PROFESSOR DWORKIN'S EXTERNAL/PERSONAL PREFERENCE DISTINCTION*

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Professor Ronald Dworkin has made several important contributions to contemporary constitutional theory. A phrase that I have quite openly purloined, because it so evocatively summarizes so much of what I have argued for, is the "right to equal concern and respect in the design and administration of the political institutions that govern" us.[1] There are other suggestive distinctions—that between constitutional concepts and conceptions for one,[2] that between equal treatment and treatment as an equal for another. Strangely, however, the distinction Dworkin most often insists upon as constitutionally useful—indeed his theory of rights rests on it—namely the distinction between personal and external preferences, is the one that on analysis turns out to be least useful.

The distinction was presented in *Taking Rights Seriously* as capable of coping with two of the classic constitutional conundrums—that of equality and that of personal autonomy. It was there invoked, in particular, to demonstrate (a) why laws favoring members of minority races are constitutional whereas those favoring Whites are not, and (b) why laws outlawing homosexual sex, contraception, and pornography should be declared invalid.

I. AFFIRMATIVE ACTION

Dworkin sets up the affirmative action problem by contrasting *Sweatt v. Painter*,[3] involving the exclusion of Blacks from the University of Texas Law School, with *DeFunis v. Odegaard*,[4] involving the favoring of Blacks by the admissions committee of the University of Washington Law School. Dworkin asserts—and with this much I

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1. R. DWORKIN, TAKING RIGHTS SERIOUSLY 180 (rev. ed. 1978), *quoted in* J. ELY, DEMOCRACY AND DISTRUST 82 (1980).

2. *See also* J. RAWLS, A THEORY OF JUSTICE 5-6 (1971).

3. 339 U.S. 629 (1950).

4. 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated and remanded as moot,* 416 U.S. 312 (1974).

agree, even if the United States Supreme Court appears not to[5]—that the latter practice should be upheld whereas the former should not.

To arrive at his conclusion Dworkin first distinguishes two general types of argument for the proposition that a given law makes a community better off. *Utilitarian* arguments are those that assert that "the average or collective level of welfare in the community is improved." *Ideal* arguments are to the effect that the law in question makes the society "more just, or in some other way closer to an ideal society, whether or not average welfare is improved."[6] According to Dworkin, the University of Washington Law School might properly "use either utilitarian or ideal arguments to justify its racial classification."

> It might argue, for example, that increasing the number of black lawyers reduces racial tensions, which improves the welfare of almost everyone in the community. That is a utilitarian argument. Or it might argue that, whatever effect minority preference will have on average welfare, it will make the community more equal and therefore more just. That is an ideal, not a utilitarian, argument.[7]

Dworkin then turns to *Sweatt v. Painter*. "The University of Texas, on the other hand, cannot make an ideal argument for segregation. It cannot claim that segregation makes the community more just whether it improves the average welfare or not."[8] Dworkin's wording here is infelicitous, almost inevitably generating the question *why* the University of Texas can't make an ideal argument for segregation. In fact, wasn't segregation most often defended precisely on the ground that it represented the natural order, and was "closer to an ideal society" than one in which the races mix? What Dworkin must mean here, therefore, is that the University of Texas cannot make an ideal argument for segregation *that does not offend the United States Constitution*. That the world would be a better place if all Presbyterians were killed is an ideal argument, but it is an ideal argument that violates the Constitution.

There is a temptation at this point to respond that the overall structure Dworkin thus implicitly introduces is just a gigantic mechanism for begging questions. Why doesn't he simply come out and argue that racial segregation violates the Constitution, drawing on the materials that every other constitutional lawyer draws on, without gussying it up with all this talk of ideal versus utilitarian arguments? This too is unfair. Although the line between the two types of argument is

5. *Compare* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974), *with* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

6. R. DWORKIN, *supra* note 1, at 232.

7. *Id.*

8. *Id.*

certainly not crystal clear,[9] the distinction does make rough sense. Sometimes state attorneys general will defend laws in terms of their consequences, arguing that they will help more people than they hurt, but sometimes they will mount a different sort of defense, one pitched to the simple rightness of what the state has done. (Actually it is to Dworkin's credit that he appreciates that such "ideal" arguments are constitutionally appropriate. Too often result-oriented constitutional commentary will try in particular contexts to slip by on the notion that such arguments do not count, that the state must argue tangible benefit and cannot rest on rightness or morality.) And when the state *does* rely on such an "ideal" argument, of course the court must judge it by constitutional standards: how else would we cope with our Presbyterian-killing example?

Texas's "ideal" argument for segregation thus dispatched, Dworkin asserts, the "arguments it makes to defend segregation must therefore be utilitarian arguments."[10] Indeed, he notes, it is quite plausible to suppose, at least in post-war Texas, that "the preferences of the people were overall in favor of the consequences of segregation in law schools, even if the intensity of the competing preference for integration, and not simply the number of those holding that preference, is taken into account."[11] To cope with this realization Dworkin draws the distinction that is the subject of this article, that between personal and external preferences.

> Preference utilitarianism asks officials to attempt to satisfy people's preferences so far as this is possible. But the preferences of an individual for the consequences of a particular policy may be seen to reflect, on further analysis, either a *personal* preference for his own enjoyment of some goods or opportunities, or an *external* preference for the assignment of goods and opportunities to others, or both.[12]

Dworkin's claim is that utilitarianism is "corrupted" when external preferences are registered by the utilitarian calculus. This is surely true, he maintains, of an external preference to the effect that members of a certain group be *deprived* of certain goods or opportunities:

> Suppose many citizens, who are not themselves sick, are racists in political theory, and therefore prefer that scarce medicine be given to a white man who needs it rather than a black man who needs it more. If utilitarianism counts these political preferences at face value, then it will be, from the standpoint of personal preferences,

9. *See, e.g.*, Baker, *Counting Preferences in Collective Choice Situations*, 25 U.C.L.A. L. REV. 381 (1978).

10. R. DWORKIN, *supra* note 1, at 232.

11. *Id.* at 233.

12. *Id.* at 234; *see also id.* at 275.

> self-defeating, because the distribution of medicine will then not be, from that standpoint, utilitarian at all.[13]

There is a similar corruption, he claims, when the external preferences that are counted are altruistic:

> Suppose many citizens, who themselves do not swim, prefer [that their city build a pool rather than a theater] because they approve of sports and admire athletes. . . . If the altruistic preferences are counted, so as to reinforce the personal preferences of swimmers, the result will be a form of double counting; each swimmer will have the benefit not only of his own preference, but also of the preference of someone else who takes pleasure in his success.[14]

Dworkin's bottom line on *Sweatt* is that Texas's utilitarian argument for segregation must fail because it is based on external preferences. *What* external preferences exactly? To describe them as "the preferences of the community at large for racial separation"[15] doesn't help much, since it obviously is racial separation whose constitutionality is at issue. At another point Dworkin appears to get more specific, characterizing as an external preference a desire for segregation growing out of the fact that one "has contempt for blacks and disapproves social situations in which the races mix."[16] But an expression of preference "for racial separation," or a disapproval of the "mixing of the races," unelaborated, seems very clearly an expression of a (misguided) vision of an *ideal* society. It is therefore necessary to revert to Dworkin's definition of an external preference to understand more precisely what he has in mind.

An external preference, remember, is a preference "for the assignment of goods and opportunities to others," which suggests that Dworkin means to assimilate the school segregation situation to the medical hypothetical he used to define the distinction. Just as the racist in that case wanted Blacks to gain fewer "goods and opportunities" (specifically medicine) than Whites (because he thought "a black man [was] to count for less and a white man therefore to count for more than one"[17]), so the ultimate idea in *Sweatt* must be that the racist wishes fewer opportunities for Blacks, in this case fewer opportunities to become lawyers. He may dress it up as an ideal argument for the justice of racial segregation or the unnatural nature of racial mixture, but what he really wants—or at least what he has to want if he is to comply with Dworkin's definition of an external preference—is that Blacks should

13. *Id.* at 235.

