LIBERAL EQUALITY RIGHTS:
RONALD DWORKIN'S JURISPRUDENCE

by

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Ronald Dworkin has achieved prominence in the field of jurisprudence through his book, Taking Rights Seriously, (hereafter TRS) his many articles in the "New York Review of Books," and other publications that pursue a coherent philosophy for liberals. In response to criticism of his earlier work, Dworkin has expanded and clarified his liberal position on equality rights. This thesis will address how Dworkin's later writings attempt to fill in gaps that occur in Dworkin's first arguments for a hierarchial, principled picture of the law. It will be argued here that Dworkin's views require an unusual perspective on the concept of an individual, and this renders his rights-based political morality seriously deficient.

The nature of Dworkin's theory is first indicated by an attack on the "ruling theory of law" which he characterizes as positivistic when asked what the law is, and utilitarian when required to decide what the law should be. His central criticism charges that legal arguments are incomplete without principles which refer to or are implications of rights. Dworkin's liberal political morality is founded on rights to equal respect and concern. The elaboration of what these rights mean is sustained throughout Dworkin's publications. He maintains that his liberal rights-thesis is the theoretical articulation of the constitutional right to equality. Applying Dworkin's rights-theory to the Regents of the University of California v. Bakke[2] case illuminates many of the more abstract aspects of his views.

This thesis will argue against Dworkin by focusing on the too-narrow conception of individuals implied by his theory of rights. The ideal Dworkin employs of a right to 'equality of resources' justifies an aggressive redistributional scheme, unchecked by a fuller conception of what is an individual. Dworkin is only able to hold his ideal of a right to 'equality of resources' together with his notion of individual rights by accepting a diminished concept of the individual. This argument suggests that a fuller conception of an individual recognizes the connection between merit and entitlement. Dworkin's skepticism regarding the feasibility of merit being protected by individual rights is undercut by introducing a distinction between merit and success. Leaving key aspects of an individual, such as merit and its related features, out of official deliberation about rights, conceptually inhibits the extent of individualizability in a rights theory. If we wish to maintain such features, and value their protection and cultivation by a political order, adopting Dworkin's rights-thesis and its consequences is imposible.

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I. DWORKIN AND THE RULING THEORY

1. The Ruling Theory

The "ruling theory" of law is comprised of legal positivism and utilitarianism. Derived from the work of Jeremy Bentham, this ruling theory is criticized by Ronald Dworkin in Taking Rights Seriously. Dworkin's position is a refurbishment of liberalism and defends a thesis that presents individual rights as basic to justice.

> Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them. TRS intro. p.xi

Utilitarianism is, of course, hostile to any preordained individual rights that are impervious to the encroachment of the general interest. Bentham dismissed such an "ontological luxury" (p. xi TRS) as "nonsense on stilts" (p. vii TRS). Legal positivism, a theory "... which holds that the truth of legal propositions consists in facts about the rules which have been adopted by specific social institutions, and in nothing else" (p. vii TRS), supports the utilitarian disdain for such suspiciously metaphysical entities like "rights" that are independent of specific pieces of legislation. Positivism says that when procedural conditions are satisfied we may demonstrate that we have a right; however, these entitlements are conditional concessions created by legislation, not some series of justified claims that are honoured at any cost because of their ontological

primacy. Dworkin's criticism and contribution to consideration of the ruling theory of law consists in the general proposition that we do have a "fundamental and axiomatic" (p. xv TRS) right to equal respect and concern. Dworkin centralizes the right to equal respect and concern and patterns both his arguments for social policies and for other individual rights in terms of the consequences of accepting that axiomatic fundamental right. "... [C]oncern and respect is a right so fundamental that it is not captured by the general characterization of rights as trumps over collective goals, except as a limiting case, because it is the source both of the general authority of collective goals and of the special limitations on their authority that justify more particular rights" (p. xv TRS).

In his discussion of John Rawls' A Theory of Justice[3] Dworkin suggests that "... our intuitions about justice presuppose not only that people have rights, but that one right among these is fundamental, even axiomatic. The most fundamental of rights is a distinct conception of the right to equality, which I call the right to equal concern and respect" (p. xii TRS). The substance of Dworkin's attack on the "ruling theory of law" will lie in the poverty of legal positivism and utilitarianism in arguments justifying political decisions and positions. Advocating the centrality of his liberal conception of equality, Dworkin will provide a theory of restricted utilitarianism, restricted ideal arguments and sketch the consequences of the primary right to treatment as an equal with respect to derivative rights such as

liberty, free speech and even "equal treatment". Recognizing the power of arguments based on the axiomatic right to equal respect and concern is what Dworkin means by the slogan "taking rights seriously". If we recognize the power of policies supported by utilitarian or moral reasons, or both, and yet still support the individual's right to veto such policies when they conflict with that fundamental structure of rights, then we are taking rights seriously indeed.

Dworkin's theoretical structure appeals to those who have long felt that utilitarianism without restrictions jeopardizes the prospects of the individual in society, especially individuals who have unpopular convictions, lifestyles or appearances. A theory of rights seems to be the most efficient way of formalizing restrictions on arguments of justification for policies that create political inequalities. Testing the success of Dworkin's enterprise will not allow us to evaluate all forms of the "rights thesis" since the axiomatic postulate will inform the enterprise as a whole. Traditional liberals may wish to formulate a rights theory that uses the right to liberty as the fundamental postulate. Perhaps the most instructive aspect of Dworkin's jurisprudence is the articulation of where contemporary jurisprudence should focus its efforts, and that by criticism and refinement of particulars, the form of the "rights theory" may usurp the current "ruling theory".

2. Equal Respect and Concern

To clarify Dworkin's stance, let us examine his definition of what treatment with equal respect and concern entails and why that right restricts certain utilitarian and ideal arguments.

Dworkin's definition of rights does not derive from any other concept, it is the bedrock of his theory. When we ask why a person has a right, we return to the fact that he has a right to equal concern and respect. In other words, Dworkin says we have a right to have a right.

> It makes sense to say that a man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence. It does not make sense otherwise.
> (p. 199 TRS)

Although Dworkin is explicit about the extent of our rights in limiting how others may treat us, he has little to say about what it is about each individual that entitles us to our rights. We may enquire where these rights come from and receive this reply from Dworkin.

> The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government's job of securing the general benefit more expensive and more difficult...
> (p. 198 TRS)

If a Government justifies a policy because it effectively secures a general benefit based on utilitarianism calculations, Dworkin argues that an individual citizen has a right to challenge that

policy if it conflicts with that individual's right to equal respect and concern. We cannot simply slough off some individuals as an unfortunate consequence of an overall attractive policy. Utilitarianism gains will only defeat rights in very limited circumstances.

> It follows from the definition of a right that it cannot be outweighed by all social goals. We might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshhold weight against collective goals in general; unless for example, it cannot be defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency. Suppose for example, some man says he recognizes the right of free speech but adds that free speech must yield whenever its exercise would inconvenience the public. He means, I take it, that he recognizes the pervasive goal of collective welfare and only such a distribution of liberty of speech as that collective goals recommends in particular circumstances. His political position is exhausted by the collective goal: the putative right adds nothing and there is no point to recognizing it as a right at all.
>
> (p. 92 TRS)

Through rights, individuals are in possession of a powerful weapon to protect their dignity and treatment with equal respect and concern. Arguments justifying political programs must respect these individualized entitlements. Dworkin's critique of utilitarianism and legal positivism will proceed through the benefits of recognizing that rights represent "...a special, in the sense of a restricted, sort of judgment about what it is right or wrong for Governments to do" (p. 139 TRS). The normative grist from Dworkin's axiomatic postulates is generated by their

connection with what he considers to be universally binding moral ideals.

> I presume that we all accept the following postulates of political morality. Governments must treat those whom it governs with concern, that is as human beings who are capable of suffering and frustration, and with respect, that is as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with respect, but with equal concern and respect.
>
> (p. 272 TRS)

We draw attention to Dworkin's grounding of his axiomatic concept of equal respect and concern in the exegesis stage of this paper because one senses the import of this fundamental concern throughout the scope of Dworkin's theoretical structure. The pedigree of the concept of equal concern and respect extends at least as far back as John Rawls' A Theory of Justice.[4] Demarcating their style of liberalism from the classical theories predicated on certain liberties, Dworkin writes

> Rawls' most basic assumption is not that men have a right to certain liberties that Locke or Mill thought important but that they have a right to equal respect and concern in the design of political institutions. This assumption may be contested in many ways... But it cannot be denied in the name of any more radical conception of equality, because none exists.
>
> (p. 182 TRS)

By "radical", I believe Dworkin means basic, and his reading of Rawls recounts how the right to equal concern and respect is argued for as if it were a priori.

> On the contrary, the right to equal respect is not, on his account, a product of the contract,

> but a condition of admission to the original position. This right, he says, is 'owed to human beings as moral persons', and follows from the moral personality that distinguishes humans from animals. It is possessed by all men who can give justice, and only such men can contract. This is one right, therefore, that does not emerge from the contract, but as assumed, as the fundamental right must be, in its design.
>
> (p. 181 TRS)

Dworkin's definition of "moral persons" is as vague as what constitutes giving justice on such an account. The hollow definition serves as a suggestive placeholder though, for if Dworkin could articulate the features of a "moral person" into a semblance of a lexical ordering of importance, a key might be found that unlocks the meaning of what constitutes equal concern and respect. Treatment as an equal does not equal strict uniformity of treatment since such a crude egalitarianism ignores the relative values of competing concerns. Such a simplistic egalitarianism is not senstive enough to demonstrate "equal respect and concern", but any alternative theory of egalitarianism must systematize and universalize the distinctions it advances in the name of equality to ensure that it does not abuse what it purports to serve. Placing their fundamental principle of equality in such a privileged position established the importance but not the meaning or content of such a right. Here Dworkin offers equality of respect and concern as a nebulous meta-right or "abstract concept" that embraces many other particular rights or derivative "conceptions". Dworkin's discussion of Rawls addresses this issue:

Rawls makes plain that these inequalities are required, not by some competing notion of liberty or some overriding goal, but by a more basic sense of equality itself. He accepts a distinction between what he calls two conceptions of equality.

> Some writers have distinguished between equality as it is invoked in connection with the distributor of certain goods, some of which will almost certainly give higher status or prestige to those who are more favoured, and equality as it applies to the respect which is owed to persons irrespective of the social position. Equality of the first kind is defined by the second principle of justice.... But equality of the second kind is fundamental.
>
> John Rawls A Theory of Justice (p. 511)

We may describe a right to equality of the second kind, which Rawls says is fundamental, in this way. We might say that individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them. This is a highly abstract right. Someone might argue, for example, that it is satisfied by political arrangements that offer equal opportunity for office and position on the basis of merit. Someone else might argue, to the contrary, that it is satisfied only by a system that guarantees absolute equality of income and status without regard to merit. A third man might argue that equal concern and respect is provided by that system, whatever it is, that improves the average welfare of all citizens counting the welfare of each on the same scale. A fourth might argue, in the name of their fundamental equality, for the priority of liberty, and for the other apparent inequalities of Rawls' two principles.

The right to equal concern and respect, then, is more abstract than the standard conceptions of equality that distinguish different political theories. It permits arguments that this more basic right requires one or another of these conceptions as a derivative right or goal.

(p. 180 TRS)

As a fundamental right, equality of respect and concern will need a few more levels of interpretation built upon it before the profile of this refurbished liberalism achieves palpable identity.

3. Liberalism

Equality of respect and concern remains undefined at the conclusion of Taking Rights Seriously. In articles published since that time Dworkin has tried to amplify what is suggested by his axiomatic concept. In "Why Liberals Should Believe in Equality",5 "What Liberalism Isn't"6 and "Liberalism",7 Dworkin recruits from the ranks of ideologically scattered liberals and tries to show how the successes of liberalism in periods like the New Deal and the Civil Rights Movement were emblematic of this axiomatic liberal conception at work. The fact that liberals have a unified political voice could be explained by their capacity to tolerate widely divergent motivations for achieving certain goals that they more or less agree on, therefore noting the connection with liberalism may confuse this exegesis of Dworkin's "Rights Thesis". Nevertheless, if one reads Dworkin as a theorist in favour of traditional liberal causes, some substance begins to appear on the bare bones of equal respect and concern.

> What does it mean for the government to treat its citizens as equals? That is, I think, the same question as what it means for the government to treat all of its citizens as free, or as independent, or with equal dignity. In any case, it is a question that has been central to political theory since Kant.

> It may be answered in two fundamentally different ways.... The first theory of equality supposes that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.... I shall now argue that liberalism takes, as its constitutive political morality, the first conception of equality.8

In the tradition of Kant, we understand that we should treat all men as "ends not means". Like the utilitarians who asserted that pushpin was as good as poetry, Dworkin equates the scholar's life with that of the "television-watching, beer-guzzling citizen who is fond of saying 'this is the life'".9 No preference that asserts one way of life is better than another is allowed by Dworkin to contaminate this "first" theory or precondition of equality.

> The liberal conception of equality sharply limits the extent to which ideal arguments may be used to justify any constraint on liberty. Such arguments cannot be used if the idea in question is itself controversial within the community. Constraints cannot be defended, for example, directly on the ground that they contribute to a culturally sophisticated community whether the community wants this sophistication or not, because that argument would violate the canon of the liberal conception of equality that prohibits a government from relying on the claim that certain forms of life are inherently more valuable than others.
>
> (p. 274 TRS)

Dworkin believes that restrictions upon possible "ideal" arguments are entailed by his rights thesis. Employing a criterion of proximity to the heart of a political theory, Dworkin asserts that government impartiality with respect to conceptions of "the good life" is "constitutive" of the political morality of liberalism.

Arguments that are fundamental to liberalism will be justified by the appeal to the conception of equality. "Derivative" political positions can be built up as "...strategies, as means of achieving the constitutive positions."10 Dworkin believes that a central constitutive political morality based on egalitarianism is at the centre of the orbit of many liberal policies. When it appears that some of the policies contradict each other, Dworkin reminds the liberal to examine why the policy was favoured and then see if the service of the "constitutive" liberal position may be better served now by an alternate policy. For example, the New Deal posited economic growth as one of the planks in its platform. That does not entail that Liberals believe in economic growth per se. "It seemed to play a useful role in achieving the complex equalitarian distribution of resources that liberalism requires."11 The contradictory policies that have brought the theoretical unity of liberalism into dispute are resolved, Dworkin believes, through abstracting motivations until they can be understood in relation to the general and axiomatic postulates that are constitutive of the liberal political orientations. The second theory of equality "... holds merely that the the treatment government owes citizens is at least partly determined by some conception of the good life. Many political theories share this thesis, including theories as far apart as, for example, American conservatism and various forms of socialism or Marxism, though they will of course differ in conception of the good life they adopt..."12 The wedge drawn between liberalism and American

conservatism on the basis of the presence or absence of a concept of the good life is a dramatic move that isolates this refurbished liberalism from other ideological impurities.

> In this respect, liberalism is not some half-way house between more forceful positions, but stands on one side of an important line that distinguishes it from all competitors taken as a group.[13]

> I do not suppose that I have made liberalism more attractive by arguing that its constitutive morality is a theory of equality that requires official neutrality amongst theories of what is good in life.[14]

If a Facist, or a Marxist, a feminist or a racist is given the power to enforce their concept of the "good life" with the machinery of government, the minority that sacrifices in the name of this concept should have the power to fight back, to assert their axiomatic right to equal concern and respect. Dworkin's limitation on the styles of "ideal" arguments that can justify political inequalities prevents the untempered success of ideologies that need the power of centralized authority to achieve their objectives. Whether one chooses this foundation of pluralism out of despair for the alternatives, or out of hope for individual autonomy, the result is to maintain discussion of the proper role of government institutions by never allowing one ideology to monopolize the debate. This is why Dworkin separates refurbished liberalism from all other political theories taken as a whole. By definition, refurbished liberalism is in ideology, but in effect, it stands as a clearing house for dialectics between more specific ideologies that carry a concept of what is

"good" or right for everyone. Under such a scheme, those who believe that they can be fulfilled by some particular ideology controlling the political community can devote themselves to maintaining their prized conception's influence in the legislative process. Those whose lifestyles are perhaps censured or devalued by such political zealots are entitled to the forum's ear to make their rebuttal. Giving each individual the opportunity to express what constitutes justice on their views, and providing all with the opportunity to be party to such debates ameliorates the quality of political discourse. Many of us will abdicate our right to debate in virtue of the superior skills others have in presenting opinions similar to our own. The complexity and necessity of specialization will result in an arrangement similar to other proxy contracts we employ for reasons of efficiency. The motivations for particular policies may be as passionate and diverse as the plethora of opinions that are held in this pluralistic system. However, no policy will receive the support of the legislature unless it can be articulated and justified without appeal to any particular conception of what is valuable in life. This theory of liberalism asserts its content in the form of a limitation yet this is not a paradox.

> Liberalism cannot be based on skepticism. Its constitutive morality provides that human beings must be treated as equals by their government not because there is no right or wrong, but because that is what is right. Liberalism does not rest on any special theory of personality, nor does it deny that most human beings will think that what is good for them is that they be active in society.

> Liberalism is not self-contradictory: the liberal conception of equality is a principle of political organization that is required by justice, not a way of life for individuals, and liberals, as such, are indifferent as to whether people choose to speak out on political matters, or to lead eccentric lives, or otherwise to behave as liberals are supposed to prefer.15

Allowing non-conformists the latitude they need to enjoy what they value in life is the practical consequence of showing all citizens equal concern and respect. This is not to imply that liberalism promotes eccentricity as the preferred lifestyle, nor does it judge more conservative habits and attitudes. A test for the respect we have for all conceptions of the "good life" is the space we allow individuals to function within before we invoke the limiting power of the law. In this respect, the axiomatic right to equality of respect and concern subsumes the traditional basis of liberalism, liberty.

