found is that application is the work of democratic bodies, not of theorists. As a consequence, philosophers endlessly debated principles of justice, while leaving questions of application largely untouched. Meanwhile the others who were to complement their work were rarely familiar with philosophical work, so that this division of intellectual labour never happened. Admittedly this is a crude overview (e.g., there are notable exceptions of economists working on justice), but it does go a long way to explain why so few philosophers have reflected on regulating markets.

Rawls's own work pioneered this approach. Whereas the much-discussed first part of *Theory of Justice* set the standard for theorizing justice, the second part, where he presents his views on economic systems, was often neglected. Here Rawls presents these views in a way which makes thinking about regulation essentially a non-philosophical task. At the start of part II, Rawls sets his economic reflections in the context of his famous 'four-stage sequence'. After having decided the principles of justice in the Original Position (first stage), the parties move to a constitutional stage, then to a legislative stage and finally to a phase in which rules are applied. Rawls then places social and economic policies in the legislative stage. He says:

Now the question whether legislation is just or unjust, especially in connection with economic and social policies, is commonly subject to reasonable differences of opinion. In these cases judgment frequently depends upon speculative political and economic doctrines and upon social theory generally. Often the

best that we can say of a law or a policy is that it is at least not clearly unjust. (Rawls 1999, 174)

Two pages later he draws the following conclusion from this indeterminacy of laws, from the point of view of justice:

And similarly just laws and policies are those that would be enacted at the legislative stage. Of course, this test is often indeterminate: it is not always clear which of several constitutions, or economic and social arrangements, would be chosen. But when this is so, justice is to that extent likewise indeterminate. Institutions within the permitted range are equally just, meaning that they could be chosen; they are compatible with all the constraints of the theory. Thus on many questions of social and economic policy we must fall back upon a notion of quasi-procedural justice: laws and policies are just provided that they lie within the allowed range, and the legislature, in ways authorized by a just constitution, has in fact enacted them. (Rawls 1999, 176; emphasis added)

In this way, Rawls leaves a large space for democratic bodies to decide about specific regulations. If we follow this split between theorizing principles and applying them in a legislature, then regulatory theory cannot be an integral part of a theory of justice.

In the rest of part II, Rawls remains true to this division. He discusses which economic systems are in accord with his principles of justice, and approvingly presents a quite elaborate overview of conventional economic theory, discussing public goods, externalities and other market failures in some depth (Rawls 1999, 234–40). However, he makes it crystal clear from the start that this endorsement of economic theory is conditional and should in fact not even be considered a part of his theory at all:

Certain elementary parts of economic theory are brought in solely to illustrate the content of the principles of justice. If economic theory is used incorrectly or if the received doctrine is itself mistaken, I hope that for the purposes of the theory of justice no harm is done. (Rawls 1999, 234)

Now, I think that Rawls's hope is misguided. The reason for this is *not* that we should completely reject the proposed division of labour between philosophical theorizing about justice and democratic decision-making. Philosophical theorizing, in the absence of empirical data, historical experiences with regulation, knowledge of human psychology, and so on can only bring us so far. Neither is the problem that, even with all this knowledge in hand, there may still be some under-determination of laws and policies measured against the requirements of a theory of justice. The latter theory, being more abstract, may reasonably allow for several just—or at least not unjust—applications and not point to a unique outcome.

Instead, I would propose that the problem is that Rawls puts the 'cut' between theorizing about justice and applying the theory too early. He thereby leaves out of philosophical scrutiny a theory (i.e., the economic theory of market failure) which itself is built on strong philosophical assumptions. The crux is that the theory of market failure is a utilitarian theory. It relies on maximising welfare in terms of individual preference satisfaction. Conventional economic theory takes individual preferences as the measure of what is normatively right in deciding which public goods should be provided by the state, which externalities require internalization, which corporate agreements are in breach of competition law, and so on. But utilitarianism is precisely the moral theory that Rawls has been at pains (correctly, in my opinion) to refute in his work. However, somehow he fails to realize that his endorsement of economic theory sits very uneasily with his rejection of utilitarianism.