14. *Id.; see also infra* text accompanying note 37.

15. R. DWORKIN, *supra* note 1, at 237.

16. *Id.* at 235.

17. *Id.* at 275; *see also infra* text accompanying note 76.

suffer comparatively, that they should count for "less than one" and therefore be assigned fewer goods and opportunities than Whites.

But were the preferences of Whites for segregation, even in post-war Texas, "external" in this sense? Dworkin considers "the associational preference of a white law student for white classmates." He grants that this can be considered as a "personal preference" for an immediate environment that one finds less alien or threatening. But, says Dworkin, this "is a personal preference that is parasitic upon external preferences: except in very rare cases a white student prefers the company of other whites because he has racist, social, and political convictions, or because he has contempt for blacks as a group."[18] (And, in turn, such "racism" must wish for Blacks fewer goods and opportunities than are available to Whites, if it is to fit Dworkin's definition of an external preference.) Thus, according to Dworkin, preferences like the White law student's, however "personal" on the surface, are "external" down deep, and utilitarian balances affected by them must be disallowed.

Let us return to *DeFunis*. Dworkin asserts that "[t]he arguments for an admissions program that discriminates in favor of blacks are both utilitarian and ideal."[19] Unlike the *Sweatt* situation in which both sorts of argument were invalid, both are valid regarding affirmative action. Dworkin grants that "[s]ome of the utilitarian arguments do rely, at least indirectly, on external preferences, such as the preference of certain blacks for lawyers of their own race."[20] (He must be given points for consistency here. Just as the preferences of White law students for White classmates must, if Dworkin's argument is to be internally consistent, be translated into a deeply held desire that Whites be given opportunities that Blacks are denied, so too, Dworkin seems here to be assuring us, a preference of a Black client for a Black lawyer must similarly screen a deep desire that Blacks be given opportunities that are denied to Whites.) However, "the utilitarian arguments that do not rely on such preferences are strong and may be sufficient."[21]

Recall Dworkin's example of such a utilitarian argument for affirmative action, quoted above, "that increasing the number of black lawyers reduces racial tension, which improves the welfare of almost everyone in the community. That is a utilitarian argument."[22] It's a utilitarian argument all right, but doesn't it follow from what Dworkin

18. R. DWORKIN, *supra* note 1, at 236.
19. *Id.* at 239.
20. *Id.*
21. *Id.*
22. *See supra* text accompanying note 7; *see also* R. DWORKIN, *supra* note 1, at 228.

In fact I agree with Dworkin's conclusion that *Sweatt* and *DeFunis* can be distinguished, though not on his terms.[25] Nothing in either the distinction between ideal and utilitarian arguments, or the distinction between personal and external preferences, has given us any reason to suppose that the utilitarian arguments for segregation and affirmative action, and for that matter the ideal arguments for both, are other than wholly symmetrical.

II. PERSONAL AUTONOMY

Dworkin's larger use of the external/personal preference distinction is to support his theory of rights. He correctly notes that it will often be impossible to unpack an election to determine how many votes were grounded in personal preferences and how many in external: indeed it will often be impossible to untangle a single voter's mixed motivations. This leads him to propose a prophylactic theory:

> I wish now to propose the following general theory of rights. The concept of an individual political right . . . is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals.[26]

Dworkin cites laws such as those prohibiting homosexual acts, contraception, and pornography as "antecedently likely" to have been passed "by virtue of" external preferences.[27] In contrast, Dworkin asserts, no such antecedent likelihood of pollution by external preference existed regarding the statute challenged in *Lochner v. New York*:[28]

> What can be said, on the general theory of rights I offer, for any particular right of property? What can be said, for example, in favor of the right to liberty of contract sustained by the Supreme Court in the famous *Lochner* case, and later regretted, not only by the court, but by liberals generally? I cannot think of any argument that a political decision to limit such a right, in the way in which minimum wage laws limited it, is antecedently likely to give effect to external preferences . . . . If, as I think, no such argument can be made out, then the alleged right does not exist; in any case there can be no

25. *See infra* note 80 and accompanying text.

26. R. DWORKIN, *supra* note 1, at 277.

27. *See id.* at 275-76; *see also* Dworkin, *Is There a Right to Pornography?*, 1 OXFORD J. LEG. STUD. 177 (1981).

28. 198 U.S. 45 (1905).

> inconsistency in denying that it exists while warmly defending a right to other liberties.[29]

But this surely is doubtful. As Lawrence Sager has observed:

> If ever there was a decision-making environment polluted by external preferences, it is that which must have surrounded the enactment of New York's labor law, which regulated the hours and working conditions of bakery employees. It was surely the humanitarian instinct on the part of large segments of the public and their elected representatives to improve the conditions of other persons which induced the enactment of such labor-protective legislation. Under Dworkin's analysis, the *Lochner* Court would appear to have been correct in recognizing a constitutional right to resist legislation stemming from such external, altruistic preferences and to contract free from government interference.[30]

Since there can hardly be doubt that such humanitarian "external" preferences did play a role in generating the law involved in *Lochner*, Dworkin's overall strategy in response would have to involve some sort of appeal to an "ideal" argument to the effect that worker-protective legislation simply conduces to a juster world.[31] Within this overall strategy there are two possible substrategies. The first is to take the view that the ability to articulate an "ideal" argument that does not offend the Constitution simply ends the matter: the law is constitutional whether or not its passage was significantly affected by external preferences. In defending against certain criticisms Dworkin does indeed sometimes seem to take this first position.[32] It is, however, one that is hard to square with the general statement of his theory of rights, which, recall, indicated that rights against government action are to be recognized respecting decisions that seem, antecedently, "likely to have been reached by virtue of" external preferences.

The second possible substrategy is closely related, but differs sufficiently to make it consistent with Dworkin's statement of his general theory of rights. It is to take the view that although the existence of a plausible and not impermissible ideal argument in favor of the challenged legislation does not automatically function (as in the first substrategy) as a legislation-saving "trump", nonetheless the ability to articulate such an ideal argument should cause one to hesitate long and hard before drawing the inference that the decision is "likely to have

29. R. DWORKIN, *supra* note 1, at 278.

30. Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417, 434 (1981) (footnote omitted); *see also* Regan, *Glosses on Dworkin: Rights, Principles, and Policies*, 76 MICH. L. REV. 1213, 1221 n.18 (1978).

31. *See* Sager, *supra* note 30, at 434.

32. *See infra* note 69 and accompanying text.

been reached" on the basis of external preferences.[33] On this second reading of Dworkin, the *Lochner* legislation must owe its constitutionality to a strong presumption that where a given law appears to have been the product of a mixture of ideal arguments (in this case for a juster world) and external preferences (in this case based on sympathetic identification with overworked bakery employees), it was in fact the ideal argument that predominated, thus rescuing the legislation from the fatal charge of having been generated by external preferences.

This reading becomes troubled, however, when one returns to Dworkin's examples of laws that *should* be invalidated under the "rights" branch of his theory—laws against homosexual acts, contraception, and pornography. He asserts repeatedly that these laws are polluted by external preferences and should for that reason fall, but is somewhat less clear on the subject of just what sort of external preferences are supposed to have been involved. He notes that laws such as these are rooted in a belief "that a community that permits rather than prohibits these acts is inherently a worse community" and goes on immediately to label that an external preference.[34] Thus stated, however, it isn't, but instead fits precisely his definition of an ideal argument (to the effect that the law in question makes the society "more just, or in some other way closer to an ideal society"). Arguments of "inherent worseness" are ideal arguments.