Very little of this exegesis of Ronald Dworkin's rights thesis will be surprising to liberals. Through giving an account of equality which adds perspective without diminishing the importance of our right to liberty, Dworkin has maintained the lineage of liberalism, yet allowed room for many fundamental liberal policies that are in conflict with liberty. As an overarching concept, equality is complex enough to sustain the breadth of the liberals' political orientation. The ruling theory that Dworkin attacks is simple: utilitarian in moral theory, positivistic in its analysis of legality. The simplicity of the

ruling theory gives Dworkin a plain target. After we examine Dworkin's attack on utilitarianism, consideration of whether Dworkin gives his opponents a reciprocally plain target to aim back at will be appropriate.

4. Utilitarianism and "Internal"/"External" Preferences

The ruling theory of law employs utilitarianism as its key moral theory. Dworkin explains that utilitarianism is appealing because of its "egalitarian" method of evaluation. "It seems to observe strict impartiality... each man is to count as one and no man is to count as more than one..." (TRS p. 234). Dworkin skims over some of the problems associated with the measurement of interests and recommends a recent formulation of utilitarianism in terms of "preferences" rather than the classical notion of pleasure. Utilitarianism accepts as its maxim the commitment to satisfy as many preferences as possible with each decision the theory recommends.

> But the preferences of an individual for the consequences of a particular policy may seem 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 or opportunities to others, or both.
> (p. 234 TRS)

Examples of "external" preferences that Dworkin offers include altruism, some political theories, racism, and some moral perspectives. Citizens may prefer a pool over a theatre, not because of any intrinsic or "personal" interest they have, since their inclination is to not use either, therefore their

preference, if expressed and entered into the calculation, will yield a corruption of the egalitarian nature of the process.

> 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. (TRS p. 235)

Racism will corrupt the calculation in a similar way. For example, if we have a scarce medicine that cures a common disease, a scenario like this may arise.

> 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, self-defeating, because the distribution of medicine will then not be, from that standpoint, utilitarian at all. (TRS p. 235)

Including such preferences in a calculation destroys, Dworkin asserts, the egalitarian basis of utilitarianism since the victims of the majority's prejudice have not been extended equal concern and respect.

> 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... unless it can be shown that the same

> disadvantage would have been justified in the absence of the prejudice. If the prejudice is widespread and pervasive, as in fact it is in the case of blacks, that can never be shown. (TRS p. 237)

Because the "ruling theory" of law is based on utilitarianism, it suffers from the defect of aggregate judgments that include "external" preferences. Utilitarianism, if it persists in allowing external preferences to guide what it will justify, will be unfair because the theory will fail to satisfy the axiomatic and fundamental postulate of political morality, which is to treat all persons with equal respect. If Dworkin's axiomatic concept is incompatible with preference utilitarianism, might it work with a more sensitive form of utilitarianism?

> If utilitarianism is suitably reconstituted so as to count only personal preferences, then the liberal thesis is a consequence, not an enemy of the theory. It is not always possible, however, to reconstitute a utilitarian argument so as to count only personal preferences. Sometimes personal and external preferences are so inextricably tied together, and so mutually dependent, that no practical test for measuring preferences will be able to discriminate the personal and external elements in any individual's overall preference. This is especially true when preferences are affected by prejudice. (TRS p. 236)

For many occasions, utilitarianism will operate fairly in its quest for the general benefit. However, Dworkin's rights thesis attends to the penumbra of utilitarian justification.

> The vast bulk of laws which diminish my liberty and justified on utilitarian grounds, as being for the general interest or the general welfare if, as Bentham supposes, each of these laws diminish my liberty, they nevertheless do not take away from me anything that I have a right to have.... (TRS p. 269)

There is no need for special justifications in the mundane business of uncontroversial legislation. No special reasons are necessary to make Lexington Avenue a one-way street. Yet there exists a penumbral region at the boundaries of legislation, and rules must be scrutinized to determine whether external preferences are corrupting the utilitarian system of justification. Since it is often difficult to distinguish external from personal preferences, Dworkin suggests that individual rights stand guard in these areas susceptible to abuse.

> I wish to propose the following general theory of rights. The concept of an individual political right, in the strong anti-utilitarian sense I distinguished earlier 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. (TRS p. 277)

Dworkin's theory introduces rights as a barrier against utilitarian arguments, saturated in "external" preferences, that will limit some individuals in carrying on with their lives. In his article, "What Rights Do We Have?" (TRS 266-279), Dworkin confirms our exegesis of the position of rights within his political theory.

> I cannot think of any argument that a political decision to limit such a right, in the way that minimum wage laws limited it, is antecendently likely to give effect to external preferences,

> and in that way offend the right of those whose liberty is curtailed to equal concern and respect. If, as I think, no argument can be made out, then the alleged right does not exist; in any case there can be no inconsistency in denying that it exists while warmly defending a right to other liberties. (TRS p. 278)

Presupposed by Dworkin's "rights" theory is a concept of what areas of legislation are "antecedently likely" to reinforce the external preferences of others. As our exegesis of Dworkin shows, this concept of "antecedently likely" intrusions of legislative power receives only a general treatment. The postulates of political morality he suggests include each individuals rights "to dignity" and recognition of their "intelligent conceptions of how their lives should be lived" (TRS p. 272). Dworkin refers in passing to the "moral personality that distinguishes humans from animals" (TRS p. 181); however he seems content with a broad demarcation of where the "theory of dignity" will be useful once constructed.

> Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its agenda. That argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place. It is perfectly understandable that lawyers dread contamination with moral philosophy and particularly philosophers who talk about rights, because the spooky overtones of that concept threaten the graveyard of reason. But better philosophy is now available than lawyers may remember. Professor Rawls of Harvard....
> (TRS p. 149)

Without this area of "contamination" filled in (and the discussion of Rawls only amplifies Dworkin's general concept), we can only

infer what these "antecendently likely" intrusions of legislative power are from Dworkin's episodic applications of his theory.

5. Dignity and "Neutral" Utilitarianism

The beginning of this theory of "dignity" is found in Dworkin's concept of "neutral" utilitarianism. We can capture some notion of what style of political justification is incompatible with treating all citizens with equal respect and concern if we understand that "neutral" utilitarianism is incompatible with many other political theories. Thanks to the pungent criticism of H.L.A. Hart, Dworkin has clarified the "Byzantine complexity"16 that has muddled both his critics and proponents. Evaluating the "anti-utilitarian" characterization of individual rights, Hart distinguishes Dworkin's usage of the term from the classical liberal tradition which connects "anti-utilitarian" rights with some concept of what are "the essentials of human well-being" or the "groundwork of our existence".17 Dworkin's idea may be connected with such notions, yet he does not commit himself to such controversial presuppositions when he demarcates the scope of "anti-utilitarian" rights as defenses against legislation that "... we know from our general knowledge of society is likely to contain large components of external preferences" (TRS p. 277). In avoiding the Scylla of controversial presuppositions, Dworkin has played into the hands of the Charybdis of uncertainty.

> We need rights as a distinct element in political theory, only when some decision that injures some people nevertheless finds prima

> facie support in the claim that it will make the community as a whole better off on some plausible account of where the community's general welfare lies.... We want to say that the decision is wrong, in spite of its apparent merit, because it does not take the damage it causes to some into account in the right way and therefore does not treat these people as equals entitled to the same concern as others.
>
> Of course that charge is never self-validating. It must be developed through some theory of what equal concern requires....18

Rights are relative to the calculation of societies' preferences. If the utilitarian calculation is suffused with external preferences that are likely to asymmetrically harm a minority or special interest group, some trump right of "political" or "moral" independence should be extended to them to help them fight back. These contingent rights are the first rights that Dworkin argues for, although he does not discount the existence of other rights.

> It must be that a just society would recognize a variety of individual rights, some grounded on very different sorts of moral considerations than others.... I shall try and describe only one possible ground for rights. It does not follow that men and women in civil society have only the rights that the argument I shall make would support but it does follow that they have at least these rights and that is important enough. (TRS p. 272)

6. Hart's Criticism of "Neutral" Utilitarianism

We should remember that Dworkin instigates his enterprise as an attack on the "ruling theory" of law. Utilitarianism is the background justification for legislation in the ruling theory, therefore Dworkin's first step in Taking Rights Seriously is to show how a package of rights together with utilitarianism can help achieve the goals of the liberal. The emphemerality of rights is

problematic to the method Dworkin uses to discover what rights we have. H.L.A. Hart notes that if rights are a consequence of a majority vote or an unrestricted utilitarian calculation, then "... the theory as it stands cannot provide support for rights against a tyranny or authorative government which does not base its coercive legislation or considerations of general welfare on a majority vote".19 Hart suggests that the other extreme is not well served by Dworkin either. If the prejudices of society disappeared what would happen to the rights that once stood vigilant? Dworkin's reply is that his enterprise is focused on a particular problem and consequently a charge of narrowness is a description of his argument rather than a criticism.

> ...[A]n informal kind of utilitarianism has for some time been accepted in practical politics. It has supplied, for example, the working justification for most of the constraints on our liberty that we consider proper. But it does not follow from this investigation that I must endorse (as I am sometimes said to endorse) the package of utilitarianism together with the rights that utilitarianism requires as the best package that can be constructed. In fact, I do not. Though rights are relative to packages, one package might still be picked out over another as better, and I doubt that in the end any package based on one's familiar form of utilitarianism will turn out best. Nor does it follow from my argument that there are no rights that any defensible package must contain - no rights that are in this sense natural rights - though the argument that there are such rights and the explanation of what these are, must obviously proceed in a rather different way from the route I followed in arguing for the right to moral independence as a trump over utilitarian justifications.20

7. Dworkin's Anti-Utilitarian Rights

The rights that Dworkin has argued for are these "relative" anti-utilitarian rights, and therefore when he claims to take rights seriously, it is these particular rights to which we should attend. As indicated in the material quoted, Dworkin may hold other views about rights contemporaneously, and his adjudication theory may substantiate other claims of rights. However, since he offers the most complete explanation of these "anti-utilitarian rights", let us first confine our criticism of Dworkin's "rights" thesis to this species of "anti-utilitarian" rights.

II. DWORKIN'S THEORY OF HARD CASES

8. Strict Scrutiny

As Dworkin's rights thesis comes into play in the penumbral regions of legislation, an examination of a law that deserves "strict scrutiny"21 is in order. Reverse discrimination uses the suspect classification of race to achieve its goals. Are citizens deprived of equality before the law when their race determines whether they receive a burden or a benefit?

Allen Bakke and Marco DeFunis were non-minority students who were passed over for admission in favour of less successful applicants from 'target' racial groups. We recall that Dworkin intends his anti-utilitarian trump rights as individualized entitlements that can prevent the general benefit from asymmetrically harming the interests of citizens. Are citizens like Bakke the victims of "external" preferences? Dworkin's surprising position is that Bakke has no right, and that affirmative action or reverse discrimination is justified, not because minority students have a right to the benefit, but simply that the policy serves a proper social goal.

Our discussion of Dworkin's position on this issue will reveal some of the most pertinent criticisms of his "rights thesis". The concept of an "anti-utilitarian" right will prove to be in need of direction or definitional theory and this deficiency is filled by Dworkin's reliance on his notion of equality. Through Dworkin's application of his rights thesis to this problem of racial equalization, a deeper concept of distribution will

follow his outline of a concept of dignity as he will reject alternate possibilities such as "wealth maximization"[22] or "causal judgments"[23] from the social sciences.

9. Discrimination and Utilitarianism

In 1945, a black man was denied admission to a Texas Law School because of his race (TRS p. 223). The utilitarian justifications of such a policy would be loaded with "external preferences" and consequently the justification is unfair.

> The arguments for an admissions program that discriminates against blacks are all utilitarian arguments, and they are all utilitarian arguments that rely on external preferences in such a way as to offend the constitutional rights of blacks to be treated as equals. The arguments for an admission program that discriminates in favour of blacks are both utilitarian and ideal. (TRS p. 239)

Dworkin separates ideal arguments from utilitarian arguments, yet perhaps his "neutral" utilitarianism is not as utilitarian as it is ideal. Discounting external preferences from a calculation of utility is the only way to avoid "double counting", and preserve the egalitarian foundation of utilitarianism. This is a controversial argument Dworkin advances and it is time to challenge it. Dworkin asserts that the utilitarian calculation respects, and even ...

> embodies the right of each citizen to be the equal of any other. The chance that each individual's preferences have to succeed, in the competition for social policy, will depend on how important his preference is to him, and how many others share it, compared to the number and intensity of competing preferences.
> (TRS p. 234)

Granting each individual the opportunity to see his preference interact with the overall calculations of utility seems to be a precondition to the universal maxim of treating all individuals with equal respect and concern. Dworkin's distinctive conception of refurbished liberalism that purports to consider all perspectives without bending them to fit a single concept of the "good life"[24] seems to be a natural interpretation of egalitarianism with respect to democratic political decisions. On the analogy of a vote, why does Dworkin characterize "external"

> The point might be put this way. Political preferences, like the Nazi's preference are on the same level - purport to occupy the same space - as the utilitarian theory itself. Therefore, although the utilitarian theory must be neutral between personal preferences for push-pin and poetry, as a matter of the theory of justice, it cannot, without contradiction, be neutral between itself and Naziism. It cannot accept at once a duty to defeat the false theory that some people's preferences should count for more than other people's and a duty to strive as to fulfill the political preferences of those who passionately accept that false theory, as energetically as it strives for any other preference.[25]

In this quotation, Dworkin is responding to H.L.A. Hart's very sensible question as to who is counted twice in an utilitarian calculation that does not distinguish "external" and "personal" preferences. Dworkin believes that distinguishing two levels of utilitarianism may help us understand why Hart's point misses the mark. In a state of nature, we may deliberate about whether we wish Nazism, Facism, or neutral utilitarianism as our background

political justification. At this stage, consideration of the Nazi viewpoint or preference can be allowed.

> But, of course, the neutral utilitarian theory we are now considering is not simply a thin theory of that sort. It proposes a theory of justice as a full political constitution, not simply a theory about how to choose one, and so it cannot escape contradiction through modesty.26

Thick "neutral" utilitarianism no longer seems expansive enough to contain the pluralism refurbished liberalism purported to embrace. In fact, we now possess a very specialized restricted utilitarianism that meets the maxim G.B. Shaw included in the "Revolutionist's Handbook": "We must eliminate the Yahoo or his vote will ruin the Commonwealth."27 A calculation that asks everyone's opinion but then discounts all preferences that contradict a result that promotes "equal respect and concern" will not serve as an utilitarian justification for Dworkin's theory. Utilitarianism substitutes "Is it Popular?" for "Is it Good?", and simplifies ethics correspondingly. Although based on a premise of universality; that all are to count for one, and none for more than one (which Dworkin describes as an egalitarian argument, TRS, p. 234); the results of utilitarianism can be an anathema to egalitarianism. When Dworkin argues that racists will corrupt a calculation of utility with respect to whether black or white men will receive some scarce medicine, he writes:

> If utilitarianism counts these external preferences at face value, than it will be, from the standpoint of personal preferences, self-defeating, because other distribution of medicine will not be egalitarian in the sense defined... If external preferences tip the

> balance, then the fact that a policy makes a community better off in a utilitarian sense would not provide a justification compatible with the right of those it disadvantages to be treated as equals.

The meaning of "external" preferences is parasitic on the concept of "equal respect and concern" and the role of the background justification of utilitarianism is exhausted by the theory of equality. The calculation adds nothing to the justification of a political decision. Dworkin might as well place a paper shredder underneath the preference ballot box. The universality of the calculation, and the consequent appeal of utilitarianism with respect to its willingness to consider all preferences equally should be considered the main appeal of utilitarianism. Usually utilitarianism triumphs by default, insofar as it asserts very little save its decision-making formula. Utilitarianism does not submit much that can be controversial, and therefore does not offer the vulnerability of more "conservative" (according to Dworkin's conception) political theories. Cautiously correct political decisions are possible with the mechanism of utilitarianism as the appeal of the theory has a strong pedigree. Egalitarianism is an entire range of problems in itself, and its deceptive simplicity when conceived as universality disappears when equality becomes a basis for normative and distributive judgments. The circularity of Dworkin's argument must eventually be brought to a stop, and once at a standstill, the problem of equality of respect and concern blocks every exit.

Utilitarian decisions are thought to be fair if the calculation is carried out with the preferences of all taken into consideration. Dworkin's charge that "external" preferences corrupt the calculation displaces the meaning of fairness from the orderly operation of the calculation to the definition of the uncontaminated calculation. If the government imposed an external preference insofar as it refused to collect the preference ballots of blacks, then we would have, on tautological grounds, a utilitarian calculation that was unfair. However, the fact that a utilitarian calculation includes preferences that Dworkin would call "external" does not, on utilitarian considerations, entail unfairness. If we excluded these external preferences in our calculations, that on utilitarian grounds would be unfair. Dworkin admits that we will not always be able to distinguish "external" from "personal" preferences. "But of course political, altruistic and moralistic preferences are often not independent, but grafted on to the personal preferences they reinforce" (TRS p. 235). Therefore it will be difficult to say what an "uncontaminated" utilitarian calculation will yield. Since Dworkin calls such a restricted utilitarianism the "... only defensible form of utilitarianism", we must conclude that utilitarianism is either unintelligible or indefensible. This is problematic not only for utilitarianism, but for even understanding Dworkin. "If utilitarianism is suitably reconstituted so as to count only personal preferences, then the liberal thesis is a consequence, not an enemy of that theory"

(TRS, p. 236). In other words, understanding what was wrong with unrestricted utilitarianism was one of the more definite routes to understanding the positive content of Dworkin's refurbished liberalism. Setting that aside for the moment, we are now able to see that Dworkin's idea of a package of trump rights with utilitarianism is a provisional option that leaves little work for the "ruling theory". "...[I]t seems to me that utilitarianism, as a general theory of either value or justice, is false, and that its present unpopularity is well deserved."[28] For Dworkin, the justification or the fairness of a policy or political decision will have little to do with the achievement of any concept of utilitarian gain. Therefore when Dworkin charges that utilitarianism engages in a form of "double counting" when the "external" preferences of citizens are counted, he is not making a criticism of utilitarianism that attends to the operation of the theory on its own terms, but rather criticizes the utilitarian's failure to discriminate amongst the conceptions of the "good" it embraces to designate the general interest, a failure he considered a virtue of refurbished liberalism.