Let us take as an example Rawls's views on public goods. On the one hand, he endorses an anti-perfectionism which makes it impossible for the state to deliver any public goods unless everyone in the polity assents to this. The 'exchange branch' in his theory can only work on the basis of unanimity. In any polity of some size, there will always be some people who will disagree and block agreement, so that no public goods will be delivered (Rawls 1999, 249–51). On the other hand, Rawls as we saw endorses the economic theory of public goods which does not require such unanimity if overall welfare is maximised by delivering the public good (Rawls 1999, 235–36). Finally, he endorses democratic decision-making as decisive, which entails commitment to a simple majority criterion as the hallmark of what a just society would do about public goods (Rawls 1999, 313–18). Thus Rawls is torn in different directions. He embraces three different positions, two substantive ones (anti-perfectionism and utilitarianism/welfarism) and one procedural position (democratic majoritarianism). It seems to me that Rawls, in the face of the deep disagreement between his anti-perfectionism and economic theory's utilitarianism, cannot retreat to proceduralism. His theory of justice must say more about the just criteria for providing public goods (for a more detailed analysis see Claassen 2013, 287). Similar conflicts can be shown, I believe, between the utilitarian assumptions underlying other categories of market failure and Rawls's (or indeed any non-utilitarian) theory of justice.

A theory of justice must say more about the principles for regulating markets and cannot leave this to democratic decision-making; at least, it cannot do so in the sense mentioned earlier, in which we strive for a reasonable demarcation of which parts of political decisions require fundamental reflection and can be meaningfully treated philosophically, and which parts rely so much on empirical detail that they must be left to more specifically located decision-makers. Theorizing the normative criteria for regulation should be part of theorizing justice. And given the influence of the theory of

market failure, this is certainly the case for those who do not want to leave economic theorizing to utilitarians. Justice should not be narrowed down to 'distributive justice', if the latter is meant as only making pronouncements about the redistributive function of government (which corrects market-based income and wealth distributions *ex post*). The provider and the regulatory roles of government are just as much part of the basic structure. Justice should be about all of these roles of government.<sup>1</sup>

#### THE MARKET AND ITS LIMITS

One may have wondered whether, if we are looking for a philosophically substantiated regulation theory, we have been looking in the wrong place. After all there has been, over the last decades, a debate in moral philosophy about the market and the moral limits to commodification. This debate was sparked by Michael Walzer's seminal contribution in *Spheres of Justice* (Walzer 1983), arguing that some goods should not be bought and sold. For a variety of moral reasons, these should be 'blocked exchanges' (Andre 1995). For Walzer this was based on a differentiation of social spheres, each sphere characterized by its own appropriate distributive principle. Other philosophers have defended the same line of argument in more detail than Walzer did, each arguing that some things should be left out of the reach of the market. Thus Elizabeth Anderson argued for sphere differentiation on the basis of a theory about different proper modes of valuation for different goods (1993). Margaret Radin argued for a theory of market-inalienabilities for those items which are personal, non-fungible property (1996). Debra Satz proposed an egalitarian theory concerned with the harmful effects of markets on the equal standing of agents (2010). Michael Sandel defended a loosely civic republican view of putting limits to markets (Sandel 2012).

These theories are animated by a worry that markets will spread everywhere, invading domains of life where other than commercial values should reign. This kind of theorizing tends to promote a dichotomous scheme in which some goods are sheltered in non-market-domains while other goods are left completely to market forces. For those goods left to the market, these theories do not present normative concerns to limit the 'deepness' of marketization itself. Implicitly, this playing field is left to the existing economic theory of market failure. To be sure, this is *not* a necessary consequence of these theories. There is nothing incoherent about acknowledging *both* that some goods should be off the market *and* that other goods can be on the market but should be subject to further restrictions. Sometimes it has been explicitly acknowledged that commodification of a good itself can be incomplete (Radin 1996) and that spheres can overlap (Anderson 1999). However, this theoretical recognition never led to a theory of market regulation. I

would like to suggest that this did not happen because the discussion is structured by a narrow definition of what 'commodification' (or marketization) is. To open up the possibility for a moral theory of market regulation requires a reconceptualization.