So far this sounds dangerously parallel to Dworkin's rendition of *Lochner*. But we should proceed slowly, and examine in this context the implications of the two possible substrategies we examined there. If it is in fact Dworkin's position that the mere ability to articulate an ideal argument that does not offend the United States Constitution is enough to save a law whether or not external preferences actually generated it, then Dworkin simply is wrong about homosexuality *et al.* (Of course, many people have tried to articulate theories of "privacy" or "personhood" to support the proposition that an ideal argument suggesting the moral preferability of a world without homosexuality or contraception is one that offends properly understood constitutional principles, but, to his credit, Dworkin has not endorsed any of them.[35] His claim, instead, is that such laws are unconstitutional on the basis of

33. *Compare* J. ELY, *supra* note 1, at 138 ("it will be next to impossible for a court responsibly to conclude that a decision was affected by an unconstitutional motivation whenever it is possible to articulate a plausible legitimate explanation for the action taken") (footnote omitted) *with id.* at 243 n.15 ("I overextended this point in 1970 by indicating that the possibility of alternative explanation rendered proof of illicit motivation completely irrelevant.").

34. R. DWORKIN, *supra* note 1, at 276.

35. Neither does Dworkin rely on a claim that such phenomena have no effect on anyone but the perpetrator, which claim is of debatable constitutional relevance and in any event plainly false

the theory as sketched thus far. It would require an entirely separate effort, which Dworkin has neither made nor endorsed, to demonstrate that the ideal argument against homosexuality, contraception, or pornography is one that violates the Constitution.[36]) If, therefore, Dworkin is to have even a chance of succeeding in his argument that these laws are unconstitutional, he must pursue a version of the second possible substrategy, and maintain that although an ideal argument in support of such laws can be articulated, that argument is a rationalization, and the laws in question were actually generated by external preferences.

What further does Dworkin have to say about the likely motivation for such laws? Some light is shed by the "pool versus theater" example alluded to earlier. In fact the first time around I edited some language out of the quotation. This time I shall restore that language and italicize it:

> There is a similar corruption when the external preferences that are counted are altruistic *or moralistic*. Suppose many citizens, who themselves do not swim, prefer the pool to the theater because they approve of sports and admire athletes, *or because they think that the theater is immoral and ought to be repressed*. If the altruistic preferences are counted, so as to reinforce the personal preferences of swimmers, the result will be a form of double counting: each swimmer will have the benefit not only of his own preference, but also the preference of someone else who takes pleasure in his success. *If the moralistic preferences are counted the effect will be the same: actors and audiences will suffer because their preferences are held in lower respect by citizens whose personal preferences are not themselves engaged.*[37]

So it isn't simply a case of the "inherent worseness" of a world containing homosexuality, contraception, or pornography. It is rather that the *preferences* of people who engage in such pursuits "are held in lower respect" by their fellow citizens *than are other preferences*. And this lessened respect for a particular view of what is proper behavior is assimilated, repeatedly, to a lessened respect for the person who holds it, a general desire that in utilitarian calculations his interest be counted at less than one.

> Utilitarianism claims that people are treated as equals when the preferences of each, weighted only for intensity, are balanced in the same scales, with no distinctions for persons or merit. The corrupt version of utilitarianism just described, which gives less weight to some per-

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where the state or another party is proceeding legally against the perpetrator. *See generally* Ely, *Democracy and the Right to be Different*, 56 N.Y.U. L. REV. 397 (1981).

36. *See also* Sager, *supra* note 30, at 434.

37. R. DWORKIN, *supra* note 1, at 235.

> sons than to others, *or discounts some preferences because these are ignoble*, forfeits that claim.[38]

The problem is that the two things here assimilated—generally counting a person's welfare as less important than the welfare of others, and specifically regarding his (or anybody's) desire to engage in a particular antisocial or immoral act as blameworthy (and in that sense less worthy than other *preferences*)—are not the same at all. H.L.A. Hart has put this point well:

> What is fundamentally wrong is the suggested interpretation of denials of freedom as denials of equal concern or respect. This surely is mistaken. . . .
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> . . . The majority . . . may regard the minority's views as mistaken or sinful; but overriding them, for those reasons (however objectionable on other grounds), seems quite compatible with recognising the equal worth of the holders of such views and may even be inspired by concern for them. In any event both the liberal prescription for governments, "impose no scheme of values on any one," and its opposite, "impose this particular conception of the good life on all," though they are universal prescriptions, seem to have nothing specifically to do with equality or the value of equal concern and respect any more than have the prescriptions "kill no one" and "kill everyone," though of course conformity with such universal prescriptions will involve treating all alike in the relevant respect.[39]

Or, as I once put it:

> Attempting to preclude the entire population from acting in ways that are perceived as immoral is not assimilable to comparatively disadvantaging a given group out of simple hostility to its members. . . . In raising my children not to act in ways I think are immoral, even punishing them when they do, I may incur the condemnation of some, but the sin is paternalism or some such, hardly that of leaving my children's interests out of account or valuing them negatively.[40]

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38. Dworkin, *supra* note 27, at 202 (emphasis added); *see also id.* at 194, 205, 207-09; R. DWORKIN, *supra* note 1, at 273; Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 513 (1981).

39. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 843-44 (1979). A year earlier, Dworkin had essentially granted Hart's point—that "impose no scheme of values on any one" may be a tenet of liberalism but is not implied by the concept of equality—when he wrote that neutrality on the question of what constitutes the good life is a component of a "liberal theory of equality" but not a component of a "second (or non-liberal) theory of equality." Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 127-28 (S. Hampshire ed. 1978). That he no longer is prepared even to come close to conceding the point is suggested by his failure to do so in his response to Hart, *see* Dworkin, *supra* note 27, at 206-12; the quite contrary view expressed in his response to me, *see infra* text accompanying note 41; and, of course, the fact that he is currently engaged in a multi-fronted effort to derive his entire political and constitutional philosophy from the single value of equality. *See generally* Dworkin, *What is Equality?*, 10 PHIL. & PUB. AFF. 185, 283 (1981); Dworkin, *What Liberalism Isn't*, N.Y. REV. BOOKS, January 20, 1983, at 47; Dworkin, *Why Liberals Should Believe in Equality*, N.Y. REV. BOOKS, February 3, 1983, at 32.

40. J. ELY, *supra* note 1, at 256 n.92.

In answering this, Professor Dworkin grants that I am right "in supposing that a utilitarian justification of laws against homosexuals does not leave their interests out of account or value them negatively":

> It counts the damage to homosexuals at full value, but finds it outweighed by the interests of those who do not want to associate with practicing homosexuals or who find them and their culture and lives inferior. But a utilitarian justification of racial discrimination does not ignore the interests of blacks or the damage discrimination does to them. It counts these at full value, and finds them outweighed by the interests of others who do not want to associate with blacks, or who find them and their culture and habits inferior or distasteful. The two utilitarian justifications are formally similar.[41]

Reading this in light of Dworkin's earlier discussion of racial discrimination, we can see that his claim has shifted markedly. It turns out, apparently, that a "moralistic" objection to homosexual acts is not ipso facto an external preference. Instead, the situation is "formally similar" to that of racial discrimination, and a purported moral or ideal objection to homosexual sex is now seen as masking a more general distaste for homosexuals generally (which we now understand, in light of the racial discrimination comparison—and indeed this move is necessary to fit the homosexual case to Dworkin's definition of external preference—must be understood as a general desire to see that homosexuals as a class receive fewer of life's "goods and opportunities" than the rest of us). In short, those who vote to outlaw sodomy do so because, down deep, they believe that homosexuals, like Blacks, are "worth less" than other people and therefore deserve less of life's good things. The moralistic objection to homosexual sex, therefore, is not itself an external preference—in fact it is formally an ideal argument—but it is a cover for one, namely a general feeling that homosexuals should generally be treated less well than other people.