10. "Thick" Utilitarianism

It should be noted that this criticism of utilitarianism does not turn on the numbers of preferences reported. Dworkin maintains that Hart is mistaken in using the analogy of a vote because ...

> ... 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 (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 peoples' preferences in the giant calculation.29

From this, Dworkin points out that his image of double counting was supposed to "... summarize the argument, not to make it". The image refers to non-egalitarian motivations being included in the calculation of utilitarian justifications, not to any actual double counting.

Dworkin has allowed his "thick" utilitarian theory to come into open conflict with his "thick" egalitarianism. What begins as egalitarianism accommodated within the "ruling theory of utilitarianism" soon turns into a disjunctive choice between egalitarianism and utilitarianism. The criticism of "contamination" of utilitarianism is dependent on the intelligibility and acceptability of Dworkin's axiomatic concept of equal respect and concern. Is the basis of his criticism of utilitarianism at the first level Dworkin distinguishes?

> We can therefore think of the content of rights at two different levels of analysis. When we are engaged in constructing a general political theory, we must consider what package - what general justification for political decisions together with what rights - is most suitable. This is the characteristic exercise of moral and political philosphers who must, so far as possible, think of political theory as a whole. But on the other occasions, we must take the general scheme of some political theory as fixed and consider what rights are necessary as trumps over the general background justification that the theory proposes.30

These two levels of analysis cannot be kept apart when the concern for equality urges the modification of the utilitarian

calculation. We need a separate argument for the advantages of using equality as the basis of our scheme of political justification. If we follow Dworkin and say, "... liberalism, conceived as equality, sharply limits the use of utilitarian arguments and justifies rights to distinct liberties provided in our Constitution..."[31] we have abandoned utilitarianism. If we construe utilitarianism as a tool for decisions that are made after the liberties guaranteed by equality are in place, we are not understanding that "thick utilitarianism" is incompatible with an axiomatic ideal argument. Armed with a vague concept of "the good" which does not cash out into "correct by concensus", citizens can now introduce uncertainty into the justification of any law that negatively affects them.

Dworkin's scheme of introducing rights to equality as a means to mend the defects of utilitarianism is a deception that introduces an ideal "first level" political theory based on equality. As Dworkin himself argues "...[u]tilitarianism must claim truth for itself and therefore must claim the falsity of any theory that contradicts it".[32] Utilitarianism is skeptical of any "rights" distinct from the general interest, and this skepticism is manifested in an indifference to the truth or appeal of any concept of the good. Restricted utilitarianism is a contradiction to this fundamental aspect of utilitarianism, and the survival of the hybrid is dependent solely upon the success of the "ideal".

Without much attention paid to the content of what constitutes treating people with "equal respect and concern",

Dworkin's rights theory is promiscuous, adopting any cause that claims to be a victim of insult. Responding to H.L.A. Hart's charge that restricting a person's liberty will be interpreted as a denial of treatment as an equal, Dworkin writes:

> But once again this ignores the distinction I wish to make. If the utilitarian justification for denying liberty of sexual practice to homosexuals can succeed without counting the moralistic preferences of the majority in the balance (as it might if there was good reason to believe what is, in fact, incredible, that the spread of homosexuality fosters violent crime), then the message of prohibition would, indeed, be only the message Hart finds, which might be put this way: "It is impossible that everyone be protected in all his interests, and the interests of the minority must yield, regrettably, to the concern of the majority for its safety." There is, (at least in my present argument) no denial of treatment as an equal in that message. But if the utilitarian justification cannot succeed without relying on the majority's moralistic preferences about how the minority should live, and the government nevertheless urges that justification, then the message is different, and in my view, nastier.33

The indifference of utilitarianism to the plight of minorities is a "textbook" criticism of the "ruling" theory. Utilitarianism is neutral with respect to how the distribution of happiness is to proceed; the formula of the greatest good for the greatest number can admit a host of distributions. As the classical utilitarian Henry Sidgwick wrote:

> The principle which most utilitarians have either tacitly or expressly adopted is that of pure equality - as given in Bentham's formula "everybody is to count for one, and nobody for more than one". And this principle seems the only one which does not need a special justification for, as we saw, it must be reasonable to treat any one man in the same way

> as any other, if there be no reason apparent for treating him differently.

Sidgwick continues in a footnote -

> It should be observed that the question here is as to the distribution of happiness, not the means of happiness. If more happines on the whole is produced by giving the same means of happiness to B rather than to A, it is an obvious and incontrovertible deduction from the utilitarian principle that it ought to be given to B, whatever distribution of the means of happiness this may involve.[34]

A person, regardless of his race or minority status, can only contribute a certain amount of pleasure and pain to the utilitarian calculation. Therefore, will the fact that a person belongs to a minority alter the value of his pains and pleasures in the utilitarian calculation? Like the case of excluding "external" preferences, the utilitarian calculation will not allow a ratio of special consideration into its calculation unless we are provided with what Sidgwick calls a "reason for treating him differently". The content of such reasons have been the substance of attempts to construct anti-utilitarian rights. Formal universality is built into utilitarianism, but no distributional rights based on egalitarian notions are accepted as compatible and certainly not derived from such universality. Reasons for treating people differently are difficult to promote within the thorough generality of utilitarian moral theory. The idea that individualized rights are "nonsense on stilts" (TRS Intro p. vii) derives from the conviction that in all morally relevant respects, people are the same. Morals, however, are always relative to the greatest happiness. If we can greatly benefit the vast majority

through an unequal burden asymmetrically placed on a select few, the utilitarian will not object on the basis of equality. For the utilitarian equality operates ceteris paribus. If a utilitarian allowed equality to trump maximum happiness, he would need a theory other than utilitarianism to determine when the trump should take place. Anti-utilitarian rights have been created by some theorists to supply this need. A bedrock of how these rights are justified is necessary since they purport to be valid despite what is taken as the general interest or "greatest happiness". Dworkin must defend his rights thesis on the basis of these challenges.

11. The 'Contested Concept' of Dignity

We are reminded that Dworkin's rights thesis is wanting a theory of dignity at this juncture in the argument. Dworkin avoids arguing for any of the classic liberal anti-utilitarian rights, yet uses the Rawlsian notion of equality to pedigree and contextualize his refurbished liberalism. Rawls believes that in a state of ignorance hypothetical citizens would opt for equality and confirm their choice with an unanimous vote. Dworkin extends no such fiction to his readers, yet predicates his rights theory with the same confidence. Rawls' notion of equality is not formal universality, but in fact a distributional scheme. Dworkin must also imply some distributional notion of equality or else he will not be able to distinguish the preferential treatment programs he defends. The scheme of distributive justice will follow an egalitarian ideal. However, until we know what equality in terms

of respect, concern and dignity entails, the "rights thesis" stalls in the doldrums of circularity, waiting for the operative concept to be defined.

To clarify this recurrent poverty in Dworkin's theory, let us suggest that a comprehensive list of what dignity means is not required. If Dworkin supplied us with such a roster, we could simply use the list and dispense with the controversial label. For reasons of comprehensiveness, we should probably reject such a list. The important idea of a premise like dignity or the "reception of equal respect and concern" is that it will continue to be relevant even in unpredictably novel situations. Some foundational direction will be implied if not stated by any theory of justice. The problem with Dworkin's reliance on dignity is that the subjective characterizations of the concept allows too much latitude, and introduces uncertainty that should not underpin something as important as individual rights. Although we can allow a measure of generality to the grounding of rights, the concept that holds that pivotal position should not be an "essentially contested concept".35 In a concept that is first found in Dworkin's "Hard Cases" (TRS pp. 81-131) and developed in "Law as Interpretation",36 Dworkin indicates that the difference between the way he sees his theory, and the way critics attack it is like the difference between "suggestive" and "vague". These contested concepts "... are not incomplete, like a book whose last page is missing, but abstract, so that their full force can be captured in a concept that admits of different conceptions..."

(TRS, p. 103). In "Essentially Contested Concepts"[37] W.B. Gallie asserts three paradigmatic features of these disputes. First, no method or model is available to prove one side of the argument either right or wrong. Secondly, each side sees its side as the only right answer. Thirdly, neither side is aware that the concept is essentially contested. Some activities suit essentially contested concepts; literature, law, and aesthetics all involve an object or activity that is structurally complex enough to sustain at least two polarized opinions. If each side of the controversy was aware that the contest was essentially unresolvable, the passion may dissipate from the debate and the polarized opinions would blend into a mediated mix, or end their discussion to retire to different camps. This much said about contested concepts, why would Dworkin wish his "rights-thesis" to depend on such an idea?

12. Statutory Construction

Returning to "Reverse Discrimination" (TRS Ch. 9), how will we resolve the interplay of contested "conceptions" with Dworkin's theory?

> It is, in fact, part of the importance of DeFunis' case that it forces us to acknowledge the distinction between equality as a policy and equality as a right, a distinction that political theory has virtually ignored. (TRS, p. 226)

We have a test case fully loaded with contested concepts, and no decisive and explicit legislation that limits the outcome. This question is now less controversial than when Dworkin wrote these articles. Canada's Charter of Rights and Freedoms explicitly

protects any legislation "... that has as its object the amelioration of disadvantaged persons or groups".38 Let us suspend that consideration and return to Dworkin.

> But the legal arguments made on both sides show that neither the text of the Constitution nor the prior decisions of the Supreme Court decisively settle the question whether, as a matter of law, the Equal Protection Clause makes all racial classifications unconstitutional. The clause makes equality a test of legislation, but it did not stipulate any particular conception of that concept.
> (TRS, p. 226)

Legal propositions are interpreted with "techniques of statutory construction". This has the sound of something more rigid and designated than is the case, suggests Dworkin, and "...lawyers must not treat legal interpretation as an activity sui generis".39 Like works of art, laws demand several levels of contestable analysis. "...[A] theory of interpretation must contain a sub-theory about identity of a work of art in order to work".40 In the face of these multiplying essentially contested concepts, Dworkin writes, "... of course they are subjective. But it does not follow that no normative theory about art is better than another, nor that one theory cannot be the best that has so far been produced."41 It is appropriate that Dworkin couches his discussion of "statutory construction" in the terms of theories about art.

13. Hercules and One Right Answer

> Nevertheless I insist that the process, even in hard cases can sensibly be said to be aimed at discovering, rather than just inventing the rights of the parties concerned, and that the political justification of the process depends upon the soundness of that characterization.
> (TRS, p. 280)

Dworkin challenges "... the myth that there is one right answer..." (TRS, p. 290) by inventing Hercules the ideal judge. Constrained by a complete index of legal materials but vital in the exercise of political morality, Hercules cuts down competing conceptions like so many heads of the Hydra. The judge must be strong, deciding "... on the demythologized analysis of rights I am using, ... that an individual is entitled to protection against the majority even at cost to the general interest" (TRS, p. 146). If Hercules could subsume the roles of the all-too-human judges we employ, he could produce a stream of precedent, diverting it dialectically (perhaps flushing the Aegean stables) through competing conceptions of political morality until he had a pool of settled meaning disturbed only by short riverlets fed by ephemeral disputes. The stasis is achieved by the equilibrium of political morality, not by any pretense of being what the "lawmakers intended".

> Hercules must suppose that it is understood in his community, though perhaps not explicitly recognized, that judicial decisions must be taken to be justified by arguments of principle rather than arguments of policy. He now sees that the familiar concept used by judges to explain their reasoning from precedent, the concept of certain principles that underlie or are embedded in the common law, is itself only a metaphorical statement of the rights thesis. He may henceforth42 use that concept in his decisions of hard common law cases.
>
> (TRS, 115, 116)

The judge with mythical powers asserts an ideal and epitomizes the role of the judiciary in Dworkin's example of a "Natural Law"43 theory. A problem with any theory of natural law is that it will

prove too inflexible to accommodate the phenomena, or lapse into irrelevancy from indeterminancy. As we can anticipate, Dworkin's theory leans into the latter category. He has Hercules recognize rights that "justice requires"44 even to the point where mistakes can be made by activist judges in pursuit of that ideal. "But of course, though we as social critics know that mistakes will be made, we do not know when because we are not Hercules either" (TRS, p. 30). Hercules issues a challenge to other theories of interpretation from the perspective of an ideal observer.

We note the appropriateness of the analogy to aesthetic judgment for Dworkin's theory of adjudication because his naturalism theory corresponds nicely to Tolstoy's "ideal observer" argument.45 As a metaphorical device, the "ideal observer" argument allows a critical perspective to focus a deep background of constitutive theory. Any interpretation of a contested concept will require a theory of interpretation, and the ideal judge Hercules is Dworkin's contender.

14. Discretion and Conventionalism

A common belief is that judges are bound by the laws they administer and that interpretation involves only the minor discretion of application. Richard Nixon believed that some judges abuse their province of responsibility, and defended his choice of judges for the Supreme Court on such grounds.

> These men, he said, would enforce law as it is, and not "twist or bend" it to suit their personal convictions as Nixon accused the Warren Court of doing. (TRS, p. 131)

Dworkin describes this fidelity to the "law as it is" as conventialism.46 The problem for the theory is that it dictates a result only in simple cases, and therefore does not articulate its differences with naturalism.

> But in these "hard cases" the difference between the two theories of adjudication cannot be that one defers to the legislature's judgment while the other challenges that judgment.47

Bakke's case will not allow a simple appeal to precedent. Although the Supreme Court judges that decided against the race-conscious admission quota at the University of California (Davis) based their decision on the existence of a statute forbidding discrimination on the basis of race,48 Dworkin believes that they never considered that decision to be mechanically required. Nathan Glazer suggested that Dworkin made a "clear mistake"49 by believing that only a naive theory of statutory construction required a decision against the program of preferential admissions. Title VI states

> No person in the United States shall, on the grounds of his race, color, or national origin, be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.50

The fact that the judges based their decision on Title VI of the 1964 Civil Rights Act does not entail that the judges were bound by its clear meaning. The fact that they requested briefs indicates the controversality of the issue.

> I do not think there is a defensible interpretation of Title VI that aids Bakke. The Supreme Court may disagree, but if so, it will not be because it accepts the naive

> interpretation that forecloses the issues I discussed. It will be in consequence of the court's own judgment on these issues.51

The poverty of positivism, which separates law as it is from what it ought to be, is that we often cannot know what the law is without considering what the law should be. Conventionalism will not be of much use for adjudication in hard cases.

15. Author's Intention

A rival interpretive hypothesis is the idea of the "author's intention": Dworkin is hostile to the position when it acts as a subterfuge. He claims this happened in debates over the equal protection clause:

> Conservative lawyers argued steadily (though not consistently) in favour of an author's intentions in interpreting this clause, and they accused others, who used a different style with more egalitarian results, of inventing rather than interpreting law... the great legal debates would have been more illuminating if it had been more widely recognized that the reliance on political theory is not a corruption of interpretation, but part of what interpretation means.52

Let us advocate the conservative position to elaborate Dworkin's assertion "... that there can be no useful interpretation of what that clause means independent of some theory about what political equality is and how far equality is required for justice...".53 The "author's intention" is an "intuitive notion" (TRS p. 159) that seems appropriate when interpreting legislative meaning. In a way it resembles the "intuitive notion" of Rawls which Dworkin recommends as a pragmatic exercise when attempting to abstract principles of justice. The "legislator's intention" imposes a

veil of ignorance over the future, so that unforseeable developments should not be settled by appeal to the terms contained in the statute. As an historical fact, the framers of the Constitution and the creators of the equal protection clause would probably have not forseen the possibility of a minority race-conscious admission policy. Therefore, can we defend the program on the basis of a justificatory principle that ties its authority to the meaning of the equal protection clause? The "author's intention" thesis suggests that we remain skeptical. Through the "author's intention" theory the conservative may vindicate his views on whether the equal protection clause creates rights to distributional equality. However, an argument based on the "author's intention" school is available to liberals, or egalitarians, as well. The Supreme Court decision against the racial quotas at the University of California in a large measure rested on Title VI of the Civil Rights Act.[54] A liberal could argue that if the act was intended to combat discrimination, it is paradoxical that Title VI now impedes minorities' progress toward substantial equality. In fact, Dworkin argues that "a correct construction" would take into consideration the "legislative history" of Title VI.[55]

> Senator Hubert Humphrey, the floor manager of the bill, told the Senate that "the purpose of the bill is to make sure that the funds of the United States are not used to support racial discrimination... Thus Title VI is simply designed to ensure that Federal funds are spent in accordance with the Constitution and the moral sense of the nation (110 Cong. Rec. 6544).[56]

The "author's intention" method of interpretation is not partisan in the way Dworkin leads us to believe, though understandably it fails to support some of the more expansive entitlements that egalitarians argue for in the name of equality. The political bias of the theory is not intrinsic to its method, and in fact, its applicability to both sides of this debate over "equality" suggests its defects lie in ambiguity, not political presuppositions.

In our characterization of the "author's intention" school of interpretation, the emphasis was on the facility of the theory for discrediting certain extensions of the meaning of propositions. Dworkin does not share this interpretation.

> These theories must suppose, on the present hypothesis, that what is valuable in a work of art, what should lead us to value one work of art more than another, is limited to what the author in some narrow and constrained sense intended to put there.[57]

Dworkin believes the "author's intention" theory of interpretation is "narrow and constrained" because it fails to recognize that implicit in the demarcation of an "author's intention" are some concurrent prnciples of criticism.