The institutional set-up of society as consisting of different social spheres, or as I would prefer to say, different socio-economic exchange mechanisms, suggests that a good can be commodified in three ways (Claassen 2009, 427–28). First, a good which has previously not been subject to the market can become marketized. Call this *market creation*. For example, a government can legalize a new market (say, for kidneys) which was previously prohibited, where the good was either not exchanged at all or subject to a different exchange mechanism (such as gift exchange). This is the traditional meaning of 'commodification'. However, there are two further meanings. Second, a good which is already subject to market exchange can become more fully commodified when restricting regulations are removed. This happens, for example, when governments lift constraints such as quota, restrictive opening hours, certification requirements, and so on. Call this *market deepening*. Finally, when a good has simultaneously been subject to both market mechanisms and one or more non-market mechanisms, the market may become relatively more dominant. This happens, for example, when more viewers start to watch commercial television and fewer of them watch publicly funded television (a different exchange mechanism), so that the latter loses audience share to the former. Call this *market enlargement*.

Using this tripartite scheme shows how worries about commodification might stretch beyond worries about the creation of new markets that should remain blocked. (In the legal regulation literature, prohibitions are one possible means [or technique] of regulation, thus the first category is subsumed under the second one.) If we accept this extension of the commodification concept the question of market regulation comes into the reach of moral theory just as much as the question of market blocking. Regulation may serve to prevent market deepening or market enlargement. This raises two follow-up questions.

First, which moral criteria are going to be proposed? One option is to use different criteria for judging cases of all three types, while the other option is to use the same criteria. I see no barriers to using the same criteria. In principle we could try to extend all the existing commodification theories to market regulation. This would parallel the move that has been made in economics with the rise of institutional economics, which uses the same utilitarian theory for questions of market regulation and for choices between market and non-market mechanisms (Williamson 1985).<sup>2</sup> Here I will not argue in favour of one specific commodification theory, but it seems to me essential, for whichever theory one is prepared to defend, that it is coherent over all

three instances of commodification. For only then will such a theory be a serious contender against the economic theory of market failure.

Second, should such a theory start from a (non-utilitarian) theory of *market failure*? In a sense it is strange that the existing theories of regulation do so. For at first glance they present themselves as about the regulation of the private sphere as a whole. But the private sphere is much larger than the market; for example, it also includes regulation of what we do with our own bodies (Arnold 2009, 105–114). Even when we confine ourselves to external objects that can be owned and exchanged, we have seen that there are private non-market exchange mechanisms (such as voluntary gift exchanges). So it seems arbitrary for a theory of regulation to start from the market as a privileged social arrangement and then argue that regulation is justified only when the market fails. One could just as well wonder why we do not start from gift exchange as our favoured mechanism and build a theory of *gift failure* to demonstrate cases where markets might be preferable to gifts.

Ideally a theory of regulation applies its normative principles to two questions: (1) which exchange mechanism should be chosen for a given good in the first place as the best one; and (2) whether that exchange mechanism should be surrounded by additional restrictions (regulations). For such a theory there is no use in starting from the market as a favoured exchange mechanism. Moreover, these two tasks are interrelated. In decisions about privatization of public services, for example, it is very important how a service is privatized, in other words, to which regulations it will be subject when privatized. For many politicians and citizens, a decision to privatize (i.e., a transfer from the public to the market exchange mechanism) will itself be acceptable only when the right regulations are guaranteed. The acceptability of privatization thus is a package deal. The question of blocking or creating markets (the original commodification question) cannot even be answered without considering how markets would be regulated when created.

The best way of proceeding, then, seems to be with a comparative institutional analysis which 'starts from nowhere' in the sense that it does not have the market or any other exchange mechanism as a default. We simply consider which institutional arrangement (exchange mechanism-cum-regulation) would best satisfy the given set of normative principles. However, this exercise itself needs to be decomposed into a separate consideration of how each exchange mechanism would perform, only then to compare the results for different mechanisms in a second step. A (non-utilitarian) theory of market failure is a necessary component of such an exercise. It teaches us what the potential of the market is to maximise a given set of normative criteria with respect to a specific good (see also section 5).



## LIBERALISM AND REGULATION: THE QUESTION OF PROPERTY

Up to this point, I have not directly argued why we should want a *non-utilitarian* theory of regulation. I have used the authority of Rawls to suggest we might do so, but even if many political philosophers are non-utilitarian, this will not convince a single economist. Economists, like other citizens of Western societies, do have strong liberal commitments. Liberal political theory is a broad camp, ranging from left-wing to right-wing variations. Given that it encompasses so much of the political field, a consideration of what liberal political theory would say about regulation seems appropriate. Happily, liberal theorists have considered the regulation question, namely in the guise of their theorizing about the legitimacy of private property. Relying on work by others (Arnold 2009; Freeman 2011; Tomasi 2012), I will present an overview of the three main families of liberal theory on the regulation of property. This reconstruction serves to identify coherent positions on regulation, despite the fact that specific authors will not always fall neatly into one of these camps. I will use three levels of analysis, loosely paralleling Rawls's first three stages of his four-stage sequence (see table 9.1).