This last move has rendered Dworkin's position on homosexual sex consistent with his overall theoretical structure, but in doing so it has paid a terrible price in plausibility. To quote myself again:

> This doesn't mean that simply by incanting "immorality" a state can be permitted successfully to defend a law that in fact was motivated by a desire simply to injure a disfavored group of persons. The legislature couldn't, for example, outlaw the wearing of yarmulkes or dashikis and defend on the ground that it regards such conduct as immoral. The question here thus reduces to whether the claim is credible that the prohibition in question was generated by a sincerely held moral objection to the act (or anything else that transcends a simple desire to injure the parties involved). It is tempting for those of us who oppose laws outlawing homosexual acts to try to parlay a

41. Dworkin, *supra* note 38, at 514.

> negative answer out of the fact that, at least in the case of consenting adults, no one seems to be hurt in any tangible way, but on honest reflection that comes across as cheating.[42]

And even if the homosexuality example isn't 100% clear, the other two that Dworkin invokes are. Legislators are certainly aware that contraception and pornography are things with which most "normal" people have had at least limited experience: the view that such pursuits are immoral can hardly be passed off as a cover for a deeply held feeling that people who have read pornography or used contraceptives ought generally (like Blacks and homosexuals) to be treated less well by society. In these cases the objection is patently to the act, and not parasitic upon a feeling that "that kind of people" ought to be disadvantaged in every way we can.[43] Especially in light of the presumption Dworkin has to entertain if he is to disapprove *Lochner*—that a close call between motivation by an ideal argument and motivation by external preference should be resolved in favor of the former[44]—his position

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42. J. ELY, *supra* note 1, at 256 n.92. This seems as inconspicuous a place as I am likely to find to confess that Dean Sandalow appears to have nailed me on my attempt to distinguish laws denying homosexuals employment opportunities from laws criminalizing acts of homosexual sex—or at least he has nailed me insofar as (a) the employment disqualification does in fact require (and I am not sure he is right that this is typically the case) actual proof of homosexual sex, and (b) the disability in question is imposed prospectively only, thus avoiding ex post facto problems. *See* Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446, 465-66 (1981).

Professor Brest has also criticized the passage quoted in the text, suggesting that antimiscegenation laws can equally be defended on the basis of a "bona fide feeling that [miscegenation] is immoral." Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 135 (1981). This too is a troubling criticism, but one that can be answered. As the Supreme Court has recognized, antimiscegenation laws were born of a desire to maintain White supremacy by keeping those of other races "in their place"—that is, away from the rest of us. Loving v. Virginia, 388 U.S. 1, 7, 11 & n.11 (1967). Whatever objection one may have to laws proscribing homosexual acts, they cannot be responsibly thus characterized. I agree that such laws are stupid and cruel, but the claim that they respond to genuine revulsion with the act rather than constituting part of a general attempt to isolate a minority is vastly more credible in the homosexual case. Indeed, as Professor Fickle has pointed out, laws against homosexuality—dramatically unlike laws against miscegenation—are assimilationist, designed to "encourage people to join the majoritarian community." Fickle, *The Dawn's Early Light: The Contributions of John Hart Ely to Constitutional Theory*, 56 IND. L.J. 637, 653 (1981). One need hardly be a blinkered interpretivist to suppose that the difference between a law that assimilates and a law that segregates is one that is constitutionally relevant. *See also* Ely, *supra* note 35, at 404-05.

43. Perhaps I am a little optimistic about people's self-perceptions in the case of pornography. It may be that in voting to ban pornography, even legislators who have looked at it themselves—and who hasn't?—tend to censor that fact out of their consciousness and instead to conjure up visions of a class of "dirty old men in raincoats" whose interests should generally be counted for less than the interests of "people like us." Even granting the partial validity of that point in the pornography context, however, it is difficult even to imagine a legislative supposition that "contraceptive users" constitute a minority who are "not like us" and whose interests should therefore be generally devalued.

44. *Cf. infra* note 72.

with regard to contraception and pornography cannot be maintained pursuant to the second substrategy either.

Professor Dworkin has led us a merry chase, but each of the alleys has proven blind. The position he sometimes espouses, that a simple ability to articulate an ideal argument in support of a law is sufficient to save it, is one he cannot maintain if he wishes to strike down laws prohibiting homosexuality, contraception, or pornography. (It also does not fit his stated general theory of rights.) The position to which he has then tended to turn, that attempting to preclude everyone from acting in ways that are perceived as immoral is the equivalent of comparatively disadvantaging a group of people because you don't like them, turns out to involve a logical fallacy. When this is pointed out, he repairs to a third position—that the former is actually a cover for the latter—which is simply implausible.

Obviously Professor Dworkin approves of laws providing for minimum wages and maximum hours, and disapproves of laws outlawing homosexual acts, contraception, and pornography. So do I. But the inquiry is not advanced by supposing that the difference is that the former are passed to make the world a better place but the latter are passed due to feelings about the classes of people who will be affected.

Dworkin's external/personal preference distinction has therefore proved unequal to either of the tasks for which he initially invoked it—that of explaining why traditional (or minority-disadvantaging) racial discrimination is unconstitutional but racially specific affirmative action is not, or of explaining why we have a right to contraception but not a right to liberty of contract. But still it may continue to seem that there is something there. Isn't Dworkin right that it is somehow a perversion of utilitarianism (and therefore,[45] derivatively, of democracy) to count as a full-fledged preference, in competition with other preferences, my preference that *you* be given a certain good or opportunity, or my preference that you be denied it? Isn't that somehow putting a thumb on (or under) the scales? Because intuitively it may seem that it is, we should look further at the theoretical structure of Dworkin's distinction.

III. A Vision of Utilitarianism

One of Professor Hart's criticisms of Dworkin's theory is that although he can understand the rough sense—though it is a sense he ultimately rejects[46]—in which counting preferences for the happiness of

45. *But see infra* text accompanying notes 64-67.

46. *See infra* text accompanying note 53.

another might be said to involve "double counting" (which certainly *sounds* corrupt), that label is obviously inapplicable to the situation in which one gains satisfaction from another's *un*happiness, which instinct Dworkin, of course, wishes equally to denominate an external preference.[47] And, indeed, it *is* difficult to come up with a label symmetrical to "double counting" that covers the second situation. It certainly isn't "half counting" since the one preference presumably neutralizes the other entirely. But there's no inherent vice in one preference's cancelling another out: that's the way utilitarianism and democracy are both supposed to work. What troubles Dworkin is cancellation by another preference whose satisfaction depends precisely on your dissatisfaction, and it's that phenomenon that it's hard to put a label on.

Labeling problems aside, the two situations *are* symmetrical[48] in terms of a particular vision of utilitarianism to which Dworkin obviously is tacitly committed (so strongly, in fact, as to lead him to suppose it is constitutionally mandatory). In his relentlessly atomistic scheme, each person can properly function only as a wholly egoistic util-cluster, registering his or her own pleasure or pain, but never allowing that pleasure or pain to be influenced one way or the other by the pleasure or pain of others.[49]

Once this animating vision is understood, of course, Dworkin is quite consistent in refusing to count "external" preferences geared to either the happiness or the suffering of some other person or group. There are in addition some other sorts of preferences that would be disallowed on the atomistic vision I have described, and it is powerful confirmation of the supposition that Dworkin tacitly entertains this vision that he is indeed prepared to disallow them. Necessarily one would have to disallow an individual preference that is itself the product of a utilitarian calculation, since such an individual decision procedure will, by definition, make determinative the extent to which the preferences of others are satisfied.[50] The theory thus has what is at least a facially startling implication, though on deeper analysis it's entirely consistent, that the political preferences of practicing utilitarians

47. Hart, *supra* note 39, at 842.

48. The situation that is symmetrical to the "double counting" situation is that in which someone derives pleasure from depriving another person or group of life's goods. Obviously I do not mean to grant Dworkin's further assumption that the universal proscription of behavior perceived as immoral is assimilable to the latter. *See supra* text accompanying notes 37-40.

49. *Cf.* J. PLAMENATZ, DEMOCRACY AND ILLUSION 153-55 (1973) (discussing Anthony Downs' "self-interest axiom").