> Interpretation becomes a concept of which there are competing conceptions.... The hypothesis denies, moreover, the sharp distinctions some scholars have cultivated. There is no longer a flat distinction between interpretation, conceived as discovering the real meaning of a work of art, and criticism, conceived as evaluating its success or importance.[58]

The interdependence is called "reversibility"[59] insofar as problems with one's theory of interpretation will be reflected in one's theory of art and vice versa. Dworkin believes that this

"reversibility" contradicts any pretention the "author's intention" theory will have for a claim to being "... a neutral observation preliminary to any coherent evaluation".[60] Therefore, the interpretation of "author's intention" as a limiting device upon arguments that purport to draw out the meaning of propositions is misguided. Whether a limit is drawn or a derivation upheld, the consequence is an act of substantive political theory.

The consequence of this argument against any "neutral" method of determining the intent of an ambiguous law or statute is to reintroduce the ubiquitous political morality problem. The argument takes a skeptical stance towards assertions that claim they are required by the "interpretation" of some ambiguous proposition. This "anti-neutrality" premise is useful for Dworkin when he attacks positions resting on such assumptions. However, it works against his theory of adjudication when we see how Hercules will tackle hard cases.

16. The Poverty of Positivism

Dworkin's attack on positivism or "classic theories of adjudication" (TRS, p. 118) successfully argues against the idea that "... a judge follows statutes or precedent until the clear direction of these runs out, after which he is free to strike out on his own" (TRS, p. 118). To fulfill the promise of his attack on positivism, he must assert a theory of adjudication that does not, as he claims judicial discretion does, "... lead nowhere and tell nothing" (TRS, p. 45). Hercules, the embodiment of Dworkin's

adjudication theory, provides the content that "classic" theories lack. Generally, Hercules decides cases on the basis of "... principle, not policy..." (TRS, p. 84). The thesis is supported by a presupposition of judicial competence, insofar as Dworkin believes that principles do not "... rest on assumptions about the nature and intensity of different demands and concerns distributed throughout the community" (TRS, p. 85). A judge is insulated from the hydraulics of pressure groups and therefore is not competent to make these assessments of competing policies. The concern of competence suggests that given a distinction between collective goals, or policies, and individualized entitlements, or rights, the judiciary should consider the latter both its responsibility and area of competence. The judges' responsibility is to protect and define our legal rights, which are a "... function, though a very special function, of political rights" (TRS, p. 105). In introducing us to Hercules, Dworkin suggests that he has created this "super human" (TRS, p. 105) to construct theories around the "contested concepts" that legal argument "turns on" (TRS, p. 105). The examples he gives of these concepts are the "... intention or purpose of a particular statute ... and the concept of principles that underlie or are embedded in the positive rules of law" (TRS, p. 105). Both of these contested concepts are "bridges" between the judges and the political scheme of which they form a special part.

> We may grasp the magnitude of this enterprise by distinguishing, within the vast material of legal decisions, that Hercules must justify a

> vertical and horizontal ordering.... The constitutional structure occupies the highest level, the Supreme Court and perhaps other courts interpreting that structure the next.... The horizontal ordering simply requires that the principles taken to justify a decision at one level must also be consistent with the justification offered for other decisions at that level. (TRS, p. 117)

Hercules must excogitate a "... theory about what the precedent itself [emphasis mine] requires ..." (TRS, p. 118) Dworkin's strategy for achieving this "... requires judgments about political and moral philosophy ..." (TRS, p. 117). This is the dialectical nature of Hercules' powers of adjudication at work. Given two conflicting theories of interpretation, Hercules "... must turn to the remaining constitutional and settled practices to see which of these two theories provides a smoother fit [emphasis mine] with the constitutional scheme as a whole" (TRS, p. 106).

> Hercules will then use his theory of dignity [emphasis mine] to answer questions that institutional history leaves open. (TRS, p. 128)

The vital operator is clearly revealed again. The theory of dignity, what it means to treat a person with equal respect and concern, again occupies a pivotal point in Dworkin's analysis.

17. Smooth Fit

Dworkin's refutation of politically "neutral" theories of interpretation will now be useful to criticize his concept of "fit" or "smoother fit". The principles of organization that cohere the mass of legislation and precedent will not be neutral since interpretation will demand a position on the "contested concepts" contained in the material under scrutiny. The

principles cannot be dictated through an assessment of which "underlie" or are "embedded" over other principles which may "float"; an interpretation of the connection between principles and the decisions they figure in will not reveal any simple relation suggested by Dworkin's metaphor. It is part of Dworkin's distinction between "rules" and "principles" that the precise influence of a principle remain controversial. "Principles... incline a decision one way, though not conclusively, and they survive intact when they do not prevail" (TRS, p. 35). If we find that a principle like "No man may profit form his own wrong" (TRS, p. 26) helps organize a body of precedent for ten years, but then no longer seems applicable for a season of cases, the principle is not refuted. "Indeed, it hardly makes sense to speak of principles as being 'overruled' or 'repealed'. When they decline they are eroded, not torpedoed" (TRS, p. 40). If an argument arose over when the principle came back into effect, the procedure for settling such a dispute is unclear. "The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time" (TRS, p. 40).

Dworkin may object that I have conflated "principles of interpretation" with "principles", however, I believe they are functionally equivalent. When interpreting a legal rule that is "open textured" or ambiguous, we look for some method of resolving the confusion. An argument for an interpretation, given the imperative to treat like cases alike (which Dworkin describes as

"articulate consistency" (TRS, pp. 87-89), will yield a principle of interpretation. Although that principle will be subject to the vagaries all principles endure, the effect is to achieve uniformity within the practice. If an activist judge resolves an ambiguous law in a certain decision in a particular way, any sufficiently similar case must resolve the ambiguity the same way, otherwise the judge is neglecting his "political responsibility" (TRS, p. 87). This doctrine of "articulate consistency" must not be exaggerated. The "... force of a precedent escapes the language of its opinion" and therefore no judge is required by previous precedents to reproduce the earlier decision. "... [H]e must limit the gravitational force of earlier decisions to the extension of the arguments of principle necessary to justify those decisions" (TRS, p. 113). If a judge is to be true to the imperative to decide on the basis of "principles not policies", he is impelled to regard any precedent decided on the grounds of policy as having no gravitational force (TRS, p. 113). Dworkin asserts this as a requirement of fairness because of the division of duties within his theory of justice. He writes that "... a responsible government may serve different goals in a piecemeal and occasional fashion..." (TRS, p. 114) but judges may not. Principles figure in Dworkin's theories as formulae for resolving ambiguous and inexplicit rules within the procedural requirements of fairness. They are canons of interpretation that are built up through the practice and application of the "rights-thesis". The judge must be free to disregard policy decisions if he is to

achieve the coherent adjudication theory that distinguishes Herculean decisions. "The law may not be a seamless web but the plaintiff is entitled to ask Hercules to treat it as if it were" (TRS, p. 116). The web of principle "... will both tutor and constrain..."[61] the process of adjudication that aims to discover what rights are to be taken seriously in this decision.

The requirements of "smooth" institutional fit have been traced back to the Constitution. If Title VI does not require a decision for Bakke, but only that the programs be in agreement with the aims of the Constitution, then "... since the correct construction of the Constitution turns on issues of political morality, the correct construction of Title VI turns on those same issues".[62] The rise to the Constitutional level in the vertical structuring of the case is important because of authority of the decision at a Constitutional level.

> If Congress disapproves a court decision interpreting a Congressional Statute, it can always reverse the decision by changing the Statute. It cannot reverse a decision that interprets the Constitution.[63]

Once a decision on the proper interpretation of equality enshrined in the Constitution is developed, we will be able to reexamine the institutional history and perhaps revise our decision about what "... the precedent itself requires..." (TRS, p. 118). If our principles of interpretation are adjusted it may result that the Bakke case could be decided on a "correct construction"[64] of institutional history. The focus must remain on the key issues of political morality because the questions of "institutional

fit" are parasitic on the resolution of the moral issues involved. The distinction between judicial reasoning and political argumentation grows very slight in Dworkin's theory.

The fault of conventionalism was a muteness in the face of hard cases; Dworkin's theory has no such "poverty". However, the inability of his theory to discriminate amongst appealing options merges as an even more urgent problem. The frank admission that the law is ambiguous is the legal positivists' option in a case like Bakke. Reasonable men could be on both sides, or the many possible sides of the issue. Dworkin does not "... respect these modest sentiments..." (TRS, p. 279). Shortly we will examine his "Herculean" arguments that "discover" the "one right answer", but first let us consider what the positivist may do in a situation like Bakke's. H.L.A. Hart remarked, "We can say that laws are incurably incomplete and we must decide the penumbral cases rationally by reference to social aims".65 Given the argument of judicial competence, which Hart may have accepted, or at least found in keeping with the positivist platform, the options would be to defer to the legislature, or decide the case by reference to social goals, with a frank avowal of the discretion involved. This is assuming that the "intent" of relevant legal materials did not dictate any other decision, for unless the assumption holds, then Bakke would not have been a "hard" case.

Dworkin makes some impressive arguments against Justice Rehnquist's statutory construction in Steelworkers v. Weber.66 However, Dworkin's success was not sufficient to capsize the

plausibility of the "author's intention" theory of statutory construction. Rehnquist's hubris in giving "...effect to the intent of Congress..."[67] did make Dworkin's job simpler. Dworkin is accurate in this suggestion:

> It seems unlikely that Congress would now pass legislation, either explicitly condoning or explicitly forbidding affirmative action in employment at least so long as that issue remains politically as volatile as it is now.[68]

The idea that Congress wished to wash their hands of the necessity to specify what they agreed to generally mitigated against any neutral "drawing out" of the relevant legislation. Dworkin successfully attacks that fiction. However, Rehnquist's argument was not confined to the descriptive issue of 'intent'. Together with a foundation argument of "political morality" to the effect that "racial" allotment of burdens and benefits is wrong, the opinion is stronger. Without considering Rehnquist's argument in combination with the foundational argument attending to the political immorality or morality of reverse discrimination, Dworkin is only repeating an argument he has already won. He will have recourse to "intent" or purpose when he takes a normative stance in defense of the University of California. That aspect of his argument will arise later. It is interesting that the concept of "demonstrable authors' intent", positivism and "smooth fit" are all lapsing into directionlessness at the juncture that conventionalism stopped at. Dworkin's assessment of the governments prudential concerns for remaining absolved of specific

intention on the Bakke case may be the best interpretation of the "author's intention". No system of adjudication will be able to reach a neutral decision on the relationship of affirmative action to the contested concept of equality. There seems to be no contradiction inherent in the "author's intent" theory claiming that in a political football case like Bakke, there was no legislative intent and that the theoretical conclusion echoes the positivist. Dworkin is no longer well placed. Conventionalism, positivism and the "author's intention" schools of adjudication can retreat to a skeptical position of discretion, and can have "statutory construction" suitably qualified within such a guarded position. Dworkin has taken a more extreme position in virtue of his criticisms of the competing theories. His "naturalism" must take a side on one end of a very "contested concept" and argue it as if it did not require discretion. His Herculean considerations of "smooth fit" have been exhausted by the province of the less ambitious theories he rejects. How will Dworkin salvage the policy of racially disadvantaging non-minority students in the pursuit of equalization? His defense of judicial activism must result in a substantive decision, and unlike his competitors, recourse to legislative classification is not an option.

18. The Forum of Principle

Responding to H.L.A. Hart's defense of positivism, Dworkin writes:

> If we shake ourselves loose from this model of rules, we may be able to build a model truer to

> the complexity and sophistication of our own practices.69

Dworkin wants to break free of the associated attempts to reconcile judicial review with democracy.

> Should we really be embarrassed that in our version of democracy an appointed court must decide some issues of political morality for everyone? ... Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply issues of political power.... these officials are, as a group, extraordinarily sensitive to the issues of political and moral principles latent in these controversies; ...
>
> Learned Hand warned us that we should not be ruled by philosopher-judges even if our judges were better philosophers. But that threat is and will continue to be a piece of hyperbole.70

Learned Hand may exaggerate, yet in the Bakke case, any position, save skepticism, asserts a legislative conclusion. While judges with modest theories of adjudication will find distress in this situation, Hercules will be in his element. Clearly, the forum of judicial review has made Herculean decisions of political and not so political morality; as H.L.A. Hart described Roe vs. Wade,71 the famous case protecting abortionists:

> It achieved at a single judicial blow more than the last of eight English parliamentary struggles over a period of fifty years secured in any country. And thus was done in the name of a right of the mother to privacy which is nowhere mentioned in the Constitution but was read into the due process clause as a fundamental liberty.72

Conventionalists, positivists and even legislative intention theorists would be uncomfortable with such an innovation, yet

Hercules does not favour deferring the issue to the democratic process.

> Do the best principles of political morality require always to be served? The question answers itself.... It cannot refer the issue whether unborn infants are people to the majority, because that simply counts their moral opinions as providing a justification for legislative decisions, and this is exactly what our theory of equal representation forbids. (Nor, for the same reason, can it either delegate that question to the legislature or accept whatever answer the legislature itself offers.)[73]

Dworkin's Herculean judge must possess great skills to be equal to the responsibility of his position. The democratic process is not supreme in his political theory, and he feels no compunction to defer to its wisdom in cases turning on "contested concepts". If the individualized right to "equal respect and concern" is perceived to be at issue, wide and unchallenged powers of authority enable the judge to secure that right even at cost to, and in the face of hue and cry from, the majority. His "equal representation" is not concerned with the actual results of the majority's deliberation, but with the concept of what those deliberations would be if cleansed of "external" preferences. Naturally, Hercules will not be able to function with the modest skepticism that enervates the decisions of his rivals. Positivists, conventionalists and "intent" theorists of adjudication have the option of deferring to the legislature in hard cases that turn on "contested concepts". Hercules must perform; he has no discretion to seek deferential refuge in skepticism.

What has happened to the political neutrality that led an inspired Dworkin to isolate his conception of refurbished liberalism from all other ideologies? We had a right to be suspicious when Dworkin claimed that liberalism would not impose some conception of the good life. As Dworkin himself writes, "[t]he flight from substance must end in substance".74 The rule of judges may be preferable to the "tyranny of the majority" rife with "external" preferences. Judges are "extraordinarily sensitive" to the issues of moral principle, but are they any more neutral? The purpose of an adjudication theory is to settle the interpretation of "contested concepts", not to compound and amplify the competing sides of the concept. A judge's sensitivity to the moral and political ramifications may simply multiply the issues he sees needing resolution in a case, not necessarily advance the decision procedure in the process. Expanding the responsibilities of the judge to necessitate inclusion of the moral and political issues of a case may paralyze rather than "tutor and constrain" a judge's deliberations. Escalating the complexity of a decision may simply multiply the perceived injustices involved in a compromise.

> Academic lawyers do no service by trying to disguise the political decisions this balance assigns to judges. Rule by academic priests guarding the myth of some canonical original intention is no better than the rule by Platonic guardians in different robes.75

We can join Dworkin in censuring a rhetorical device of claiming authority through a deceptive reference to intent, yet his

alternative demands no less mythical robes, or loinclothes, as the case may be. Describing the work of a judge in an analogy of a house full of novelists collaborating chapter by chapter on a book, Dworkin writes

> Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions and practices are the history; it is his job to continue the history into the future through what he does that day. He must [Dworkin's emphasis] interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine according to his own judgment what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.76

Dworkin's anti-neutrality stance that he found so comfortable in his attacks on positivism and the "author's intent school", now returns to cramp his style. When he uses phrases like "must interpret", we can infer some ability to fail at interpretation. However short of self-contradiction, ruled out by the principle of "articulate consistency", we have little indication of what this failure could be. A judge could even reject the majority of precedent relevant to the instant case, by employing the skeptical arguments Dworkin urges against the "majoritarian" position in his discussion of democracy. Given the flexibility of "constitutive"77 and "derivative"78 political decisions, even the appearance of self-contradiction could be abstracted into convergence. Regardless, Dworkin's reliance on the formal properties of "principles", "rules", and "vertical"

ordering gives only the illusion of content. For a theorist who spent so many hours attacking "mechanical" jurisprudence, he should have been vigilant of Hart's aphorism "logic is silent on how to classify particulars... and this is the heart of judicial decision".[79] If the characterization of a judge's political morality will determine his conditions of relevancy for the organization of precedent and institutional history, then "smooth fit" is not the type of criterion that will be articulate enough to support a charge of inconsistency. Impelling a judge to feel the pressure of what the "... point or theme..." of the practice is, when the judge is responsible for that determination, is like hoping to stop a runaway horse by having it trample on its own rein. Dworkin wavers on the brink of positivism when he holds the authority of law as somehow discoverable in the accumulated experience of the system. His skepticism keeps him on the edge, and his "legal realist" arguments battle with this "principled picture" of the law. H.L.A. Hart reminds us of Roscoe Pound's[80] massive tract on jurisprudence that attempted to "... search in the existing system for a principle or principles which singly or collectively will both serve to explain the clear existing rules and yield a determinate result for the instant case".[81] The similarity with Dworkin's ambition for Hercules is probably not accidental. Pound was eighty-nine when his labyrinth was published, and perhaps too tired to contemplate the additional labours required by his vision. Dworkin has wisely conceded the mythical nature of his centrepiece and perhaps that indicates the

role of the "rights thesis" in his writings. Dworkin wants to be fair to the phenomena, which requires imposing complexities, and yet wishes to share the applicability and usefulness of other theories that are less ambitious. Legal theory has been constricted into roughly two polarities of possibility.