At the legislative level the three theories defend different attitudes towards the acceptability of regulation. Libertarians reject both economic and social regulation, because they believe in the market as a free and spontaneous order, where agents can act as they see fit. Classical liberals only defend economic regulation. While they share libertarians' positive evaluation of the market, they also acknowledge that freely acting individuals sometimes are unable or unwilling to guarantee a well-functioning market. Government intervention is then needed to help individuals to secure this goal. Modern liberals defend both economic and social regulation. In contrast to the other two, modern liberals do not start from an *a priori* positive evaluation of the market, but from certain social values. They recognize that a well-functioning market may contribute to these values (support for economic regulation)

Table 9.1.

	Modern liberals	Classical liberals	Libertarians
Market regulation (legislative level)	Social and economic regulation	Economic regulation	none
Basic rights (constitutional level)	Civil, political rights (or: and economic and social rights)	Civil, political, and economic rights	Economic rights
Moral theory (level of justification)	My proposal (section 5): autonomous agency	Natural rights theory, utilitarianism.	Natural rights theory (possibly others)

but when even a well-functioning market would offset these values they do not hesitate to intervene to adjust its outcomes (support for social regulation). These positions can be related to different stances at the constitutional level. Liberalism is characterized by its commitment to individual freedom as a superior value and also by an institutional commitment to protect individual freedom through a constitutionally guaranteed set of individual basic rights against government that cannot easily be overridden by non-rights considerations. The basic status of any right is meant to protect some individual interest against a political majority's ideas about the common good. There are four possible categories of rights that could be basic: civil rights (like freedom of expression or religion), political rights (like right to vote and stand for office), economic rights, and social rights. Economic rights here refer to the bundle of rights that come with private property, which includes freedom of contract, that is the ability to alienate one's property.

Libertarians only recognize economic rights as basic. They give property an absolute status and subsume civil and political rights under private property rights (Narveson 2001: 66). This gives their position a special, some would even argue illiberal outlook (Freeman 2001, 114–15, 123–31). Libertarians cannot accept any form of regulation, as market agents' free decisions should be decisive over all market transactions. For example, they often do not accept anti-trust legislation, and this is consistent from their viewpoint. Respect for individual property rights implies respecting the exercise of these rights in Pareto-inferior ways. Libertarians choose to protect these rights and have to accept higher prices and lower output that are the typical result of cartels or monopoly (Freeman 2001, 137; Vanberg 1999, 232). The deeper reason for this, on a third and final level, seems to be that libertarians most often (but not always) rely on a natural rights justification to explain the absolute status they accord to property rights. Individuals in a state of nature are said to have property rights 'by nature' (Freeman 2001, 125; Nozick 1974, 118).

Classical and modern liberals differ from libertarians in treating individuals' civil and political rights as basic. In addition, classical liberals give economic rights the same basic status and endorse a freedom defence of markets similar to what one finds in libertarian authors. Because of their insistence on economic rights protecting core economic freedoms, they are (like libertarians) suspicious about social objectives overriding these rights. However, unlike libertarians, classical liberals do accept the economic theory of market failure. As Freeman put it:

liberals generally, including classical liberals, maintain that, when markets break down due to monopolistic concentration of market power, or when markets are incapable of adequately supplying goods or services that are important to individuals' independence and well-being, it is government's role to

intervene and address such 'externalities' or 'neighbourhood effects' by restoring competition and providing for these 'public goods'. (Freeman 2011, 23)

Thus, classical liberals are committed both to market-based freedoms (economic rights) and to welfare-maximising policies that can come into conflict with these freedoms.<sup>3</sup> The latter implies a commitment to utilitarianism, and this commitment also helps to explain classical liberals' rejection of social regulation. Markets are to function according to individual preferences. Social regulations substitute a collective judgment for these preferences and that makes them unacceptable to the (preference) utilitarian. While this rejection of social regulation is consistent with their acceptance of economic regulation (both can be explained by utilitarianism), the problem for classical liberals is how to reconcile their utilitarianism on these issues with their strong (libertarian-style) endorsement of economic freedoms.