50. *See also* R. WOLFF, THE POVERTY OF LIBERALISM 35 n.* (1968); *cf.* Kuflik, *Majority Rule Procedure*, *in* NOMOS XVIII: DUE PROCESS 296, 303-04 (J. Pennock & J. Chapman eds. 1977).

must be disallowed in any "suitably reconstituted" utilitarian calculation: for the system to work, individuals must function as monadic util-clusters, not as utilitarians.[51]

A wholly self-centered version of utilitarianism would also have to refuse to count all preferences grounded in "ideal" arguments or constituent senses of the rightness or justice of things, again because in such a case the constituent is not behaving as he must if the system is to work, as an egoistic util-cluster. And indeed Dworkin indicates repeatedly that this is precisely what he thinks: it is all very well, indeed often admirable, for people to pitch their preferences to a sense of what is right or just, but, he asserts, it is a corruption of utilitarianism (and derivatively of democracy) to tote up those preferences along with the self-interested, "personal," preferences of properly functioning egoists:

> [L]egislators . . . are subject to constraints about how far preference utilitarianism provides a justification for their decisions; that is, how far the fact that a majority prefers a particular state of affairs (as distinct from the justice of what the majority wants) counts as an argument for a political decision to promote it. The fact that a majority personally prefers a sports stadium to an opera house might count as an argument in favour of the stadium. *The fact that the majority thinks that homosexuality is immoral or that cruelty to children is wrong should not, in my view, count as an argument for anything*, although, of course, the different fact that cruelty harms children does count very much.[52]

Of course Dworkin has no objection to *government officials'* making decisions on the basis of either ideal arguments or (properly reconstituted) utilitarian balances: he is quite clear that those are the two ways officials must decide. But his vision insists that ideal arguments and utilitarian balances must function, if you will, as generators only of "bottom lines" or ultimate decisions: they cannot function so as to gen-

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51. *Cf. infra* text accompanying notes 58-60.

52. R. DWORKIN, *supra* note 1, at 358 (emphasis added); *see also* B. BARRY, POLITICAL ARGUMENT 64 (1965); Dworkin, *supra* note 27, at 208:

> Utilitarianism holds that . . . we should work to achieve the maximum possible satisfaction of the preferences we find distributed in our community. If we accept this test in an unrestricted way, then we would count the attractive political convictions of the 60's liberals simply as data, to be balanced against the less attractive convictions of others, to see which carries the day in the contest of number and intensity. . . .
>
> But I have been arguing that this is a false test, which in fact undermines the case for utilitarianism, if political preferences of either the liberals or their opponents are counted and balanced to determine what justice requires. . . . [T]he liberals who campaigned in the interests of homosexuals in England in the 60's most certainly did not embrace the test I reject. They of course *expressed* their own political preferences in their votes and arguments, but they did not *appeal to* the popularity of these preferences as providing an argument in itself for what they wanted, as the unrestricted utilitarian argument I oppose would have encouraged them to do. . . . [T]he case for reform would have been just as strong in political theory even if there had been very few or no heterosexuals who wanted reform.

erate the data (individual preferences) that are grist for the utilitarian decision-maker's mill. The instruction to officials is thus not that there is anything wrong with their deciding either as idealists or utilitarians: what they must not do is count as data in any utilitarian calculation constituent preferences that were themselves the product of either of those impulses.

IV. ATOMISM AS A UTILITARIAN POSTULATE

Professor Dworkin's unspoken insistence on this atomistic version of utilitarianism seems highly questionable in terms of that philosophy's overall aims. Let us take first the "double counting" case, where one person's preference is correlated positively with the satisfaction of the preferences of another person or group. Responding to Dworkin, Professor Hart argued:

> Dworkin's simple example . . . is where one person wants the construction of a swimming-pool for his use and others, non-swimmers, support this. But why is this a "form of double counting"? No one's preference is counted twice . . . ; it is only the case that the proposal for the allocation of some good to the swimmers is supported by the preferences both of the swimmer and (say) his disinterested non-swimmer neighbour. Each of the two preferences is counted only as one; and surely *not* to count the neighbour's disinterested preference on this issue would be to fail to treat the two as equals. It would be "undercounting" and presumably as bad as double counting.[53]

In an article published in 1981, Dworkin answered Hart's argument:

> I suggested . . . that if a utilitarian counts preferences like the preferences of the Sarah lovers [this is the 1981 successor to the swimming pool example], then this is a 'form' of double-counting because, in effect, Sarah's preferences are counted twice. . . . Hart says that this is a mistake, because in fact no one's preferences are counted twice, and it would *under*count the Sarah lovers' preferences, and so fail to treat them as equals, if their preferences in her favor were discarded. There would be something in this last point if votes rather than preferences were in issue, because if someone wished to vote for Sarah's success rather than his own, his role in the calculation would be exhausted by this gift, and if his vote was then discarded he might well complain that he had been cheated of his equal power over political decision. But preferences (as these figure in utilitarian calculations) are not like votes in that way. Someone who reports more preferences to the utilitarian computer does not

53. Hart, *supra* note 39, at 842 (footnote omitted); *see also* Baker, *supra* note 9, at 386; Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 407 n.32 (1978) ("[T]here is nothing unworthy of moral recognition in getting one's happiness from what one perceives as beneficial impacts on persons other than himself. (I suppose it *is* a form of double-counting but it's a justifiable form. If A's immediate happiness makes both A and B happy, A's immediate happiness *should* be counted both times).") (emphasis in original).

> (except trivially) diminish the impact of other preferences he also reports; he rather increases the role of his preferences overall, compared with the role of other [people's] preferences, in the giant calculation. So someone who prefers Sarah's success to the success of people generally, and through the contribution of that preference to an unrestricted utilitarian calculation secures more for her, does not have any less for himself—for the fulfillment of his more personal preferences—than someone else who is indifferent to Sarah's fortunes.[54]

It's a clever response, but it won't work. Initially, it won't work on a purely philosophical plane. Dworkin's rejoinder would be more relevantly addressed not to Hart's argument—that it discriminates against "the Sarah lover" (let's call him Abraham)[55] not to count his preferences—but instead to that old utilitarian bugaboo, the "utility monster" who simply has more (and perhaps stronger) preferences than others. If the goal is maximizing overall preference satisfaction, such monsters will end up with more than the rest of us. Utilitarians have disagreed about whether this is properly regarded as a problem, but there is general agreement that no "answer" (assuming one is needed) has been found. Utilitarians thus stand ready generally, and Dworkin certainly suggests no generalized adjustment of this attitude, to feed into the "computer" Gidget's preference for swimming without pausing to inquire how many of Gidget's *other* preferences have already been processed. Hart is thus quite right: excluding Abraham's preference for Sarah's satisfaction, *whether or not it is his only preference*, would be discriminating against him in the count.

Recall, moreover, that the external/personal preference distinction was presented as the foundation for a *constitutional* argument. If Dworkin is serious about this first answer to Hart, he would have to uphold a referendum or initiative no matter how convinced he was that most people voted for it on the basis of an external preference such as racial prejudice (because, after all, they have spent their only votes on their external preferences and have not asked for others to service their more personal preferences). I simply don't believe that this is an implication that Dworkin would be prepared to accept; indeed I would have supposed he would have regarded a case like *Hunter v. Erickson*[56] as one of the cleaner exemplars of his theory.

The difficulty is simply more graphic with referenda, however; it doesn't stop there. Remember that Dworkin would have us (or courts, to be more precise) evaluate the extent to which utilitarian decisions by

54. Dworkin, *supra* note 27, at 206-07.

55. "Sarahocrat," *id.* at 204, is hardly an improvement on "Sarah lover".