> We must stand with the positivists who insist that it is always just a question of fact what the law is. Or, we must fly with the most extreme of the natural lawyers, who say that there can be no difference between principles of law, and principles of morality. But both of these extreme pictures of law are wrong.82

Dworkin offers a synthesis that shows an interconnection between the role of moral principles and principles of judicial interpretation. He hopes that the interpretative enterprise is distinguished from "pure moral" argument by the "necessity" of recognizing the "point" of institutional history. The "mythical" aspect of his theory is the necessity of creating an "authoritative" interpretation. Without a Herculean perspective, opponents of a controversial decision will not find guidance when there are two justifications available, pointing in opposite directions, both meeting the "smooth fit" requirements. When examining Weber's challenge of voluntary affirmative action quotas, Dworkin wrote:

> In these cases I see no procedure for decision - no theory of legislation - other than this: one justification for a statute is better than another, and provides the direction for coherent development of the statute, if it provides a more accurate or more sensitive or sounder analysis of the underlying moral principles.83

This advice shows how Dworkin's thesis falls short of being a theory of adjudication. The absence of Hercules creates a void in the space we want a theory of adjudication to fill. We are left with a description of what judges can be construed as doing, which perhaps offers a critical standard for some normative decisions, but the poverty that Dworkin began his enterprise to supply, the filling in of "discretion" with the "rights thesis", fails to occur. Dworkin accuses his critics of having "... fixed ideas about the necessary and sufficient conditions of objectivity (for example, that no theory of law can be sound unless it is demonstrably sound, unless it would wring assent from a stone)".84 This is not the substance of this criticism. We expect some process for decision that advances a set of critical presuppositions, identifies their role in the adjudication process and indicates the soundness of the theory in the attractiveness of the results it produces when applied. Objectivity is hardly the issue, and Dworkin is justified in resisting attacks from such a perspective. Frankly, his taunt of "one right answer" provokes such attacks: yet it must seem strange to judges (for example in cases like Weber) that they have a "duty" to find "one right answer" when Dworkin admits the questions turn on "essentially contested concepts" of political morality.

19. Natural Law Revisited

As a form of "natural law revisited",85 Dworkin would have been well advised to consider a "natural law" theorist three hundred years his senior, Thomas Hobbes. Inspired by the

deductive rigour of Euclid, Hobbes wished to "tutor and constrain" legislation and adjudication through presuppositions that had both arguable validity and distinctive meaning in their applications. By positing an ambiguous fundamental concept, Dworkin has given himself the illusion of depth that is useful when attacking theories that try to limit and manage the concerns of adjudicators. Dworkin does not provide any reciprocally clear target to his opponents, and that inevitably gives rise to whether he offers any substantial guidance to those who would like to adopt the theory he claims to offer. He offers the rights thesis "... as a model for understanding what lies behind a judicial decision..."[87] and perhaps the model simply wishes to describe adjudication rather than guide it. Mortal judges are lacking the powers that enable Hercules to create his entire "seamless web" political theory. Their calculation of an individual's rights are not realized with the clarity we are asking Dworkin for and would expect from Hercules. Our judges develop a sense of what the "point" of the legal institution is, or a sense of what the precedent itself requires, but it is not articulate and analyzable separate from the context. This is what Dworkin means when he says "... any official's sense of the game will have developed over a career, and he will employ rather than expose that sense in his judgments." (TRS, p. 104) Dworkin celebrates the inarticulate "felt necessities"[88] of the judicial forum, perhaps believing that if, like Hercules, we had the vision, we would discern some pattern in these sporadic, isolated and individual efforts.

The "rights thesis" is hopeful that by challenging judges to give their decisions in a principled fashion, the substance of the rights-thesis will begin to take shape. The "rights thesis" is free to say that it takes rights seriously because it simply sketches how rights are to be "discovered" and requires no more from officials than that they show citizens equal concern and respect.

III. THE HARD CASE OF BAKKE: DOES HE HAVE A RIGHT?

20. Equal Respect and Concern for Bakke

Bakke claims that by having his race counted against him, he was denied his rights, in Dworkin's terms, a right to be treated with equal concern and respect. Dworkin is committed to the formal procedure of deciding on the basis of "principles not policies". Therefore, how will his formal requirements allow for the necessary reverse discrimination involved in the scheme of "affirmative action"? Dworkin evades the force of his aximomatic right by claiming that DeFunis or Bakke is not entitled to it.

> Of course, if DeFunis had some other right beyond the right to be treated as an equal, which the Washington policy violated, then the fact that the policy might achieve an overall social gain would not justify the violation. (TRS, p. 228)

In other words, if they had a real right, not a vague right to equality of respect and concern, the universities would not be able to suspend the uniform operation of their admission practices. Dworkin believes that "... the only genuine principle they describe is the principle that no one should suffer from the prejudice or contempt of others".89 This will not stand as a Herculean principle and will demonstrate problems with institutional fit. The other principle at work (although Dworkin does not recognize it as a principle) perhaps we should call a factor, is that there is no such thing as merit "... in the abstract".90 Perhaps Dworkin means a priori when he says "in the abstract", insofar as he describes merit teleologically. Both of

these factors are complex and we will consider them separately; however, we will discern a connection at the outset. Will we be able to define what constitutes treating someone with equal respect and concern if we are skeptical of the abstract claim that someone can be said to deserve something? How can one be treated with less respect and concern than one deserves if one cannot be said to merit anything?

21. Discrimination Rights

How are Dworkin's requirements of institutional fit compatible with this assertion?

> ...[A]s reflection demonstrates the only genuine principle is that no one should suffer from the prejudice or contempt of others.91

Most theorists draw a distinction between the right to equality before the law and a much more complex right to not be the victim of discrimination and contempt. The birth and subsequent death of the tort of wrongful discrimination and the surrounding literature showed how the right to compensation for discrimination creates numerous complications in private transactions.92 Without considering those complications in detail, we can see that enforcing the rights of individuals to be free of the "prejudice and the contempt of others" would be competitive with many other venerable principles. As S.C. Coval and J.C. Smith write:

> How can there be a right to compensation for the failure to receive a specific job or premises unless there is a right to that specific job or premises, and how can particular persons have a right to a specific job or premises when no one else has such a right?93

The enforcement of anti-discrimination legislation must compete with the rights of employers and landlords in these cases. The "best" qualified applicant, or the first buyer to meet the advertised terms would have a "right" to the job or the premises. Unless a narrow interpretation of what constituted "every person" in codes like the Human Rights Code of British Columbia was demanded, then every person who had the best "... bona fide qualifications..."[94] would have a right to the position he sought. The implications in the area of real estate contracts are expansive.

> The present position is that an advertisement or listing of real estate is merely an invitation to treat, and not an offer. A vendor may reject an offer even though it meets the terms advertised.95

Unlike goods and sevices offered to the public in general, employers and landlords have traditionally had fundamental liberties to choose among candidates. If a principle like Dworkin's was accepted, then the options of choosing employees and tenants would not longer conform to principled liberties such as freedom of association, freedom of contract and the pursuit of happiness. If the principle of equality before the law was built into the definition, then all individuals would have a right to the job or premises, resulting in Human Rights Boards, or the courts, engaging in countless disputes that would have little to do with the issue of prejudice and contempt. If the right was conferred through minority status, then the enforcement of the

rights would create a host of confusions and bend the meaning of equality before the law considerably. For example, if the first qualified applicant did not have the right to the job, but the first qualified minority applicant did, then how would an employer be able to judge applicants on any criteria other than basic qualifications and minority status? If an applicant has additional aspects that an employer wishes to count, but that don't hinge directly on the job itself, what are the employer's options? If a feminist employer does not wish to hire a protected applicant because of their ideological differences, is this precluded by the legislation? Once qualified protected applicants are recruited, does the decision rest on the sequence of the applications or is the employer free to choose amongst protected minorities on their merits? Can one choose amongst protected applicants on the basis of features not related to the job? A principle that demands that no one "suffer from the prejudice and contempt of others" can only be bought at the expense of isolating a group for preference and then giving them asymmetrical rights. Otherwise, overt discrimination simply becomes covert. If employers wish to avoid sexists, they can interview applicants until a suitable non-sexist is found. If a right to be free from the suffering of prejudice and contempt allows a minority to abbreviate this selection process by trumping all subsequent applicants, employers cannot engage in this covert discrimination. Therefore, minorities cannot be free from contempt and discrimination unless they have a right to the job. The feminist

will no longer be free to work in an ideologically unified environment, however such interests must be weighed in proportion to the strength of the principle that bestows these rights on minorities.

The right to not suffer from the prejudice and contempt of others can be best conceived as a package of rights. The achievement of the goal is contingent upon certain rights asymmetrically enhancing the minorities' prospects. The fundamental interests that employers have in selecting people they must work with, who are both qualified in formal criteria, and suitable in important other ways, are in conflict with these packages of rights. A landlord's prerogative to pick the "best" tenants for the premises is also in conflict with this package of rights. If the landlord lives in the location that the premises are for rent, questions of compatability may enter as well as basic considerations such as an ability to pay and whether the tenants will leave the premises in good shape. Of course, judging such factual considerations on the basis of appearances is an example of pre-judging or prejudice. However, the generalizations may not be motivated by contempt as much as they are by prudence. The abdication of societies' responsibilities toward single mothers, the elderly and the chronically poor cannot be achieved by simply giving them rights against members of the private sector. If the landlord is required to suspend judgments about the tenants who apply for the premises, a confict with a basic

right to further one's interests through freedom of contract is limited.

The principle that no one should suffer from the contempt or prejudice of others is a difficult ideal to achieve. It does not distinguish between situations when the right to not suffer discrimination conflicts with a fundamental right and more common situations where the right involves the trumping of a mere 'interest' or preference. Given a lexical ordering of goals that individuals have as social creatures, we can distinguish broadly between fundamental goals which are general and relatable to common goals of all persons, and interests which are generally asymmetrical and relative in importance. The right to not have one's goals interfered with because of the 'interests' of others is derivable from the distinction. In cases like the prejudiced restaurant owner who refuses service to orientals, the conflict can be clearly construed as a mere interest of the restauranteer to indulge his preferences versus a fundamental goal of all individuals to have their goals function freely unless they conflict with other individuals' goals. There will be penumbral regions where interests can be construed as goals and the ranking will not be clear. This does not undermine the distinction, but simply indicates how adjudication should proceed. The adjudication procedure is most necessary when the fundamental goals of two individuals are in conflict. The purpose here is not to suggest how a resolution of these goals is to proceed, or to predict that a resolution will always be clear or evident.

However, the alternate strategy of confering novel package rights on minorities to secure their freedom from discrimination precludes the possibility of keeping these areas open for debate. The disjunctiveness of the choice is not warranted by the situation, for clearly there are complications in the job of breaking down the mechanisms and effects of discrimination. The landlord would not have the reasonable concern of a single mother's inability to pay the rent if a more comprehensive social welfare system was backing her up. The advantage of rejecting Dworkins scheme is the diffusion of the burden from the employer or landlord alone to society in general. Perhaps the rights of landlords and employers are not the most popular to defend. However, if we take rights seriously, we take everyone's rights seriously.

The creation of rights is the consequence of a principle that "... no one should suffer from the prejudice or contempt of others". Simple universality will guarantee equal protection of the laws and would outlaw cases like Sweatt. (TRS Chap 9) The provisions that Dworkin implies by his principle are far beyond the requirements of a desegregation case. Sweatt was refused admission in spite of his merits, and that is a denial of equal protection. It is not unconstitutional because it is "... an automatic insult..." (TRS, p. 238); it is simply both. Remedying the discriminatory actions of the University of Texas does not require Dworkin's principle, nor does the history of desegregation

imply the creation or support the existence of Dworkin's principle. As Justice Powell remarked in his analysis of the legislative history of Title VI:

> It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms guaranteed to the individual. They are personal rights". Shelley v. Kraemer, supra at 22, Accord, Missouri, Ex rel. Gaines v. Canada, supra, at 351; McCabe v. Atchison, T. & S. F.R. Co. 235 U.S. 151, 161-162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another colour. If both are not accorded the same protection, then it is not equal.96

There cannot be the argument that since Bakke's racial group is well represented in the University, he has no complaint. The Constitution individualizes a citizen's right to a remedy. Texas could not defend its segregation policy by claiming that since few blacks qualified, the scheme affected very few individuals.

> When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or background, it must be regarded as suspect.97

The Court does not have to hold that all racial classifications are not constitutional, as Dworkin suggests.

> If there is something wrong with racial classifications, then it must be something that is wrong with racial classifications as such, not just classifications that work against those groups currently in favour. That is the inarticulate premise behind the slogan, relied on by defendents of DeFunis, that the Constitution is colour blind. That slogan means, of course, just the opposite of what it says: it means that the Constitution is so sensitive to colour that it makes any institutional racial classification invalid as a matter of law. (TRS, p. 229)

The distinction Powell draws will allow us to distinguish when racial classifications are justified, and in principle his distinction maintains the constitutional guarantee of equality before the law.

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial legislative or administrative findings of constitutional violations...
>
> To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. This is a step we have never approved.98

If an institution can be shown to deny the right of minorities to the pursuit of their goals, then there must be a remedy. On the principle established in Ashby v. White,[99] there is no point in calling something a right if there exists no means to protect it.

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed, it is a vain thing to imagine a right without a remedy; for want of a right and want of a remedy are reciprocal.100

By altering the status of racial classifications as a remedy of constitutional violations, into a social policy that creates rights, Dworkin has altered the value and significance of rights. Principles of interpretation, especially in such areas of dense interrelation as the equal protection clause, are inextricably united with transcendent concerns such as the maintenance of dignity and respect for all citizens. Why should minority rights

to redress be watered down into what he calls "accidental"[101] effects of a "useful" (TRS, p. 227) social policy?

Hercules is sensitive to principle. However, strong sympathies to noble goals seem to rush his excogitations and diminish the rigourousness of his rights thesis. After perceiving the injustice of asymmetrical treatment motivated by prejudice and contempt, he retroactively creates a right to not suffer from such treatment. As we have already shown, this method of defining rights is circular and unpredictable. Dworkin must discern the presuppositions behind prejudice and contempt before he can achieve a principled method of eliminating its ubiquitous and tragic influence.

22. An Alternate Grounding for Rights

The utilitarian makes no distinction between individuals unless there is a reason for treating them differently. Let us advance two classes of description that may be used to distinguish people: "actabilities"[102] and passive features. What are actabilities? S.C. Coval and J.C. Smith have characterized the problem of rights as a question about what is "...vital to all agents...".[103] As our analysis of Dworkin has demonstrated, the justification of rights against the general interest, or an account of rights that makes their content independently powerful and meaningful, must be grounded in an explanatory concept. "Actability"[104] is the right to develop the abilities necessary to achieve what an individual wants, regardless of what that will be.

This is their criterion for selecting basic rights and is intended to protect the following features of all individuals:

> 1. The ability to evaluate the truth of empirical propositions.
> 2. The ability to reckon, which includes predication, numerateness and logic and is not separable from the first ability.
> 3. The capacity of having goals, where this will mean that our needs and desires function in some way as background to our goals.
> 4. The (at least partial) ability to choose along these desiderata by ranking them according to their consequences and relative desirability, thus using 1 and 2; and thereby forming plans and having resolves.
> 5. The ability to set in motion, with one's body, events which tend to accomplish these objectives.
>
> An agent then is a sentient, reckoning, goal-oriented, physically effective system.105

'Actability' incorporates the epistemological preconditions that shape the choice and guide the execution of actions, as well as the goals and physical movements that instigate and achieve realizable intentions. Agents are individualized and characterized in terms of their teleology, or the goals which are relevant in their lives. All agents will share the fundamental desire to protect and enhance the contributory and enabling epistemological elements of action, and of course, the ability to physically actualize intentions.

> We have then epistemological, teleological and physical rights as agents because the abilities protected by those rights define us as agents. We have thus the right to be agents, to be what we are.106

If it seems awkward to conceptualize an "ability" to have epistemological conditions for action, let the concept of "actability" allow for the greater inclusiveness germane to this concept. It is the content of an action that forms the criterion for "actability", and since epistemological beliefs are central to the concept of action they are an "actability". The usefulness of this description is that its aegis is co-extensive with all of the relevant aspects of an individual that make one subject to praise and blame. "Actability" is derived from a study of the accepted legal defenses, the roster of excuses that explain how an act can be the product of diminished responsiblity. When one studies the converse of what is missing from an action of diminished agency, one can derive what features are implicit in the voluntary fully intentional action. A legal system that punishes on the basis of responsibility must implicitly be operating with a concept of action, and of excuse, and the theoretical revelation of the theory of agency consists in the exposure and connection of our basic rights with that which is basic to all agents, "actability". Freedom of speech, assembly, thought, and the press are basic rights that enhance each agent's epistemic foundation. Freedom of movement and the laws of delict and tort have a venerable connection to our need to physically affect our environment in the pursuit of our ends. Of course, our teleology will bear a symbiotic relation to our epistemological concerns and is often expressed by the right to "... the pursuit of happiness...". "Actability ...purified of a particular teleology..."[107] will be

the universalizable basis of rights and will guide adjudication when competition for common goals or conflicts of goals cause problems among agents. The presuppositions catalogued in exegesis here are argued for in detail in Coval and Smith's book. However, the substance of "actability" as a class of descriptions should be palpable. Aspects of an individual that are not related to the exercise of one's epistemological, teleological, and physical "actabilities" are passive features. We can delineate, ceteris paribus, such aspects as race, religion, sex, place of origin, and in some cases, age and language as passive features of an agent. The features are not in themselves a basis for generalizable judgments about agents. The right of agents to the equal protection of the law amounts to the recognition of what must be protected and the possible grounding of distinctions between agents. "Law is about actions".108 Classifications should have their foundations in action, not allowing concurrence with passive features to subsume the nature of the classification. Arguments that asymmetrically benefit or burden a minority no longer fix on the passive features of that minority in the explanation of the classification; they simply accept the passive feature as coinciding with the explanation that takes the action involved as central. Individuals no longer are benefited or burdened as members of a race, but as members of a group that suffered or benefited from a set of actions. As a system of rights, the theory of agency limits the use of certain justifications and

coheres the principles of interpretation with an axiomatic postulate.