Modern liberals are often presented as differing from classical liberals because they give economic rights a lower, non-basic status (Arnold 2009, 17; Freeman 2011, 19–20; Tomasi 2012, 67). Because they do not accord basic status to economic rights, they can defend interventions with these rights 'for the common good', both of an economic and of a social nature. However, this defence of economic and social regulation can also be construed (as it has, in many constitutional traditions) as based on an acceptance of *both* economic *and* social rights as basic rights. Social objectives then become themselves part of the basic rights package, so that trade-offs between economic and social goals become trade-offs between economic and social rights. Whichever of these two constructions one prefers, in essence for the modern liberal economic freedoms are as important as certain social objectives (like a basic right to an adequate standard of living, or health care and education) and certain economic objectives (welfare-maximising markets). Either this equivalence is expressed by treating both as basic rights or by treating neither as such.

There is no accepted normative theory backing up modern liberals' defence of economic and social regulation. Modern liberals do not have the same problem classical liberals have because, while they do accept economic regulation (i.e., utilitarianism), they do not accept economic rights (i.e., market freedom) as basic (or when they do, social rights have the same basic status). They do face an inconsistency, however, between their preference satisfaction utilitarianism and their defence of social regulation. This is so because social regulation is based on a critique of the unquestioning status of individual preferences in utilitarianism. We saw that there are broadly two categories of social regulation: paternalist and equity-based regulations. Paternalist regulations presuppose that individuals' own (deformed or misguided) preferences are not a reliable guide of what will bring them well-being. Equity-based regulations presuppose that one should not (always)

aggregate utility across persons and maximise overall utility. So what can explain the modern liberal's simultaneous commitments to economic freedom, utility, and non-utility considerations?

In conclusion, both positions on regulation require a deeper explanation to make them consistent. The utilitarian character of the economic theory of market failure causes trouble for classical liberals, because it is in tension with unqualified economic freedoms (the libertarians' only commitment), and it causes trouble for modern liberals since it is in tension with socially motivated regulations. Is there an explanation that can resolve these tensions?

#### AUTONOMOUS AGENCY IN MARKETS

The explanation I will propose is that modern and classical liberals are both trying to do justice, in different ways, to the core liberal value of *autonomous agency*. Moreover, I will suggest that this has peculiar implication for modern liberals: they will have to abandon their utilitarian analysis of market failure and replace it with an agency-based analysis of market failure.

Take classical liberals first. Why are they committed to the economic theory of market failure and its underlying preference utilitarianism? My speculation is that this is because they think that the expression of individual preferences in a market context is worthy of respect. Subjective preferences have normative authority. Classical liberals do not value a utility-maximising overall state of affairs as intrinsically valuable. This would make a fetish of the value of states of affairs over the value of persons. Since only persons have value in themselves (as any liberal would claim), their voluntarily expressed preferences in a free market count for something. This is why classical liberals cannot embrace an objective-value variant of utilitarianism, where happiness or well-being (say, measured scientifically) instead of subjective preferences would be the basis for regulation. For this would quickly lead to paternalist legislation which claims to know better about citizens' well-being. The classical liberal cannot accept this critique of subjective preferences, because he takes the person expressing these preferences as having superior value.

This liberal defence of preference utilitarian considerations in a market context is consistent with the classical liberal's equally important commitment to economic freedoms. For these freedoms to hold and exchange private property at will are the legal guarantees that allow an autonomous agent to act upon his subjective preferences. Again, the authority of the individual person as he expresses his self-conception (in his preferences) is behind the defence of these basic economic freedoms. The difficulty, for the classical liberal, is that, in the market, the free expression of preferences of some will



come into conflict with that of others. Thus, in the case of a cartel, the preferences of consumers cannot be satisfied because producers (who outsmart the consumers by colluding) win the conflict. The classical liberal must then decide whose preferences have *more* authority. Unlike the libertarian, a classical liberal cannot be satisfied by deciding this conflict *a priori* by declaring economic freedom sacrosanct. Instead, he decides to give everyone's preferences equal weight and see whether it is possible to have as much preference-satisfaction as possible. The machinery of the economic theory of market failure is brought into play as a way of solving conflicts between autonomous agents whose preferences deserve equal respect, that is, as a way of reconciling the negative freedom of one agent with that of others.