56. 393 U.S. 385 (1969).

government officials respecting the preferences of their constituents are "antecedently likely" to have been affected by the counting of external preferences—and in making that assessment to determine whether constituent preferences rationalized otherwise in fact are "parasitic upon" or mask deeply held external preferences. Most often his language suggests, quite realistically, that the inquiry must be at wholesale, that courts must use their best judgment as to what "really" was moving "the people" who supported the position that prevailed. But even assuming a judicial ability to break preferences down to the individual constituent level, there surely is no suggestion that they can be broken down still further, that the preferences of individual voters can be dissected so as to count the personal elements and ignore the external. In fact, in a passage from *Taking Rights Seriously* that makes his later response to Hart doubly hard to understand, Dworkin says as much:

> But democracy cannot discriminate, within the overall preferences imperfectly revealed by voting, distinct personal and external components, so as to provide a method for enforcing the former while ignoring the latter. An actual vote in an election or referendum must be taken to represent an overall preference rather than some component of the preference that a skillful cross-examination of the individual voter, if time and expense permitted, would reveal.[57]

Even at its most precise it's "one person, one preference" as respects any given issue—Gidget's preference for the swimming pool either does or does not count, depending on a best estimate of why she "really" holds it—and the imagery of voting is entirely appropriate (assuming that that is a conclusion that should make a difference, which it isn't).

Unsurprisingly, therefore, Dworkin has another answer to Hart's contention that not counting Abraham's preference would amount to discrimination against him: it is that Abraham, by taking his satisfaction from the satisfaction of Sarah, is rejecting the utilitarian tenet that everyone's preferences are to be counted equally and thus demonstrating that he holds "theories that are themselves contrary to utilitarianism."[58] Utilitarianism, Dworkin maintains, "cannot accept at once a duty to defeat the false theory that some peoples' preferences should count for more than other peoples' and a duty to strive to fulfill the political preferences of those who passionately accept that false theory, as energetically as it strives for any other preferences."[59]

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57. R. DWORKIN, *supra* note 1, at 276.

58. *Id.* at 235.

59. Dworkin, *supra* note 27, at 204; *see also id.* at 202-03.

If Dworkin actually meant what he seems to say here, that Abraham's preferences are to be left out of the utilitarian calculus because Abraham himself is not a utilitarian, there would be a temptation to observe that this sounds suspiciously like the (rightly discredited) argument we used to hear in the 1950s, to the effect that people who supported systems that did not believe in free speech (*viz*, Communists) were not entitled to free speech. However, Dworkin doesn't mean quite what he said. Abraham's preference is not discounted because he is not a utilitarian. (In fact, we have seen, constituent preferences grounded in utilitarian balances are themselves disallowed.) It is rather because, by pitching his satisfaction to that of Sarah, he is not functioning as an appropriately self-centered utility maximizer.

The question with which we began thus remains, unadvanced: *why* are non-egoistic preferences to be excluded from the utilitarian count? It is no coincidence that an answer to this question has not been forthcoming from Dworkin or any other quarter, because in many ways the whole point of utilitarianism is to avoid picking and choosing among people's preferences (and the ways they arrived at them)—"push-pin is as good as poetry" and all that—and it is just that sort of picking and choosing that Dworkin is counseling. If Abraham gets his kicks from seeing Sarah happy, that is none of the calculator's business.[60] Indeed Bentham's taxonomy of the sorts of pleasures and pains that go to make up the utilitarian calculus included "the pleasures of good-will, the pleasures of sympathy, or the pleasures of the benevolent or social affections" which stem from the knowledge that other persons (or animals) are experiencing pleasure, and even pleasures of "malevolence," "ill-will," or "antipathy" which result "from the view of any pain supposed to be suffered by the beings who may become the objects of malevolence."[61]

Similarly, people sometimes get genuine pleasure from seeing laws enacted that have no particular (perhaps a negative) personal impact on themselves but nonetheless seem to them either to represent a favorable utilitarian balance or to make the world more just. I know I have voted for a progressive state income tax (in Massachusetts) and while admittedly I had mixed feelings, I certainly was, on balance, disappointed when it lost. I assume Dworkin has had similar experiences, and, again, no reason has been given to suggest why the utilitarian or ideal source of one's pleasures or pains is any business of the calculator. (Again the "intent of the [utilitarian] framers" can be cited, for what it's

60. *But cf. infra* note 78.

61. Bentham, *Principles of Morals and Legislation*, *in* 1 WORKS OF JEREMY BENTHAM 18 (J. Bowring ed. 1962).

worth—and I think it is worth something where a "properly functioning" utilitarianism is simply asserted to involve contrary assumptions. Both Bentham and Mill certainly incorporated utilitarian calculi into their various votes and opinions as citizens, and there is in the writing of each of them indication that that was precisely how he expected good citizens to behave.[62])

Confronted with Hart's argument that there is nothing in a proper understanding of utilitarianism that demands that we exclude external preferences from the calculus—that, indeed, the animating impulses of utilitarianism insist that such preferences be counted along with all others—Dworkin suggests, albeit subtly, that "Hart's misunderstanding" might stem in part from the fact that Dworkin had introduced the distinction in the context of a discussion of the United States constitutional system, which is understandably foreign to Hart, a British philosopher.[63] It is thus appropriate to turn to a discussion of that system to see whether Dworkin's distinction makes any more sense there than it does as pure philosophy.

V. ATOMISM AS A CONSTITUTIONAL IMPERATIVE

Those who are even passingly acquainted with my work will know that I agree with what appears to be the general form of Dworkin's argument, that courts should intervene constitutionally when the preconditions of democratic choice have not been satisfied.[64] I also agree that there exists a rough congruence between utilitarian and democratic models of public choice. Indeed, I have suggested this connection several times in my own writing.[65]

It has, however, never occurred to me to suggest that the United States Constitution somehow incorporates utilitarianism or requires a utilitarian model of public choice. Dworkin, of course, does not suggest that it does either. In fact he indicates repeatedly that he has reser-

62. J.S. Mill, *Representative Government*, *in* UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 217 (Everyman ed. 1951); J. LIVELY, DEMOCRACY 120 (1975)(Bentham). Neither has there been any discernible shift in the thinking of our leading contemporary utilitarian theorists on this issue. *See, e.g.*, P. SINGER, PRACTICAL ETHICS (1979); Smart, *An Outline of a System of Utilitarian Ethics*, *in* J. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST 30-42 (1973); Hare, *Ethical Theory and Utilitarianism*, *in* UTILITARIANISM AND BEYOND 23 (A. Sen & B. Williams eds. 1982).

63. Dworkin, *supra* note 27, at 209.

64. I therefore do not agree, at least on the level of constitutional theory, with Hart's criticisms that Dworkin's theory creates rights only for a democratic context and that it makes their content vary with what prejudices are current in a given society at a given time. Hart, *supra* note 39, at 840. *See generally* J. ELY, *supra* note 1.

65. *See* Ely, *supra* note 53, at 405-08; Ely, *Democracy and Judicial Review*, 17 STAN. LAWYER 3 (1982); *see also* R. DWORKIN, *supra* note 1, at 276, 364.

vations about utilitarianism (though obviously it has influenced his thinking). What he suggests, instead, is that there are two general models of public choice: "ideal" and "utilitarian". With that rough division I also have no problem. What is troubling is the further suggestion that *if* a public official decides to make or defend a decision on a "utilitarian" as opposed to an "ideal" basis, he must do so in accord with Dworkin's "properly reconstituted," narrowly atomistic model of utilitarianism.

The telling objection here is not that Dworkin's model deviates substantially from that of Bentham and Mill without explaining the reasons for the changes. It is rather that there is nothing in any elaborated, or plausibly imaginable, theory of the United States Constitution to suggest either (a) that officials misbehave when they opt neither for a purely ideal nor a purely utilitarian theory of decision but rather somehow combine the two, or (b) that officials operating within what is generally a utilitarian public choice model are obligated to consider only egoistic preferences.

Utilitarianism and democracy are certainly related. They share a theoretical presupposition that no one person's preference for what the world should be like is entitled to any more weight than anyone else's. And they are connected institutionally by the fact that a democratic political system gives government officials strong incentives to maximize the satisfaction of their constituents' individual preferences.[66] However, the shared presumption of the equal worth of individual preferences draws no distinction (unless one explains why such a distinction is in order) between preferences that are egoistic on the one hand and those that are altruistic, utilitarian, or idealistic on the other. And of course the representative's incentive to maximize the satisfaction of the preferences of his or her constituency is equally strong no matter what the source or origin of those preferences may be. An insistence that only egoistic preferences can be allowed to "count" thus makes no more sense as a "constitutional" argument than it does if it is not so billed.