We now return to Dworkin with a form of "natural law revisited". There is an implication that centralizing action in the interpretation of law is not an entirely descriptive, or as Dworkin may prefer, "neutral" perspective.

23. Problems with Dworkin's Grounding of Discrimination Rights

Dworkin is aware of the "thin edge of the wedge" implications of his defense of affirmative action. If we hold his premise or principle, that "... no one should suffer from the prejudice and contempt of others.."109 as being the criterion of a right to equal respect and concern, should blacks be distinguished from other visible minorities? Perhaps a regional adjustment to the specific density of prejudice should be applied in service of the effective realization of the principle? Dworkin wishes to avoid these problems and in doing so, makes one of the most damaging mistakes of this test case.

> Affirmative action programs seem to encourage for example, a popular misunderstanding, which is that they assume that racial or ethnic groups are entitled to proportional shares of opportunity, so that Italian or Polish ethnic minorities are, in theory, as entitled to their proportionate shares as blacks or Chicano's or Americans. Indians are entitled to the shares the present programs give them. That is a plain mistake. The programs are not based on the idea that those who are aided are entitled to aid but only in the strategic hypothesis that helping them is now an effective way of attacking a national problem. Some medical schools might well make that judgement, under

> certain circumstances, about a white ethnic minority. Indeed, it seems likely that some medical schools are even now attempting to help white Appalachian applicants, for example, under programs of regional distribution.110

If Dworkin believes that the genuine principle underlying these decisions is that no one should suffer from prejudice and contempt, how will he be able to support his distinction between the claims of blacks and those of less paradigmatic "minorities"? Certainly the paragraph quoted in full offers no explanation, in fact, it contradicts itself. Simply because some medical schools may discriminate in favour of disadvantaged whites does not circumscribe a criterion for distinguishing the claims of suffered prejudice the Italian or Pole offers from that of blacks. The example of discriminating in favour of white Appalachians illustrates the force of arguments made by white minorities such as Poles to the vindication of their rights. Their colour does not protect them from the prejudice and contempt of others; why should it exempt them from the overall social policy of making Americans less likely to suffer from prejudice and contempt?

At this juncture of the argument, we can notice the difficulty of distinguishing principles and policies and their respective implications for the rights theory. Deciding on the basis of "principle not policy" is inconclusive advice in this case since policies can create benefits to a group that are theirs by right, yet others who can advance the same goal achieved by the policy may not, regardless of their justification, have a right to the benefits of the policy. This delineation of the function of

policies becomes divisive when the principle of not suffering from contempt and prejudice is at the core of the justification of the policy.

> If a legislative decision benefits some particular group, not because that group is thought entitled to the benefit, but because the benefit is a by-product of a scheme thought to advance a particular collective goal, then others have no political right to the same benefit, even if providing the benefit for them would, in fact, advance that same collective goal even further.[111]

The problem with Dworkin's distinction is that although a right to the policy does not exist by principle before the statute brings the policy into play, by principle there is a right to the policy once it is established, and there also exists a right to not have the benefit cut off even if the empirical basis of the decision to implement the policy changes. In brief, once a policy is established that benefits a minority, it is theirs by right thereafter by the strength of two strong principles.

> ...[U]noriginal judicial decisions that merely enforce the clear terms of some plainly valid statute are always justified on arguments of principle, even if the statute itself was generated by policy. (TRS, p. 83)

Dworkin believes that affirmative action is based on "... the strategic hypothesis that helping them now is an effective way of dealing with a national problem".[112] That suggests that implementation of affirmative action is justified on policy grounds. The justification of policies usually rests on what Dworkin calls causal judgments.

> Causal judgments are judgments that assert a causal connection between two independently specifiable social phenomena.[113]

Dworkin employs many causal judgments in his defense of affirmative action. Without affirmative action the "... status quo will almost certainly continue..."[114]

> The tiny number of black doctors is both a consequence and a continuing cause of American racial consciousness, one link in a long an self-fuelling chain reaction...
>
> But their long-term goal is to reduce the degree to which America is overall a racially conscious society...
>
> We have not succeeded in reforming the racial-consciousness of our society by racially neutral means.[115]
>
> It might well improve the quality of legal education for all students, moreover, to have a greater number of blacks as classroom discussants of social problems. (TRS, p. 228)
>
> Further, if blacks are seen as successful law students, then other blacks who do meet the usual intellectual standards might be encouraged to apply, and that, in turn, would raise the intellectual quality of the bar. (TRS, p. 228)

These policy arguments are causal judgements that Dworkin supplies without attaching much weight to them.

> But these are complex and controversial empirical judgments, and it is far too early, wise critics concede, to decide whether preferential treatment does more harm than good... (TRS, p. 224)

In discussing the relationship of "causal judgments" from the social sciences to constitutional adjudication, Dworkin asks:

> The problem is this: these various propositions now appear to be more doubtful than they were several years ago. This doubt raises two questions. The first is: does this suggest that the judicial decisions were, in fact, wrong? Must any doubts we have about these propositions of social science be translated into doubts about the soundness of the decisions that ordered integration?105

That which is created by policy may be perpetuated by right, especially if the minority that benefits from the policy is the victim of prejudice and contempt. Dworkin does not wish to render explicit what we found implicit in his "genuine" principle of "not suffering from prejudice and contempt". Discussing "busing", Dworkin guards his conferrment of rights:

> There is a high antecedent probability that any community decisions on that issue wil be corrupted, high enough, since the matter is plainly important, to call for Constitutional interventions. But what remedy is available as the vehicle of that intervention?117

In the next paragraph, Dworkin notes the comparative difficulty of this situation compared to other constitutional guarantees, like free speech or being able to choose to have an abortion.

> The special features of the school assignment issue requires different kinds of rights.
>
> But what kind of right? We might well approach that question backwards. Under what circumstances different from the present, would we be wiling to say that a particular decision on pupil assignment was not corrupt, and so could stand without interference from the judiciary? There are two possibilities. First, we might relax our judgment that such decisions are antecedently likely to be corrupt. We would do this on the basis of an interpretative judgment that society had charged. The background of preferences, beliefs, ideologies - in short, the background of prejudice could have lifted, as we all hope someday that it will. The background could change in another way. Members of the minority who are supposedly disadvantaged may assume political power to such a degree, at least power over school assignment decisions, that we need no longer worry about the antecedent probability that these decisions are corrupted by prejudice against them....
>
> What else would pursuade us to disregard that possibility of external preference corruption?

> Only one thing: the outcome. If the decision actually produced by the political process was of a sort itself to negate the charge of corruption, then we conclude, for that case, the judgment that the process was too corrupt to allow it to continue.118

Two things are clear; the liberals wish to be in favour of busing and affirmative action: Dworkin wishes to be a liberal. Regardless of the outcome of argument about the policy issues he touches on, Dworkin believes that the minorities have a "backwards" right. The right is backwards only in presentation. It cannot be revoked unless there exists a future state of affairs when blacks would do away with it through the exercise of their political clout, or some change in Dworkin's assessment of racial consciousness occurs. The right to these programs is unimpeachable by all of the policy arguments that appeal to our collective aims, because Dworkin believes that the decision to adopt them is not based on "causal judgments." The right is not reversible by the democratic process.

> The order speaks to those in political power and says this: "If you yourself refuse to produce on outcome that negates the antecedent probability of corruption, then we must impose upon you such an outcome. The only decision that we can impose, given the nature of the problem, is a decision that requires integration on some formula that is evidently not corrupt, even if it is just as evidently arbitrary."119

This order sounds like an expression of Dworkin's idea of a right with a minimum threshold weight that can only be trumped by goals of "special urgency" (TRS, p. 92). Why does he wish to approach it backwards? The obfuscation is part of Dworkin's strategy of arguing for the extended notion of equality based on the

Constitutional guarantees. The package of rights minorities must have to combat the influence of prejudice and contempt have little claim to institutional history, and as Dworkin admits, ephemeral support from the sociological empirical judgments that form the substance of policy decisions. If the high tide of "causal judgments" in favour of anti-discrimination legislation instigates measures to secure benefits for the minorities, Dworkin's principles of "unoriginal decisions" and "antecendently likely corruption protection" will entrench the measure and make them impervious to review as matters of right. Canada has achieved such an effect by entrenching protection for affirmative action in section 15(2) of the Canadian Charter of Rights and Freedoms.[120] The problem is the obscurity that surrounds rights that are created so surreptitiously. For example, the explanatory note which accompanies section 15(2) says that "...affirmative action programs for disadvantaged groups will not be prohibited even though such programs may discriminate amongst persons".[121] All selection procedures discriminate amongst persons;"affirmative action" must, by definition, discriminate against non-minority groups. The adoption of an even tone, and the description of "strategic hypotheses" in the language of policy does not advance our understanding of the problem. For Dworkin to defend affirmative action as a policy which by his definition denotes that "... the special benefits individuals receive are accidental..."[122] is to abdicate the honesty and clarity that should distinguish jurisprudence from political rhetoric. The

result of this policy is to entrench a right beyond "corrupt" majoritarian review, and shift the justification of the entrenchment to the interpretative right to not suffer the contempt and prejudice of others. Policy supported by "causal judgments" will not be able to displace the rights once they have been precedented because vindication of their influence will be achieved through "interpretative" arguments.

> "Indeed, if the analysis I have sketched is correct, then interpretative judgments are at the centre of every decision involving the equal protection clause."[123]

"Articulate consistency" will measure and cement anti-discrimination legislation so that the pedigree of policy is subsumed by a justification of principle that is irreversible except on "interpretative" grounds. The substance of Dworkin's argument is now clear however we must ask why he chooses to conceal the implications of his "genuine principle that no one should suffer from the prejudice or contempt of others".[124]

24. Principle, not Policy

The creation of the rights minorities need to not suffer from prejudice through a policy shows how the interrelationship between principles and policies confounds Dworkin's Herculean judicial maxim: decide on the basis of principles not policies. What seems to cement the distinction is the curious proposition that Dworkin describes as the "foundation of... the gravitational force of precedents".[125] It becomes difficult to manage the idea of

"accidental" benefits, or benefits as "by product" when discussing the entitlements created by affirmative action legislation.

> I pointed out that groups are justifiably distinguished, when policy, is in play, for reasons that would be inappropriate if the argument were an argument of principles because they are not reasons made relevant by fairness. These include reasons of convenience of administration or simply that a policy already launched has been sufficiently successful already cited legislative subsidies as a clear example...126

If the government gives a subsidy to groups that manufacture fuel-efficient cars, but does not extend the subsidy to fuel-efficient motorboats, there is no argument from fairness for the motorboat manufacturers.

> It would be a sufficient answer that the energy-saving from motorcars was enough to get on with... I do not mean to deny what I have elsewhere laboured to explain, that regulations serving policy may be improper (and often unconstitutional as well) if they violate independent principles carrying rights against the state.127

Given such a clarification of Dworkin's distinction, we can see that his argument for the anti-discrimination principles is not a policy argument at all. The policy of fuel-efficiency does not establish general rights, therefore, there is no argument from articulate consistency to those similarily situated like the motorboat manufacturers. The argument of fuel-efficiency does not establish a principle either, since no interpretative claim to analogous treatment is provided by Dworkin. Therefore, Herculean procedure, to decide on principles not policies, is mute on our test case because affirmative action is not a "standard" policy.

We have shown that Dworkin's "genuine" principle requires the creation of anti-discrimination rights, and the rights created are irreversible by ordinary policy, since they are protected by "interpretative" constitutional level guarantees. Because of the protection extended to these rights created by policy, there must be a distinction between affirmative action policies and those designed to secure collective goals with "accidental" beneficiaries. No "accidental" beneficiary of a subsidy to manufacture motors can claim an interpretative constitutional right against that subsidy being taken away by further policy decisions. Dworkin is deceptive when he describes controversial programs like preferential admissions as policies (TRS, p. 22) but talks of precedented anti-discrimination legislation like busing in terms of these "backwards" rights. Rhetorically, it would seem that Dworkin wishes to establish the programs through the unspectacular reasoning involved in politicizing policies into power, but once this is achieved he is prepared to employ the more formidable Constitutional arguments to secure his gains.

The connection with Constitutional issues distinguishes the "policy" of affirmative action from generic policies such as the fuel-efficient motor example. When Hercules examines the disenfranchised Poles' claim to the benefit of the policy, can he claim "administrative convenience" or "sufficient success"128 as the basis for his admittedly arbitrary distinction? The connection with Constitutional concerns suggests not, and Dworkin must admit that the issues of fairness and justice depend on the

interpretation of the rights at issue now. Dworkin's definition of policies, and his classification of affirmative action as a policy may seem, to him, to be sufficient to answer the charge of under-inclusiveness that other minorities may claim against the program. Once the status of affirmative action has been shifted by examination of how it differs from generic policies, the issue is revitalized.

The package of rights protecting minorities from prejudice and contempt can be traced back to Dworkin's "axiomatic" basis of liberalism. Dworkin's arguments about the "essentially contested" nature of the concept of equality allows him to maintain the implicit existence of an ideal of equalizing society on a distribution scheme within the "interpretive" limits of the "Equal Protection Clause."129 This establishes the authority of the axiom, and the activist license of the judiciary to enforce a favoured program implying the concept. Once the concept of equality is introduced through precedent that depends on the distributional scheme for justification, the mechanical requirements of "smooth fit" and "principled" seamless web political theory can abet the distributional concept with more powerful and less controversial methods. Given a combination of history and theoretical interpretation based on the Constitution, Dworkin can summon his arguments against the skepticism of legal realists and other proponents of judicial relativism to entrench the distributional scheme. Is the decision that Dworkin offers the "one right answer" Hercules would create?

25. What is Missing From Dworkin's Account of Equality Rights?

We have seen that the origin of the concept of equality Dworkin implies by this test case cannot be explained through Dworkin's strategy of "anti-utilitarian rights". The lack of a clear notion of external preferences without the presupposition of a theory of dignity impedes Dworkin's attempt to reconcile utilitarianism with his theory. A "seamless web" of political theory may yield a description of what the axiomatic right entails, yet all we can expect is the noumenal glow of Hercules to distinguish that description, making its existence a source of frustration instead of actual justification. Resting our "interpretive" judgments on the pedigree of proximity to Hercules via the "forum of principle" is the consequence of Dworkin's theory of interpretation and the basis of his justification of judicial activism. The mechanics of Dworkin's theory have a smooth abstract shape, yet they are silent as hierarchial and logical structures. The importance of the concept of dignity, or what treatment an individual can expect from the axiomatic right to be given equal concern and respect, is being defined in the principles at work in affirmative action. Supplanting the function of racial classifications as a tool to remedy constitutional violations into a discretioanry and autonomous privilege that institutions can conform to their view of societal discrimination is a motion of principle. The remedy of the effects of discrimination is a goal that can be effectively

pursued without the introduction of the distributional rights Dworkin embraces.

26. Remedy, Instead of Distributional, Rights for Minorities

The content of the principles that guide the remedy legislation can be built on the model of contract. Minorities who have been limited in the exercise of their "actabilities" can claim that the preferences they receive on the basis of their "passive features" are the proper remedy for historical exclusion on the basis of those same passive features. The use of race to supply a benefit must be linked with a constitutional violation, or some proof that the race was the cause of an asymmetrical burden that the group suffered. The model of contract is intended to illustrate both halves of the dyadic relationship of discrimination. Remedies should correspond to the nature of the injury. When considering the status of programs designed to remedy discrimination, our enthusiasm for the goal should not entail license for all to pursue it as they see fit. Justice Powell urged that the administrators at the University of California at Davis did not demonstrate their competence to formulate "legislative policy" or adjudicate claims of remedy for discrimination.

> ...[I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively created criteria.130

This proposition conforms with the requirements of institutional fit as Hampton v. Mow Sun Wong131 attests.

A Federal Civil Service Commission rule that denied resident aliens jobs was rejected because the commission could not affect this "important liberty"132 unless the board had special competence of "direct responsibility"133 for the issue. When an agent's individualized right to equal protection of the laws is undercut by a racial classification, some assurance that the goal of the classification is related to an important collective interest and that the administration of the classification is being competently handled seems to be requisite for fairness. On a scale admitting of degrees, the Federal Civil Service Commission would be closer to an authoritative position than the board of admissions at Davis whose expertise would best be construed as educational. Even in Dworkin's example of a generic policy, the dispensation of subsidies would be restricted to the agents of an authorized government agent. The administration of racial discrimination against the majority must be handled with the care and attention requisite to the rights it seeks to vindicate.

The compelling state interest in remedying the effects of discrimination must be linked to the evil that racial discrimination has produced. In terms of the "natural law" theory that we offered as an alternative to Dworkin, the activity of racial discrimination is a denial of the opportunities and benefits of an agents "actabilities" because of the existence of a "passive feature" that is the object of contempt. In such a case, the individual can be said to merit or be entitled to the benefit or opportunity, yet is refused on the basis of a criterion not

relatable to the exercise of one's epistemological, teleological, and physical "actabilities". The key to what constitutes merit is a description of what, in the absence of prejudice, would have qualified the individual for the benefit or the opportunity. This is far from specifying an a priori definition of merit, however, it does indicate the inextricability of the concept of merit or desert with the concept of discrimination. The idea of a right to remedy is possible only through a recognition of some theory of what a person is and what aspects of that description are related to merit or desert. This will involve key concepts that are ubiquitous in legal issues such as responsibility and excuses and moral issues such as praise, blame, and dignity. In aphoristic form, we could say that the law presumes what individuals are when it decides how they should be treated. Recalling Dworkin's discussion of the interpretation of laws and the analogy with art,

> ... a theory of interpretation must contain a sub-theory about identity of a work of art in order to be able to tell the difference between interpreting and changing a work.134

Dworkin adumbrates a theory of identity in his arguments against the rights of Bakke.