All of this presupposes, and this is the hallmark of the classical liberal's way of respecting autonomous agency, that all participants in the economy are already (sufficiently) respect-worthy persons. Autonomous agency, for the classical liberal, is a postulate, something that is assumed to be present in persons. The modern liberal, by contrast, sees autonomous agency as something that may or may not be present. Autonomous agency is something that needs to be achieved in a social context. This achievement requires hard work of the person and society surrounding her, to develop her rational and other capacities to make informed decisions and act upon them; hence the modern liberal's commitment to paternalist and equity-based regulations. To the extent that market participants are not automatically autonomous agents, (1) their preferences have no inherent authority, and (2) regulation is required to ensure that they become such agents whose preferences can come to have authority. Many paternalist regulations help them to acquire such skills or information, or redress imbalances in power in the market (e.g., bargaining between employees and employers) so that each can develop sufficient agency vis-à-vis others.

This different way of respecting autonomous agency also explains modern liberals' attachment to economic regulation and economic freedoms. For just like the classical liberal, the modern liberal believes that *to the extent* that persons have autonomous agency, their preferences should be respected. But in contrast to the classical liberal, I would argue that the modern liberal makes a mistake if she accepts the utilitarian analysis of market failure. For the classical liberal, as we saw, accepted market failure theory as part of his respect for (as his postulate goes) already well-formed agency and preferences. The modern liberal, however, should suspect that in many cases of market failure, what may be at stake is *lacking agency on the part of some participants, or lack of equality of agency between participants*. Thus, public goods cases for him are cases not where one seeks to use a government mechanism to satisfy preferences that the market cannot satisfy on its own. They are cases where government may deliver goods that are necessary conditions of autonomous agency, which the market cannot deliver (Classsen

2013). Negative externalities may be harms to others outside of the market which diminish the agency of those who are harmed (Classsen 2016). Collusive agreements between producers may serve not to maximise their profits to the detriment of consumer welfare, but to protect agency interests of third parties (Classsen and Gerbrandy 2016). Information asymmetries may be caused by insufficient agency of some market participants. In all such cases the modern liberal has to weigh agency interests, making trade-offs between different (groups of) persons, but these are now trade-offs in terms of agency development, not preference satisfaction.

As a consequence, social and economic regulation should merge. The traditional categories of market failure should only have a heuristic value for the modern liberal. They point to situations where government regulation may be necessary *to protect the equal agency-development of all participants*. The same thing is true for paternalist and equity-based regulations. Paternalism is better described as a concern for the constitution of an individual's future agency. Just as a liberal is prepared to prohibit voluntary enslavement because she cares for the person's freedom tomorrow (Freeman 2001, 110–13), so she is prepared to restrict her market-based freedom because she cares for her future agency. Similarly, distributive concerns are often concerns about the extent to which agents have effective agency vis-à-vis others within the market. Differences in wealth are not problematic per se, but they are judged problematic where they upset this equality of agency.

When social and economic regulation are unified on this basis (as a concern for agency-development), what remains is a conflict between this commitment to develop everyone's agency and the commitment to respect the exercise of agency once developed (economic freedoms). For the modern liberal does aim to respect the negative economic freedom of agents, if and where they are sufficiently autonomous. In this free space, agents can act as maximisers of their own preferences, if they so choose. Thus the modern liberal's principle of justice is double-edged: *to protect the equal agency-development and respect the equal agency-exercise of all participants*. The tension between these two parts is irreducible—it leads to a tension between demands for regulation in the name of agency-development and demands for deregulation in the name of respect for agency-exercise. The borderline is determined, amongst other things, by one's concrete view of agency (which capabilities does it include?) one's aspirations (how much agency-development is taken to be enough? Where does one put the threshold?) and one's judgments in applying these norms (how much agency have these participants developed?).

Answering these questions requires much more theoretical work. What I have attempted to show is that the standard juxtaposition of economic and social regulation in handbooks of regulation can be found back in modern liberal political theory. However, once we look at the liberal roots of accept-

ing both economic freedoms and economic regulation and social regulation, the only way I can see of unifying this multiplicity of commitments is to construct it as being animated and justified in the end by a concern for the opportunities for citizens to exercise effective autonomous agency in the economic sphere. This is my first conclusion.