Professor Dworkin's principal criticism of my work has been that I have smuggled into my constitutional theorizing an unstated vision of "democracy" and then proceeded to infer various conclusions from my hidden presuppositions.[67] Of course there is the beginning of a point here: at least since Descartes we have all understood that one can't get anywhere without assumptions. I had supposed, however, that mine

66. Ely, *supra* note 65, at 6.

67. Dworkin, *supra* note 38.

were quite overt, and that I had made what amounted at least to a good faith effort to derive them from both the specific provisions and certain overall themes of our constitutional document. Thus, it is quite true that the various conclusions I reached in *Democracy and Distrust* could not be reached without strong starting presumptions in favor of free political discussion and association, unencumbered and equally counted votes, and so forth.[68] Perhaps these are controversial starting points even in the American constitutional context—though I think they are not—but in any event they are tame stuff compared with the uncompromisingly atomistic utilitarian theory of public choice upon which Dworkin constructs his version of American constitutionalism.

VI. CONCLUSION

People who disagree with Professor Dworkin often do so because they misunderstand what he has written. "Ely's misunderstanding," I predict, will be that my entire discussion has been premised on the mistaken assumption that Dworkin thinks that there is something *wrong* with constituents' forming and expressing their political opinions in terms of external preferences, individual utilitarian balances, or ideal arguments. This misunderstanding will be seen as doubly mysterious, since Dworkin has previously called attention to it in connection with Sager's suggestion that the environment surrounding the law (wrongly) struck down in *Lochner* must have been polluted by external preferences, and Hart's comparable suggestion that Britain's liberalization of its laws against homosexuality must have resulted from the exterual preferences and ideal arguments of sympathetic heterosexuals:

> There is a certain misunderstanding about my distinction between external and personal preferences which is undoubtedly my fault. I was not saying that you should be suspicious of any decision that is *caused* by external preferences. Suppose this community decides to give aid to the people starving in Cambodia. We are moved to do that by external preferences — that is by our concern for their welfare rather than ours. And there's nothing wrong with that. It should happen more often. What I think is wrong is a decision that is not caused by external preferences, but is justified by the existence of external preferences. That is, if the only justification for sending aid to Cambodia was that all the people in our community wanted to do it, then that would be, in my view, an inadequate justification. Luckily, there's another justification, namely the reasons we have for wanting to do it.[69]

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68. *See also infra* note 79.

69. Dworkin, *Commentary*, 56 N.Y.U. L. REV. 525, 544 (1981); *see also* Dworkin, *supra* note 27, at 208-209; R. DWORKIN, *supra* note 1, at 357-58:

Dworkin here represents his theory as strictly an argument-rebutter: *should* the state decide to defend its law in terms of a utilitarian justification, and of course it need not, *then* nonpersonal preferences must simply be excluded from the count. There is nothing wrong with external preferences (at least those of the altruistic sort), and certainly there is nothing wrong with (constitutionally acceptable) ideal arguments: it's just that they can't be counted in any utilitarian justification.

To this attempt to limit the range of the claim there are two independent responses, each of them by now somewhat obvious. The first is that even in the limited compass represented by the quoted passage, the claim is difficult to make sense of. If there is nothing wrong with external preferences (or ideal arguments), why *shouldn't* they be counted by a utilitarian decision-maker bent on maximizing preference-satisfaction? This article has argued that no convincing reason for refusing to count them has been given, and granting that there is "nothing wrong with them" only compounds the problem. Limiting the argument doesn't make it follow.

The second general response is that it can hardly come as a surprise that so many of us keep falling prey to this "mistaken" interpretation, since it is one that Dworkin himself often falls prey to—and understandably so, since it is a "misunderstanding" that is essential to most of the specific constitutional conclusions he derives. What is more, he falls prey to *both halves* of the "misunderstanding"—(a) that which suggests that there is something "wrong" with acting on the basis of external preferences, and (b) that which fails to attend to his insistence that he means only to disqualify certain utilitarian arguments that might be made in support of various laws, not to invalidate laws on the ground that they were in fact the product of external preferences. I shall address the second half of the "misunderstanding" first.

At the very least Dworkin misspeaks himself when he suggests that he means only to exclude non-personal preferences from the utilitarian count. As, for example, his discussion of the White law students' preferences for White classmates makes clear, a substantial mix of personal and external preferences will result for him not in an attempt somehow to ferret out the latter and exclude them from the calculus, but in the invalidation of the entire utilitarian argument. In fact at times he is quite candid about the implications of the presence of "large compo-

I have also been interpreted—even less plausibly—as arguing that external preferences are in themselves bad, and that people should strive not to have them and should vote ignoring the ones they do have. . . . Nothing could be further from what I suppose. . . . I argue only against counting external preferences, whether malevolent or altruistic, good or bad, in some utilitarian justification for a political decision.

nents" (or even the substantial likelihood of large components)[70] of external preferences in a given decision: "In any community in which prejudice against a particular minority is strong, then the personal preferences upon which a utilitarian argument must fix will be saturated with that prejudice; it follows that in such a community *no utilitarian argument purporting to justify a disadvantage to that minority can be fair*."[71] At least this is what he sometimes says.[72]

It is possible at this point that Dworkin might grant that he overstated a bit in suggesting that he meant only to exclude non-personal preferences from utilitarian justifications, but continue to maintain the accuracy of his more general claim that he never intended his external/personal preference distinction to function as anything more than an argument-rebutter. It is true that the presence of a "large component" of external preferences will invalidate all possible utilitarian justifications for a given law, this revised statement of the position would run, but nonetheless the ability to articulate a constitutionally permissible *ideal* argument in support of the law will suffice to preserve its constitutionality.

We have mentioned this possibility before, but have also noted that it is not a position that is consistent with his conclusion that laws outlawing homosexuality, contraception, and pornography are unconstitutional. There is thus reason to suppose that he knew whereof he

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70. R. DWORKIN, *supra* note 1, at 277.

71. *Id.* at 236-37 (footnote omitted; emphasis added); *cf.* Dworkin, *supra* note 27, at 197 ("We therefore encounter, in peoples' motives for objecting to the advertising or display of pornography, at least a mix and interaction of attitudes, beliefs and tastes that rule out any confident assertion that regulation justified by appeal to these motives would not violate the right to moral independence."). *But cf. infra* note 72.

72. *But cf. supra* text accompanying notes 23-24, 30-33, 44. (Of course these situations involved *benign* external preferences, but that will be my point exactly. *See infra* text accompanying notes 76-80). Dworkin, *supra* note 27, at 205-06, proposes a more "neutral" standard for deciding which cases are "appropriate . . . for a prophylactic refusal to count any motive whenever we cannot be sure that the motive is unmixed with" external preferences. (So far as I know, this is the only time that Dworkin has recognized that he has two practices regarding the subject.) The question under consideration is the public display of pornography (as opposed to its private enjoyment) and Dworkin's suggestion is "that restriction may be justified even though we cannot be sure that the preferences people have for restriction are untinged by the kind of preferences we should exclude" because "[t]his is a situation in which the egalitarian cast of utilitarianism is threatened from not one but two directions." That is, were the censorial preferences discarded entirely on the ground that they are polluted by external preferences, then "the neutrality of utilitarianism" would be "compromised in the other direction" since the *personal* preferences that people have for censorship of public pornography (preferences, according to Dworkin, concerning the sexual experience they want for themselves) would not be counted. This plainly will not work as a distinction, however—ignoring a mixed bundle of personal and external preferences will by definition have the effect of refusing to count some personal preferences—and one has to suspect that again the decision is being made on a ground that is not finding full expression. (And, indeed, the public display of pornography *is* more offensive than its private enjoyment.).

wrote when he set forth his "general theory of rights," a theory "prohibiting decisions that seem, antecedently, *likely to have been reached by virtue of* the external components of the preferences democracy reveals."[73] "The liberal, therefore, needs a scheme of civil rights, whose effect will be to determine those political decisions that are antecedently likely to reflect strong external preferences, *and to remove those decisions from majoritarian political institutions altogether*."[74] The suggestion of these passages is unmistakable, and indeed it is essential to many of the conclusions Dworkin reaches: decisions that appear "to have been reached by virtue of" external preferences are simply to be set aside.