> The important principle, that individual people are not entitled to any particular job or income just because of their abilities, does not depend on any assumption about whether people "own" these abilities, and therefore does not depend on any theory or picture of the "self" as either including or excluding these properties. It depends on questions of political morality that do not intersect with these (in my opinion, obscure) metaphysical

> issues. Someone who holds the meritocratic theory, that people are entitled to jobs in virtue of their talents, must provide an argument which brings their claim under some appealing and more general argument for rights. They cannot do this, as I just said, by urging that people own their talents, because this proposition, assigning it the only sense it can have, simply begs the question.[135]

This skepticism about the connection between abilities and desert is congruent with Dworkin's arguments about the unacceptability of any concept of the "good life". His relativism that equates the "beer guzzler"[136] with the scholar is the interpersonal example of this argument based on his liberal "political morality". Dworkin's justification of affirmative action, excluding his "causal judgments", will not rest on the asymmetrical denial of the exercise of "actabilities" on the basis of a passive feature (such as remedy arguments employ) since this would presuppose the meritocratic premise he takes care to oppose.

> ... in certain circumstances, a policy which puts many individuals at a disadvantage is nevertheless justified because it makes the community as a whole better off.
>
> Any institution that uses that idea to justify a discriminatory policy faces a series of theoretical and practical difficulties. There are, in the first place, two distinct senses in which a community may be said to be better off as a whole, in spite of the fact that certain members are worse off, and any justification must specify which sense is meant. It may be better off in a <u>utilitarian</u> sense, that is because the average or the collective welfare is improved even though the welfare of some falls. Or it may be better off in an <u>ideal</u> sense, that is because it is more just, or in someway closer to an ideal society, whether or not average welfare improves. The University of Washington might

> use either utilitarian or ideal arguments to justify its racial classification. (TRS 232)

Is Dworkin's defense of affirmative action based on a conception of a society that is more ideal?

IV: EQUALITY OF RESOURCES AND INDIVIDUAL RIGHTS

27. Plugging the Gap

We are prepard to isolate where Dworkin grounds his defense of affirmative action.

> The arguments for an admissions program that discriminate in favour of blacks are both utilitarian and ideal. Some of the utilitarian arguments do rely, at least indirectly, on external preferences, such as the preference of certian blacks for lawyers of their own race; but the utilitarian arguments that do not rely on such preferences are strong and may be sufficient. (TRS, p. 239).

Dworkin is cautious of utilitarian arguments because, like causal judgments from the social sciences, they are based on shifting data.

> The ideal arguments do not rely upon preferences at all, but on the independent argument that a more equal society is a better society even if its citizens prefer inequality. That argument does not deny anyone's right to be treated as an equal himself. (TRS, p. 239)

The ideal argument that a more equal society is a better society can only be focussed with a theory of identity or the outline of an individual's protection against policy instruments that pursue that ideal. Will Dworkin's belief that we are not entitled to the rewards offered for the exercise of our abilities be accepted as a corollary to the fundamental ideal? Dworkin's two articles[137] on the meaning of equality indicates his path has diverged from John Rawls' "difference principle". Dworkin does not accept that "... it is really and exclusively the situation of the worst-off group which determines what is just."[138] His 'equality of resources' is

more individualized than the class structure that Rawls employs. Dworkin sees the difference in talents as a problem for equality and creates redistributive taxes on the income produced by these talents.

> We want to find some way to distinguish fair from unfair differences in wealth generated by differences in occupation. Unfair differences are those traceable to genetic luck, to talents that make some people prosperous but are denied to others who would exploit them to the full if they had them.[139]

The problem with the redistributive theoretical schemes of taxation and an abstract option to buy insurance against having unmarketable skills is

> how far the ownership of independent material resources should be affected by differences that exist in physical and mental powers, and the response of our theory should speak in that vocabulary.[140]

Dworkin is skeptical of desert in a philosophical mode that challenges the intelligiblity of freedom and responsiblity in a deterministic world. Dworkin does not believe that society owns the talents,[141] but that nobody can really be said to deserve the consequences of something that is not, at a certain perspective philosophically, fairly said to be theirs. If society can make itself more equal through redistribution of the effects of those talents, then no problematic remedy argument based on causal judgments need impede the clear justification of programs like affirmative action. Dworkin maintains that the entitlement of the minorities to the package of rights is implied by his genuine principle that no one should suffer from prejudice and

contempt. Since groups that have not endured such discrimination may have had prosperity that could be "... traced to genetic luck..." the redistributive taxation scheme may further implement affirmative action with upscaled equalization programs paid in cash.

This argument of political morality brings the husk of Dworkin's hierarchial procedure arguments to life. The forum of principle will appeal to the ideal of the 'seamless web' and Dworkin hopes that network will be spun around his central concept of 'equality of resources'. Derivative liberal programs will position around this constitutive stance. Adjudicators will find that the concept 'tutors and constrains' their interpretations and they will admire the smooth "institutional fit" exposed in their active judgments. Other political theories that "purport to occupy the same space"[142] will feel the pressure of a theory that, like neutral utilitarianism, "...cannot escape contradiction through modesty".[143] Perhaps 'equality of resources' would be the 'upshot' of netural utilitarianism, an outcome that was formerly unintelligible. Of course "equality of resources" is "... a rather different argument about what equal concern and respect requires."[144] Yet, since Dworkin's procedural requirements for defining those rights gave us the mechanics of a justificatory scheme rather than the normative grist, the congruence of the concept with the rest of his theory suggests that a program like "equality of resources" is what Dworkin has been aiming at. The interaction of basic concepts of responsiblity and desert with

interpretative judgments of law is fleshed out by Dworkin's form of 'natural law revisited' and illustrates "... my sense that politics, art, and law are united, somehow in philosphy."[145]

28. Equality of Resources and Affirmative Action

Before examining Dworkin's philosophical presuppositions about the interplay between abilities and the distribution of benefits and burdens that are suggested by these presuppositions in the context of a theory of political morality, let us summarize the position on affirmative action. The hierarchial procedures for developing justifications imply the centrality of Dworkin's theory of equal concern and respect. We have rights based on the constitutional connection with this theory and such a pedigree protects the right against encroachment by majoritarian legislation, even if an interest or policy can effectively secure an important collective goal. This is the definition of the minimum threshhold or weight of individualized rights to equal respect and concern. These rights are put in perspective when we recognize that many of the abilities and talents an individual has had related to "genetic luck" and can therefore compromise the theory of political morality that is a perpetual attempt to maintain "equality of resources." Individualization of rights should therefore be sensitive to the inequalities and envy that unequal distribution of wealth creates. The composition of the individual rights to equal respect and concern will primarily govern the questions of how individuals will be treated in pursuit of these fundamental political goals. Liberalism, conceived as

equality of resources, does not face the paradoxical conflicts of policy that other liberal conceptions have tried to untangle. Libertarian claims based on liberty that argue for deregulation were a problem for liberals who saw individual liberty at the heart of their political morality. The arguments for economic liberty are not given such priority in Dworkins position, and therefore he has no problem embracing an expansive redistribution scheme. New Deal liberalism, he suggests, "... played a useful role in achieving the complex egalitarian distribution of resources that liberalism requires."[146] The 'derivative' program is not intrinsically valuable, and as Dworkin puts it, "...equality of resources travels very far from the boundaries of the night-watchman state."[147] The 'deep equality'[148] theory aims for a mix between wealth efficiency and equality and does not commit itself to rights at either end of those occasionally polarized concepts. The liberties of the individual are delineated by the necessity of an active governmental interest in assessing and maintaining this "right mix".[149] Bakke is not positioned to complain in such a political scenario. Dworkin believes that there is nothing "... inherently offensive to an individual's right to equal protection..." (TRS, p. 226) if the state employs racial classifications to achieve this 'right mix'. Dworkin thinks that the central position of 'equality of resources' necessitates the option of using such classifications and that "... we must not corrupt the debate by supposing that these programs are unfair even if they do work" (TRS, p. 239).

> I now add that the government must not be allowed to use its power to pursue policy piecemeal in order to discriminate against unpopular or politically weak groups.150

The ideal of equality of resources will be pursued by instruments of policy, and insofar as particulars are the province of policy, some arbitrariness is involved in the specific beneficiaries of any one piece of legislation. The shape of policy is restricted to this condition of non-discrimination, however, Dworkin does not believe Bakke is entitled to such protection.

> Does he mean that he was kept out because his race is the object of prejudice and contempt? A very high proportion of those who were accepted (and presumably, of those who run the admission program) were members of the same race.151

Redistribution will attend to the obvious differences in wealth and resources between racial groups, and while the programs may not always explicitly anchor their objectives in terms of goals defined by race, the inability to do so would be a serious impediment. Bakke must be content with his right to be shown the sympathy that equal respect and concern offers him for being a disappointed applicant.

> It is of course regrettable when any citizen's expectations are defeated by new programs serving some more general concern. It is regrettable, for example, when established small businesses fail because new and superior roads are built: in that case people have invested more than Bakke has.152

Affirmative action is an urgent social goal that is linked with the political morality "... the correct construction of the Constitution turns on ...".153 The court must defend the policies

with the 'backwards' rights minorities need to achieve their goals.

> It is not the business of the Supreme Court, or of any other court to decide the "shape of our democracy" except insofar as one shape rather than another is required to protect the rights of individuals. The qualification is important: the last two decades of constitutional litigation show how far the programs of governments and private institutions may have to be adjusted in order to protect the rights the courts think individuals have. But even those who defend the Warren Court do not think that the court should remake society except for that purpose.154

The 'serious' implications of centralizing the 'rights thesis' is the political 'shaping' that is consequent to Dworkin's interpretation of the axiomatic right to equal concern and respect. The Bakke case indicates how the political morality Dworkin develops interacts and informs the hierarchial, principled picture of the law the "rights-thesis" suggests. Liberalism is skeptical of any goal of the "good life", yet the liberal is not skeptical about the need fo equality, and will use the power of political tools like policy to abet and realize the "embedded" meaning of that "constitutional" right. Liberals are joined in this rights-based political program by activist judges, who in taking their prized conceptions of rights seriously, adjudicate to effect and entrench legislation serving these liberal ideals. Dworkin argues for a decision in Bakke that is congruent with the liberal enterprise and establishes valuable precedent to support the goal of "equality of resources".

29. Agency and Affirmative Action

If the majoritarian process is too 'corrupt' to legislate against "backwards rights" that serve the equalization ideal, then the growth of the interpretation of 'equal protection' is assured by each precedent and piece of legislation that conforms with the ideal of "equality of resources". Bakke is a test case that can reach an outcome without specifying exactly which principles are vindicated or eroded. Dworkin's strategy is to emphasize the arguments that rest on interpretive judgments from the Constitution since these principles generate a precedent that will be useful in extending the distributional rights "embedded" in this conception of the Equal Protection Clause. The liberal mandate is selective amongst arguments justifying preferential treatment. Dworkin has supplied us with a liberal conception of the conflicts involved in Bakke. The Coval/Smith theory of 'actabilities' will supply a different plan for resolving the conflicts. The differences between the two perspectives will show how the philosophical presuppositions of a theory of rights will inform adjudication and guide the resolution of legislation proposals.

A meritocratic theory must suggest why people are entitled to jobs or benefits because of their abilities. Coval and Smith emphasize the role of "actabilities" in selecting rights and imply that the maintenance, development and benefits of "actabilities" are sources of value to individuals, perhaps the reason they instigate a political order. The composite view of an

individual's exercise of "actabilities" yields the idea of agency. Hobbes' view that agents cannot keep binding contracts in the absence of a political order is shared by this theory. However, unlike Hobbes, and all social contractarians, Coval and Smith do not introduce content into the organization of society beyond what is implied by the contracting practice itself. The ideal is a legal order that extends the agency of each individual as far as the bounds of other's agency will allow. Unlike Hobbes, who required obedience to the recognized sovereign without appeal to competing individual concerns, the rule of law would be individualized upon the justificatory basis of the rights agents need "... to be what they are."[155] Sharing the distinction of being a rights based theory of law that implies structural guidelines for a political order, Dworkin has little else in common with this concept of agency. Coval and Smith conceive a dynamic individual that sees the social order as a stable structure facilitating the exercise and extension of agency. Dworkin adjusts the impact of agency to achieve an equilibrium of result characterized by the concept of equality of "resources". Dworkin introduces more content to the political order through his individual rights than Coval and Smith require. At a deep level of abstraction, Dworkin could be characterized as offering more substantial guarantees through his program. Distributional duties and rights are tacitly agreed to when citizens serve and receive the implications of "equality of resources".

> Our view is that only the negotiating/ contracting practice itself, initially devoid

> of any content, is implied as an extension of agency.156

The concept of agency implies a contract of rights that furthers the cultivation of "actabilities" and maximizes their effect on the satisfaction of an agent's goals. The content rests with what is needed to contract and not with particulars that may be contracted. Structural concerns identify and abet the facilitation of "actabilities" that all agents share. Instead of a concept of dignity and respect which resolves into the "equality of resources" scheme, the concept of agency particularizes nothing about these essentially political concerns. The fundamental legal variable is the agent, but the political organizations achieved through the negotiating/contracting procedures are not fixed by that concern. The consequences of Dworkin's axiomatic concept of individuals guarantees certain distributional consequences that are compatible but not entailed by agency. Affirmative action is justified through Dworkin's distributional rights and his resolution of particular problems of affirmative action implementation and administration reflects the proximity of the program to Dworkin's general distributional scheme. The concept of agency recognizes the substantial guarantees "equality of resources" offers, yet fails to find support for that premise on the concept of an individual's right to equality. Agents are equal as agents before the law. Rights serve agency and are valued because they protect the cultivation of 'actabilities' required to perform responsible action. The subordination of

rights and the shape of the political order to the imperatives of individualized agency suggests a ranking or a hierarchial arrangement. The disjunctiveness is only conceptual, even though arguments from agency can be used to argue interpretive questions of politics and rights, the relationship is isomorphic. Agency is expanded or constricted by the political order that contextualizes the actions of agents. Pursuit of the favoured system that realizes the goals of most agents can be worked through a negotiation/contracting model that is common to all legal systems and is an essential political device.

The concept of agency can subsume Dworkin's theory and consequently a political order aimed at "equality of resources" could be the shape which agency chooses through the "contractual-negotiating pit"157 or legislative assembly. The concept of agency demonstrates normative implications by imposing a critical standard on the political machinery employed in the achivement of favoured goals. Presupposed by the theory of agency is the content of a metaphysic of action and the entailments of the theory for a package of rights. Essential features of agency that every agent shares will be protected, yet this framework is consistent with many political orders. The compatibility is not an expression of neutrality, as the jurisprudential significance of the concept will conflict with some expressions of substantive political theory. In the hard case of Bakke, Dworkin does not recognize an argument based on the connection of merit with desert. We have noted the isomorphism between Dworkin's

conception of responsibility and "genetic luck" and his rights thesis which resolves into "equality of resources". The concept of agency stresses the connection between an agent and action and strives through rights to eliminate impediments that diminish responsiblity. To assume ontologically that agents are determined in the expression of their agency by factors beyond their control or responsibility would limit the success of a political order shaped to expand and facilitate agency. Praise and blame, merit and culpability are polarized concepts that are enervated by theories of action that circumpose responsibility. The theory of agency will develop a concept of merit through its related presuppositions about action and responsibility. The theory will address Dworkin's challenge to defenders of merit.

> Someone who holds the meritocratic theory, that people are entitled to jobs in virtue of their talents, must provide an argument which brings their claim under some appealing and more general arguments for rights.158

If Coval and Smith can show the connection between rights and the protection agents' need to act intentionally and responsibly, the groundwork of political rights will furnish a standard of accountability and imply how to resolve competitive interests in an economy of ends.

Dworkin's hierarchial, principled picture of the law is built upon presuppositions constricting the role of individual responsibility in connection with scarce desiderata. The compensation of distributional entitlements through equality of resources will characteristically proceed by taxation, or through

policies like affirmative action. Perhaps it is characteristic of governments to act in this redistributive role. However, the principles that justify the programs are not fixed by function, they are explained by the goals they serve. In general ideological terms, Coval and Smith will justify political administration when the programs promote and respect the interests and rights of agents. The ability of agents to secure ends with collective policies is an extension of agency, however the pursuit cannot contradict the individualized justificatory base. Dworkin, however has little content remaining in his idea of individual rights, since the ideal of 'equality of resources' will determine the content of individualized claims. Instead of functioning independently, as they do in Dworkin's rhetoric, the ideal controls the meaning of our individual rights.

V. TAKING INDIVIDUALS SERIOUSLY

30. Sandel's Criticism of Dworkin

In response to Profesor Sandel's criticism of Dworkin's position on the relationship of merit and entitlement, he writes:

> I do not deny that individuals have talents, or that they can take pride in these, or that they can find in these, if they hold the necessary beliefs about value, evidence of their own moral worth. I say only that these talents do not entitle them to any particular status or job or reward, and that is something surely quite different.159

The relationship that entitlement has developed with merit over the years suggests that the two concepts are interconnected. In fact, many entitlement theories will justify their shape by appealing to how their theory rewards merit better than another. Merit has a venerable place in the family of concepts that give content to an individual's existence. Without freedom, value and responsibility, the concept of an individual is diminished into a variable that may be useful for a purpose, but is without value intrinsically. Dworkin's eliminative views on merit are culmulative. Perhaps Dworkin is unaware of the implications of his skepticism about merit. Sandel's criticism focuses on the interpretive issue of the role of talents in society: If an individual does not own his talents, then the state must. Sandel requires Dworkin's rationale for the displacement. Sandel's criticism extends Dworkin's analysis too far to address the fundamental issue. Dworkin does not need to admit that talents entitle either man or society to any particular rewards.