The second one is that this in turn requires us to reconceptualise the economic theory of market failure that underlies economic regulation; and see the traditional categories of market failure as instances in which what is at stake is not so much a government regulating to maximise subjective preferences where citizens cannot do so themselves, but a government regulating to protect and respect the equal agency of all parties involved. This requires a rethinking of each of these categories that is only in its infancy and should be the program of much more work.

## NOTES

1. This increased space for theorizing does not take away the fact that in the end, every aspect of political decisions about regulation (theoretical and applied) should be left to democratic organs; or at least so a theory of justice would say which points to democracy as what justice requires in the area of decision-making. See Claassen 2011.
2. One can even extend this to a third question, about the moral evaluation of actions within the market. For example, Heath defends a market failure approach to business ethics (Heath 2014).
3. Maybe even libertarians cannot rely on freedom considerations alone, as (Cohen 1995) argued with respect to Nozick's reliance on utilitarian considerations. Freeman argues that 'neoliberals' such as Friedman and Hayek are predominantly utilitarians (Freeman 2011, 34–35).

## REFERENCES

- Anderson, Elizabeth. 1993. *Value in Ethics and Economics*. Cambridge Massachusetts: Harvard University Press.
- . 1999. "Contested Commodities (Book Review)." *Ethics* 109: 914–17.
- André, Judith. 1995. "Blocked Exchanges: A Taxonomy." In *Pluralism, Justice and Equality*, edited by David Miller and Michael Walzer, 171–96. Oxford: Oxford University Press.
- Arnold, N. Scott. 2009. *Imposing Values: An Essay on Liberalism and Regulation*. Oxford: Oxford University Press.
- Barr, Nicholas. 2004. *Economics of the Welfare State*. Fourth edition. Oxford: Oxford University Press.
- Bator, Francis M. 1958. "The Anatomy of Market Failure." *Quarterly Journal of Economics* 72 (3): 351–79.
- Bozeman, Barry. 2002. "Public-Value Failure: When Efficient Markets May Not Do." *Public Administration Review* 62 (2): 145–61.
- Braithwaite, John. 2008. *Regulatory Capitalism*. Cheltenham, UK: Edward Elgar.
- Claassen, Ruiger. 2009. "Institutional Pluralism and the Limits of the Market." *Politics, Philosophy, and Economics* 8 (4): 420–47.
- . 2011. "Making Capability Lists. Philosophy versus Democracy." *Political Studies* 59 (3): 491–508.
- . 2013. "Public Goods, Mutual Benefits, and Majority Rule." *Journal of Social Philosophy* 44 (3): 270–90.
- . 2016. "Externalities as a Basis for Regulation: A Philosophical View." *Journal of Institutional Economics*, forthcoming.
- Claassen, Ruiger, and Anna Gerbrandy. 2016. "Rethinking Competition Law: From a Consumer Welfare to a Capability Approach." *Utrecht Law Review* 12 (1): 1–15.
- Cohen, G.A. 1995. *Self-Ownership, Freedom and Equality*. Cambridge: Cambridge University Press.
- Coleman, Jules. 1985. "Market Contractarianism and the Unanimity Rule." *Social Philosophy and Policy* 2 (2): 69–114.
- Cowen, Tyler. 1988. "Public Goods and Externalities: Old and New Perspectives." In *The Theory of Market Failure: A Critical Examination*, edited by Tyler Cowen, 1–26. Fairfax, VA: George Mason University Press.
- Diezsch, Peter. 2010. "The Market, Competition, and Equality." *Philosophy, Politics, and Economics* 9 (2): 213–44.
- Feinuck, Mike. 2010. "Regulatory Rationales beyond the Economic: In Search of the Public Interest." In *The Oxford Handbook of Regulation*, edited by Robert Baldwin, Martin Cave, and Martin Lodge, 39–63. Oxford: Oxford University Press.
- Freeman, Samuel. 2001. "Liberal Libertarians: Why Libertarianism Is Not a Liberal View." *Philosophy & Public Affairs* 30 (2): 105–51.
- . 2011. "Capitalism in the Classical and High Liberal Traditions." *Social Philosophy & Policy* 28 (2): 19–55.
- Gauthier, David. 1986. *Morals by Agreement*. Oxford: Clarendon Press.
- Heath, Joseph. 2014. *Morality, Competition and the Firm: The Market Failures Approach to Business Ethics*. Oxford: Oxford University Press.
- Hertog, Johan Den. 1999. "General Theories of Regulation." *Encyclopedia of Law and Economics*, 223–70. Cheltenham: Edward Elgar.
- Jordana, Jacint, and David Levi-Faur. 2005. *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*. Cheltenham: Edward Elgar.
- Moran, Michael. 2002. "Understanding the Regulatory State." *British Journal of Political Science* 32: 391–413.
- Morgan, Browne, and Karen Yeung. 2007. *An Introduction to Law and Regulation*. Cambridge: Cambridge University Press.
- Narveson, Jan. 2001. *The Libertarian Idea*. Ontario: Broadview Press.
- Nozick, Robert. 1974. *Anarchy, State, and Utopia*. Oxford: Blackwell Publishing.
- Ogus, Anthony. 2004. *Regulation: Legal Form and Economic Theory*. Oxford: Hart Publishing.
- Prosser, Tony. 2006. "Regulation and Social Solidarity." *Journal of Law and Society* 33 (3): 364–87.
- Radin, Margaret. 1996. *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things*. Cambridge, MA: Harvard University Press.
- Rawls, John. 1999. *A Theory of Justice*. Revised edition. Oxford: Oxford University Press.
- Sandel, Michael. 2012. *What Money Can't Buy: The Moral Limits of Markets*. London: Allen Lane.
- Satz, Debra. 2010. *Why Some Things Should Not Be for Sale: The Moral Limits of Markets*. New York: Oxford University Press.
- Soule, Edward. 2003. *Morality & Markets: The Ethics of Government Regulation*. Lanham, MD: Rowman & Littlefield.
- Stewart, Richard. 1982. "Regulation in a Liberal State." *Yale Law Journal* 92: 1537–90.
- Stiglitz, Joseph. 2009. "Government Failure vs. Market Failure: Principles of Regulation." In *Government and Markets: Toward a New Theory of Regulation*, edited by Edward Balliscan and David Moss, 13–51. New York: Cambridge University Press.
- Sunstein, Cass. 1990. *After the Rights Revolution: Reconceiving the Regulatory State*. Cambridge, MA: Harvard University Press.
- Tomas, John. 2012. *Free Market Fairness*. Princeton: Princeton University Press.