It is understandable that this is a position he should take—at times[75]—since there are times (they obviously tend to coincide) when he too falls into the other half of the "misunderstanding," that of supposing that there is something *wrong* with external preferences:

> Suppose the community contains a Nazi, for example, whose set of preferences includes the preference that Aryans have more and Jews less of their preferences fulfilled just because of who they are. A neutral utilitarian cannot say that there is no reason in political morality for rejecting or dishonoring that preference, for not dismissing it as simply wrong.[76]

We therefore hear two quite different tunes from Dworkin—the one, just quoted, that suggests that the actual influence of external preferences pollutes a decision and demands the creation of a "trumping" constitutional right, and the other, quoted earlier in characterizing "Ely's misunderstanding," to the effect that there is nothing wrong with non-personal constituent preferences, it's just that they can't be counted in utilitarian justifications. By now, however, you will have noticed that the tune varies with the occasion. The former attitude is expressed when what is at issue is an external preference of the malign sort, involving a desire to deprive another person or group of an equal share of life's goods or opportunities. Conversely, suggestions that "of course there is nothing wrong" with such preferences, they just can't be counted, appear in discussions of either altruistic external preferences or ideal arguments. Just six pages after the "Nazi" passage ("rejecting or dishonoring" the external preference involved there on the ground that it is "simply wrong") there appears the following:

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73. *See supra* text accompanying note 26 (emphasis added).

74. Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 134 (S. Hampshire ed. 1978) (emphasis added).

75. *But cf. supra* note 72, *infra* note 77.

76. Dworkin, *supra* note 27, at 203.

> [S]omeone might have been led to suppose, by my discussion, that what I condemned is any political process that would allow any decision to be taken if [people's] reasons for supporting one decision rather than another are likely to lie beyond their own personal interests. I hope it is now plain why this is wrong. *That* position would not allow a democracy to vote for social welfare programs, or foreign aid, or conservation for later generations.[77]

The cause of the inconsistency is by now clear, namely Dworkin's insistence that the two sorts of "external" preferences, malicious and altruistic, are equivalent in their implications for constitutional theory.

There is nothing wrong, either in utilitarian theory or in the context of the United States Constitution, with an individual constituent's gaining his satisfaction from the satisfaction of another or formulating his preferences on the basis of either a utilitarian balance or an ideal argument, and certainly there is nothing wrong with a government official's taking preferences thus formed into full account in deciding what will most satisfy his constituency.[78] What *does* violate the duty of equal representation that has informed our Constitution from the beginning, and undeniably animates the equal protection clause, is the counting of *one particular kind* of "external" preference, one rooted in a belief that certain racial or other groups simply deserve less of life's good things than the rest of us.[79] Thus there is indeed an asymmetry

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77. *Id.* at 209; *see also* R. DWORKIN, *supra* note 1, at 358 (laws helping disabled persons can be upheld on basis of ideal argument though generated by altruistic external preference); Dworkin, *supra* note 27, at 208 (similar conclusion concerning Britain's liberalization of its antihomosexuality laws); *supra* text accompanying notes 23-24 (affirmative action); *supra* text accompanying notes 30-33 (*Lochner* law); *supra* text accompanying note 69 (aid to Cambodia).

78. Of course such preferences may well be felt less intensely than purely selfish ones, in which case (a common bromide to the contrary notwithstanding) they are likely effectively to be counted for less by a system of representative democracy such as ours. *See* Ely, *supra* note 53, at 407-08; Ely, *supra* note 65, at 7. Of course they may *not* be felt less intensely, in which case they are not likely to be effectively discounted by a represeutative system, a result that I am suggesting, contrary to Dworkin, is entirely correct.

79. *See* Ely, *Commentary*, 56 N.Y.U. L. REV. 525, 543-44 (1981) (suggesting that *Democracy and Distrust* effectively adopts something resembling half, but only half, of the exterual preference notion). For the representative to act on the basis of a naked desire—either his own or that of his constituents—that some minority simply be denied an equal share of life's goods and opportunities [Dworkin's terminology] is surely tantamount to valuing the welfare of that minority negatively [my terminology], and that, I argue at length, is a violation of the constitutionally imposed duty to "represent" the entirety of one's constituency. *See also id.* at 539-40; *see* J. ELY, *supra* note 1, especially chs. 4 & 6; *cf.* Aristotle, *Nicomachean Ethics* ii.7. 1108b, *in* THE BASIC WORKS OF ARISTOTLE 961 (R. McKeon ed. 1941) (defining spite as taking pleasure from the undeserved pain of others); *accord* J. RAWLS, *supra* note 2, at 533.

If you were watching carefully, you saw the rabbit go into the hat with the words "or that of his constituents." That *is* tantamount to discounting malign constituent external preferences. And contrary to my detractors' sometime renditions of what I must have supposed I was doing, I am fully aware that it is a move that is not compelled by pure logic (uninformed by any theory of the Constitution) and, further, that it is a move with consequences. It is, however, a move that

between old-fashioned racial segregation and racially specific affirmative action, though it will not be found in anything that Dworkin has identified. It will be found, instead, in the fact that the former case involves Whites discriminating against Blacks or other minorities, and the latter involves Whites discriminating against Whites. That difference, in turn, is highly probative of the "antecedent likelihood" that the decision to discriminate was rooted in a perfectly proper (and countable) altruistic preference or ideal argument rather than the sort of external preference whose recognition *does* violate the Constitution's duty of fair representation, one rooted in a belief that one's "own kind" are a priori entitled to more of life's goods and opportunities than others. But then you already knew that.[80]

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seems to me to follow from the duty imposed by the fourteenth amendment to review legislative and other governmental output for equality. Without such a discount (however expressed) the 88% nonblack majority could, for example, legislate that our 12% Black population shall henceforth be consigned to menial labor at best.

Commentators on my work have felt it necessary to observe that this move does not follow from an unmodified utilitarianism that seeks simply to maximize satisfaction of constituent preferences, however destructive of other constituents. *See, e.g.*, Sager, *supra* note 30, at 429 ("Unrefined utilitarianism can offer no solace to Ely."); Dworkin, *supra* note 38, at 512 n.101 ("The pure utilitarian account would not support Ely's own argument that minority interests constitutionally are guaranteed 'virtual representation' in the political process . . . and that political decisions based on prejudice (unconstitutionally) deny such representation."). In fact I was aware of this. Ely, *supra* note 53 (published three years before these two observations) had stated, at 406 (footnotes omitted):

> And even if that impulse to qualify utilitarianism [by rights] is of arguable legitimacy, there is another that seems rather plainly not to be: inherent in utilitarianism is a problem of equity that simply cannot be ignored. An ethical system that was serious in demanding only the greatest happiness of the greatest number would have to count as moral a world in which 75% of the people systematically promoted their own happiness at the expense of the other 25% in circumstances where no one could say there was a relevant difference between the two classes. Now this is more than a little troubling, in fact if uncorrected it is fatal, and philosophers and societies have been forced, with varying degrees of success, to find mechanisms for correcting it.

The unsurprising fact of the matter is that the United States Constitution does not incorporate unmodified preference utilitarianism: in fact I have argued earlier in this article, contrary to Dworkin's sometime hints, that it does not incorporate utilitarianism of any sort, however reconstituted. And I defy anyone to give the equal protection clause any meaning whatever without incorporating, by one mechanism or another, a willingness to discount the malign (*e.g.*, racist) external preferences of constituents.

80. *See* Ely, *supra* note 5. *See generally* J. ELY, *supra* note 1.