Entitlement, in the traditional sense of justly deserving something, is simply jettisoned as bad theory by his eliminative views. Sandel's strategy is misplaced. No arguments justifying why the state is entitled to distribute what Bakke believes he deserves is required by Dworkin's position. Diverted by this development, Sandel never asks about the weighty issues Dworkin drops to keep his eliminative views airborne. At the end of his reply, Dworkin charges that a political morality argument should show why individuals are entitled to the goods that they claim they deserve. Sandel's suggestion of a Hegelian community as the proper conception to base political morality upon is too hastily sketched to address this entitlement issue.

> Sandel must show how it follows from the proper active sense of community that people who achieve high scores on admission tests are prima facie entitled to a university education in preference to someone else who scores lower but has other qualities useful for the profession. If he can do this, then he can justly say that any proposals, that the latter should nevertheless sometimes be preferred, involves a sacrifice that must be justified by showing that the community that gains can be said to be their community in the necessary active sense. This could, I think, easily be shown. But it is not necessary because no none has yet shown that any sacrifice is involved. No notion of community, no matter how rich or Hegelian, can collapse the two steps of the argument that is required.160

No sacrifice is involved in this issue because Dworkin denies the relevance of Bakke's merits to the distribution of the medical training. Perhaps Sandel's conception of the political community is not sufficient to give a complete account of how merit relates

to entitlement. However, at the outset of this issue, it is clear that the onus is on Dworkin's eliminative strategy to find justification. Broadly speaking, few positions of ethical theory will jettison concepts such as merit and desert, as they are useful and venerable. If merit is not employed as the criterion of distribution, some more passive notion of entitlement such as a 'need' must be manufactured to fill the gap. Constructs such as a system of needs are popular amongst egalitarians. However, such a position seems to grind against the dynamism of rights-based theories of political morality.

31. Rights as Rhetoric

The lacuna within Dworkin's rights thesis is the absence of explanation about how we qualify for the rights he defends. Individuals have an equal right to the maintenance of their dignity, however, as our earlier investigations showed, the concept of dignity is more suggestive than substantial. Dworkin's use of "rights" in this theory seems to distinguish his platform from other egalitarians, who generally hold eliminative ideas about entitlement and prefer to use the language of "needs" for their basic political constructs, instead of rights. The question for us now is whether Dworkin's change in terms is an ideological difference, or simply a rhetorical device.

32. A Mechanical View

Dworkin's skepticism about the relationship between abilities, merit, success and entitlement, leads to a mechanical picture of the individual in relation to society. The paucity of

explanation regarding what features of an individual qualify the person for the ascription of rights seemed at first blush to be a gap in Dworkin's rights thesis. As the vital operative concepts are exposed and the 'right mix' redistributive scheme is clearly identified as Dworkins central concept, the mechanics of his rights thesis appear more boldly. Individuals are variables in calculations determining the right mix between wealth, efficiency and equality of resources. As such, the rights individuals' hold are like promissory notes that are cashed in when the calculation requires such redistribution. Dignity and respect become abstract conditions on the calculation, implying some cutoff point past which no rights-holder is allowed to slip. Our typical conceptions of respect and dignity are inadequate notions for Dworkin's purposes. Dworkin's concept of respect and dignity must be neutral to individualized conceptions of what constitutes respect or dignity. As Dworkin would put it, political morality must be neutral between competing conceptions of the good life. Individuals may, "... if they hold the necessary beliefs about value...",161 define dignity in more concrete terms than those Dworkin employs in his capacity as the spokesman for the "forum of principle". Abstracted from concrete examples, Dworkin's conception of dignity grows rarified and indeterminate. If dignity is generalized into some ratio of redistributive benefits, the active conception of protecting an individual in the exercise of agency is subsumed by an enervated guarantee of a right to a minimum standard of living. Justification of welfare benefits

need not, and to the best of my recollection, never has, appealed to merit skepticism as the basis of redistribution.

33. Merit and Entitlement

Disclaiming the connection between merit and entitlement allows Dworkin to resolve the prima facie contradictoriness of an individualized rights theory and an aggressive redistributional scheme. The resolution is more successful as rhetoric than political theory. The rights that emerge from the complete system that Dworkin has published are egalitarian, but not equal. Individuals are subject to laws that will diminish the impact of their abilities on their objectives if the calculation requires such policies. If an individual objects that the policy appropriates the property that the agent's merit secured, the policy will dismiss the objection as misplaced. If the calculation creates the scheme of entitlement, an individual cannot be entitled to anything withheld by programs serving the calculation. Dworkin's theory of entitlement is not a framework that we map onto our meritocratic practices. The entitlement theory Dworkin offers subsumes the meritocratic theory. Dworkin's philosophical presuppositions preclude the meritocratic theorists' axiomatic concepts. Dworkin does not exclude the concurrence of meritocratic concepts with his theory, given that the individuals "... hold the necessary beliefs about value". Such concurrence is not important. The naive may continue to believe, however, Dworkin's 'forum of principle' will not base their political morality on such motives. If the definition of individual rights

escalates to their deliberations, then naive beliefs about the imperatives of merit will not figure in official calculations. If the policy that best serves the 'ideal' involves legislation with an unequal impact on indidivual interests, the rights belong to the government pursuing egalitarianism, not to individuals with equal rights.

It may be objected that we overlook the influence of concepts, such as dignity, in shaping policies aimed at securing this 'right mix'. Our suggestion that dignity will translate into some ratio of distribution past which no one will drop is perhaps too simplistic. Handicapped people may require more goods than the standard because of their special needs. Dignity is placing a meaningful condition upon the calculation in this circumstance. Given that dignity secured equally for all is a mandate of the redistributional scheme, it would be surprising if the concept did not alter the distribution when confronted with needs that were asymmetrical, but serving dignity. The responsiveness of Dworkin's scheme of redistribution is, theoretically at least, vast and individualizable. The necessity of generalizations in the administration of such distributional schemes, and the ability of the system to afford the distribution would perhaps be crucial practical restraints. These are not objections to the principles that Dworkin offers. More important problems derive from the areas neglected by Dworkin's redistributional scheme. The fact that entitlement distribution will adapt to the particulars of each individuals' 'dignity' is a representation of the flexibility

of the formulae used to calculate the equality of resources scheme. However, will a calculation that attends to economic facts uncover enough about dignity to truly individualize a system of rights?

34. A Distinction Between Merit and Success

Citizen-agents are conceived as entities whose sole value is in terms of the external relation they bear to the goods of the world. Citizens are entities with rights to a certain apportionment of those goods, and are judged as not receiving equal respect and concern only if their apportionment is not to some degree, equal. Their dignity and respect, qua individual, is thus really a matter of entitlement to goods. Functioning as a theory of entitlement, "equality of resources" fills the gap left by Dworkin's merit skepticism. Will a full conception of an individual's dignity be protected by such an entitlement scheme? Will each citizen be able to realize the liberal ideal of autonomously pursuing his personal conception of a good life? When Dworkin's entitlement scheme is located as the central concept in his rights-theory, and the corollary beliefs about merit-skepticism are in place, does the official deliberation about rights truly attend to the features of an individual? To address these issues, a reply must be made to Dworkin's merit-skepticism. The argument charges that a view like Dworkin's leads to a mechanical picture of the nature of individual rights. His dessicated view of individuals that ignores merit is too superficial to individualize rights. To substantiate these

arguments, a distinction between merit and success will be drawn to undermine Dworkin's merit-skepticism.

The distinction between merit and success flows from a concept of action. Actions are based on epistemic beliefs about the world and the agent's relationship to it. The epistimic element of action will be designated as E. The goal or intention or directedness of an action is the teleological component, and is designated by T. Finally, some causal network must be instigated by the agent, and this will be called the physical, or P element of action. The Coval/Smith position contends that the E T P elements of action can constitute a full action description.162 This position involves an internalized concept of action as complete before the consequences of an action ensue. A point of clarification: the causal chain is not cut in the analysis. Consequences are causally linked to actions. However, this analysis allows us to distinguish the concept of an 'action' from 'consequences' that include the causal ingredient of action mixed with other causal factors. Success is a description of consequence. Merit attends to the internal components of action. Abilities are descriptions of an average of success. They indicate a statistical ranking of performance within the aegis of a convention that measures an agent's success. Averages of performance, or abilities, provide our context for understanding the merit involved in an action. Abilities function as a mean or a standard through which measurements of effort are possible. Abilities, like success, attend to the consequences of action.

Merit describes the internal standard of effort, assiduousness, or how hard the agent is trying. Merit is more difficult to measure because an individualized assessment is required. A familiarity with the abilities of each agent is necessary before one can perform a calculation of the merit involved. On this analysis, we can make perfect sense of agents achieving the same result, the same success, yet displaying different amounts of merit in the process. This useful distinction between merit and success can trace its conceptual lineage back to the concept of action. In response to Dworkin's charge that there is no such thing as "merit in the abstract", we can offer this definition. Dworkin's relativism about what can constitute merit now fits on to our delineation of success. Given the relativism of conventions that certify or signify success, it is probably true that a set of actions may be able to find a convention that will interpret them as successful. For example, an artist may mystify us with a painting he considers to be a success. When asked about the salability of the painting he may justify his ascription of success by pointing to some other convention of success. "If it doesn't sell here, it's because Vancouver audiences are unsophisticated. In New York they would love it!" Given a multiplicity of conventions of success, the relativism of the concept is assured. However, Dworkin will not encounter the same flexibility of interpretation when he considers merit. Given our internal standard, we would compare the painting in question to other works the artist has achieved with his abilities, and our

analysis of the merit of the picture would attend to the particular performance in the context of the artist's demonstrated abilities. Merit describes an epistemic ability that directs assiduousness towards the cultivation of the optimum result from an agent's abilities. Usually the abilities are exercised within a convention that measures success. The concurrence between merit and success is not evidence of their indistinguishability, but simply a reflection of the evaluative context that a convention of success provides us with to facilitate the measurement of merit. Merit can exist in failure, because merit is not always recognized or rewarded by success. Furthermore, success is not always evidence of merit, as one can win without trying, or achieve without effort. If we fail to separate merit and success, we lack the conceptual apparatus to rank the values of different forms of success. Dworkin's skepticism about merit leaves him with an impoverished picture of success.

35. Fairness and Merit

Will Dworkin's political ideals be able to coexist with a deeper conception of merit and success? Depending on the pervasiveness of Dworkin's recondite rights to redistribution, perhaps not. If wealth efficiency, next to equality, dominates the organization of the economic conditions for agents in Dworkin's theory, then his political scheme will reinforce success. In many cases the results of such an arrangement will not be controversial. However, if merit is not included as an important value in the economic structure, conflicts between merit

and success will always be resolved in favour of success. This will facilitate the goals of agents that are consequence-oriented, but at the cost of ignoring those internal aspects of actions that constitute merit. It may be that merit must be nurtured by the political system in order to prosper. Certainly one of the evaluative criteria that figures in our appraisal of the fairness of the economic order is the proclivity to reward merit. This asepct of fairness will not be recognized in Dworkin's scheme of redistribution. If an entitlement scheme recognizes and rewards the internal aspects of action, such as the assiduousness and effort which constitute merit, then the entitlement an agent receives is predicated upon an individualized, particularized judgment about each individual. Dworkin's presuppositions preclude entitlement following such individualized standards. If the official merit skepticism contributes to the formation of the measurement of redistribution rights of an individual, then entitlement will necessarily follow a narrower, consequence-orientated scheme of identification. This is the substance of our charge that Dworkin's scheme offers a mechanical picture of the individual in society. If an individual requires the benefits of the redistributional scheme, then the calculation has determined a fact about the individual's degree of success. Conversely, those who are generating wealth and contributing to the redistributional scheme will be rewarded with success or money because of a fact about the individual's efficacy in the economic order. This evaluation is characterized as mechanical because of the nature of

the criteria employed in the calculation of entitlement. Without the additional criterion of merit, success is simply an ability to prevail in the conventions that define success. Recalling Dworkin's argument that "anything" can constitute "merit",163 and our analysis which shows how Dworkin's conception of merit actually maps onto the idea of success, we can predict that the meaning of success will be altered by Dworkin's scheme. Although some meritorious goals are compatible with Dworkin's program, the cultivation and nurturing of these goals through the recognition of the independent value of merit is conceptually ruled out. A primary source of the value success holds for individuals is the implied connection with merit. In other words, not only does the agent have something in exchange for his abilities, he deserves this success for reasons that are under his individualized control. Merit as an internalized standard undercuts the objections that Dworkin offers against "merit".164 Abilities that are products of genetic luck or historical chance are relevant to success and can diminish an individual's responsibility for such success. However, when the discussion moves to the evaluation of merit, abilities become relevant for measuring the presence or absence of effort, and therefore, differences in ability between individuals is irrelevant. A political theory that wishes to recognize and reward merit must by definition individualize the rights of individuals. Dworkins' theory, focusing on the distributional rights that agents hold, need not attend to individual merits, and will base its rights scheme on degrees of

success. Limiting judgments about individuals to questions about their efficacy in conventions that define consequences in terms of failure and success seems to be too abbreviated to underpin a theory of individual rights.

FOOTNOTES

1. Ronald Dworkin, Taking Rights Seriously, Harvard University Press, 1977.

2. Regents of the University of California v. Bakke, Supreme Court of the United States No. 76-811, June 28, 1978, Indian Law Reporter, 51 LRA - 119.

3. John Rawls, A Theory of Justice, Harvard University Press, 1972.

4. Ibid.

5. Ronald Dworkin, "Why Liberals Should Believe in Equality", New York Review of Books, Feb. 3, 1983.

6. Ronald Dworkin, "What Liberalism Isn't", New York Review of Books, Jan. 20, 1983.

7. Ronald Dworkin, "Liberalism", Stuart Hampshire Ed., Public and Private Morality, Cambridge University Press, 1978, p. 113-143.

8. Ronald Dworkin, "Liberalism", Private and Public Morality, op. cit. p. 127.

9. Dworkin, op. cit., p. 127.

10. Dworkin, op. cit., p. 116.

11. Ibid., p. 141.

12. Ibid., p. 128.

13. Ibid., p. 128.

14. Ibid., p. 142.

15. Ibid., pp. 142, 143.

16. H.L.A. Hart, "Between Utility and Rights", Ronald Dworkin and Contemporary Jurisprudence, Ed. by Marshall Cohen, Rowman and Allanheld 1983, pp. 219.

17. J.S. Mill, Utilitarianism, p. 255.

18. Dworkin, Ronald Dworkin and Contemporary Jurisprudence, op. cit.

19. Hart, "Between Utility and Rights", op. cit., p. 220.

20. Dworkin, op. cit., "A Reply by Ronald Dworkin", p. 290.

21. Tussman, J. and Tenbroek, J., "The Equal Protection of the Laws", California Law Review, 1949.

22. Ronald Dworkin, "Is Wealth a Value?", Journal of Legal Studies 9 (1980): 191; "Why Efficiency?", Hofstra Law Review 8 (1980): 563.

23. R. Dworkin, "Social Sciences and Constitutional Rights", The Education Forum.

24. R. Dworkin, "Liberalism", op. cit.

25. R. Dworkin, "A Reply by Ronald Dworkin", M. Cohen Ed., Ronald Dworkin and Contemporary Jurisprudence, pp. 284, Roman and Allenheld, 1983.

26. R. Dworkin, "A Reply by Ronald Dworkin", M. Cohen Ed., Ronald Dworkin and Contemporary Jurisprudence, pp. 285, Roman and Allenheld, 1983.

27. G.B. Shaw, Man and Superman, Penguin Books, p. 245.

28. R. Dworkin, "Is Wealth a Value?", The Journal of Legal Studies, 9 (1980) p. 216.

29. Dworkin, "A Reply by Ronald Dworkin", op. cit., p. 286.

30. Ibid., p. 281.

31. Ibid., p. 282.

32. Ibid., p. 283.

33. Ibid., p. 287.

34. Henry Sidgwick, The Methods of Ethics, MacMillan & Co., 1962, (First edition, 1874) pp. 417.

35. W. Gallie, "Essentially Contested Concepts", Proceedings of the Aristotelian Society (1965), 167, 168.

36. Ronald Dworkin, "Law as Interpretation", Texas Law Review, Vol. 60, 551, 1982.

37. Gallie, "Essentially Contested Concepts", op. cit.

38. 15(2) The Bill of Rights, The Canadian Charter of Rights and Freedoms.

39. Ronald Dworkin, "Law as Interpretation", Texas Law Review, Vol. 60, 527, 1982, p. 529.

40. Ibid., p. 531.

41. Ibid., p. 535.

42. Perhaps Dworkin would punctuate that commission with the presentation of a loincloth in hopes of distinguishing Hercules from British barristers and judges dressed, as he put it at the British Academy, in "middle aged drag"., see: Ronald Dworkin, "Political Judges and the Rule of Law", Proceedings of the British Academy, Volume LXIV (1978), Oxford University Press., p. 286.

43. Ronald Dworkin, "Natural Law Revisited", University of Florida Law Review, 165, 1982.

44. Ibid., p. 185.

45. Leo Tolstoy, What is Art?

46. Ronald Dworkin, "Natural Law Revisited", op. cit., p. 179.

47. Ibid., p. 179.

48. Regents of the University of California v. Bakke, Supreme Court of the United States No. 76-811, June 28, 1978, Indian Law Reporter, 51 LRA - 119.

49. Ronald Dworkin, "Ronald Dworkin and Respondents", John Arthur and William H. Shaw ed., Readings in the Philosophy of Law, Prentice Hall, Englewood Cliffs N.J., 1984, p. 631.

50. Ibid., p. 628.

51. Ibid., p. 632.

52. Ronald Dworkin, "Law as Interpretation", Texas Law Review, Vol. 60, 527, 1982, p. 549.

53. Ibid., p. 549.

54. Regents of the University of California v. Bakke, op. cit.

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