- Trebilcock, Michael. 1993. *The Limits of Freedom of Contract*. London: Harvard University Press.
- Vanberg, Viktor. 1999. "Markets and Regulation: On The Contrast between Free-Market Liberalism and Constitutional Liberalism." *Constitutional Political Economy* 10: 219–43.
- Walzer, Michael. 1983. *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books.
- Williamson, Oliver. 1985. *The Economic Institutions of Capitalism*. New York: Free Press.

## Chapter Ten

# The Recognition Gap

## *Why Labels Matter in Human Rights Protection*

Stacy J. Kosko

One way to understand human rights is as guarantors of certain broad principles of justice, principles that are then codified in specific norms and laws. Much discussion about the protection of human rights centres on whether these laws are adequately specified and implemented to ensure that the principles of justice in question are enjoyed by all. When they are not, what is commonly called a 'protection gap' arises. A human rights 'protection gap' is a space in which protections for one or more human rights, or classes of rights, are absent, inadequate, inapplicable, or under-enforced, leaving the rights holder susceptible to the very sort of injuries against which human rights laws are meant to protect. To the extent that human rights laws are meant as expressions of our most fundamental principles of justice, we must be relentless in our efforts to identify and close this protection gap wherever possible. Doing so, however, requires a more nuanced understanding of the protection gap, one that breaks it down into its several constituent forms.

In this chapter, I will first address what are commonly called the 'implementation' and 'normative' gaps, the kinds of failures of justice that most have in mind when referring to a 'human rights protection gap'. Then, I will propose and explore what I call the 'recognition gap' by examining some particularities regarding the situation of ethnocultural minorities (including indigenous peoples) under international law, especially in Europe. I aim to demonstrate that the degree to which—and ways in which—different ethnic minority and indigenous groups are protected in international human rights law is not necessarily in direct response to their particular vulnerabilities, that is, to the challenges they face in enjoying the principles of justice that the international human rights system demands be upheld for every human be-

Theorizing Justice

*Critical Insights and Future Directions*

Krushil Watene and Jay Drydyk

ROWMAN &  
LITTLEFIELD

INTERNATIONAL

London • New York