Nebraska Law Review

Volume 85 | Issue 2 Article 6

2006

Affirmative Action in Higher Education: Insults, Preferences, and the Dworkin Defense

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I. AFFIRMATIVE ACTION

This Essay analyzes a particular kind of justification for affirmative action in higher education. Ronald Dworkin, in *Taking Rights Seriously*,[1] advances the position that the insult felt by victims of discrimination has a pivotal effect on the meaning of the act of discrimination, thus rendering the targets of such discrimination *victims*, and making the discriminatory act unethical and illegal. Conversely, the absence of such insult to those merely denied benefits by policies of affirmative action renders their objections impotent and makes affirmative action an ethical and lawful policy. In this Essay, I assess the confluence of ethical, legal, and psychological issues in Dworkin's arguments about affirmative action. I argue that Dworkin's defense of affirmative action, using ascriptive characteristics as a consideration in admissions or other awards procedures, is inadequate to demonstrate the justice or constitutionality of the policy, even when used as a remedy for past or continuing discrimination. In assessing Dworkin's psychology and the empirical component of his argument centered on the notion of "insult," I attend particularly to the legitimacy

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1. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

of different kinds of preferences and to the question of psychological harm done to the victims of discrimination.

Affirmative action is characterized by two features. First, it is a remedial policy, designed to help overcome the legacy of past discrimination and to counter the effects of continuing discrimination on the basis of race or other ascriptive characteristics.[2] Second, it is a discriminatory policy in the sense that, as a means of offering a remedy for wrongful discrimination, it differentially weighs ascriptive characteristics that would otherwise be impermissible to consider in admissions or other award decisions. Affirmative action has taken many forms, from individualized attention to the diversity that an applicant is likely to contribute to a school class because of his or her characteristics,[3] to the formulaic application of a fixed numerical advantage to university applicants of preferred races,[4] to the use of quotas that require a certain percentage distribution of characteristics among a selected population.[5] Most share the feature of using remedial discrimination, discriminating on the basis of characteristics which it would normally be wrong to weigh,[6] and doing so to remedy other wrongs.

As a policy that treats people unequally on the basis of race, affirmative action has been criticized for violating the principles of racial equality and equal protection of the laws. These objections typically hold that laws instituting policies of affirmative action violate the right to equal protection because they allow individuals' immutable characteristics to be held against them when they have a right to demand that such characteristics be treated as making them no more or less entitled to anything than anyone else.[7] In reply to these objections, defenders of affirmative action have long contended that the enduring legacy of discrimination and the existing forms of prejudice in the United States demand a remedy, and that affirmative

2. Even when justified primarily for the purpose of promoting diversity, affirmative action is legally permissible only when it is rendered necessary by social circumstances. Grutter v. Bollinger, 539 U.S. 306 (2003). In *Grutter*, the Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions," *id.* at 325, and stated an expectation that affirmative action will become unnecessary within twenty-five years, *id.* at 342.

3. *See, e.g.*, *id* at 337–39.

4. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003).

5. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

6. "[A] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

7. *See, e.g.*, Richard Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities, in* 1 AFFIRMATIVE ACTION AND THE CONSTITUTION 249–80 (Gabriel Chin ed., 1998); Lisa Newton, *Reverse Discrimination as Unjustified*, 83 ETHICS 308 (1973); MICHAEL WALZER, SPHERES OF JUSTICE 143–54 (1983).

action serves to diminish the unfair advantages that historically and currently advantaged groups (particularly whites and males) enjoy.[8] Affirmative action thus, in this view, advances the cause of equality by treating people unequally to a degree inversely related to their status in society, helping those who have been wrongly disadvantaged to attain their rightful social station. A second line of defense, recently upheld by the Supreme Court, is that a form of affirmative action is necessary to obtain the educational benefits that result from having a diverse student body.[9] In this view, affirmative action improves the quality of each student's education by increasing the diversity of experiences and characteristics within each class, thereby exposing students to an educationally valuable breadth of perspectives.

Ronald Dworkin has presented another argument in favor of affirmative action in *Taking Rights Seriously*.[10] Dworkin's argument emphasizes three issues: the characterization of remedial discrimination as a social policy intended to make the community more equal overall, the insult felt by victims of wrongful discrimination, and the illegitimacy of the preferences of those who favor such discrimination. His discussion of these themes is presented in an analysis of the cases of *DeFunis v. Odegaard*[11] and *Sweatt v. Painter*.[12] Sweatt was a black applicant who was denied admission to the law school at the University of Texas in 1945 because, under a policy of segregation, blacks were barred from admission. DeFunis was a white applicant who was denied admission to the University of Washington's law school under an affirmative action policy that applied different admissions standards to white and black applicants,[13] while "[t]he school conceded that any minority applicant with his average would certainly have been accepted."[14] Dworkin's discussion of affirmative action is still regularly cited,[15] and the Supreme Court recently echoed Dworkin's concern for making the community more equal overall when it discussed the importance of diversity in public life for the realization of

8. *See, e.g.*, Diana Axelson, *With All Deliberate Delay: On Justifying Preferential Policies in Education and Employment*, 9 PHIL. F. 264–288 (1977); Howard McGary, Jr., *Justice and Reparations*, 9 PHIL. F. 250–263 (1977).

9. Grutter v. Bollinger, 539 U.S. 306 (2003).

10. DWORKIN, *supra* note 1, 223–39.

11. 416 U.S. 312 (1974).

12. 339 U.S. 629 (1950).

13. *DeFunis*, 416 U.S. at 323–24.

14. DWORKIN, *supra* note 1, at 223.

15. *See, e.g.*, Todd B. Adams, *Environmental Justice and the Limits of Disparate Impact Analysis*, 16 T.M. COOLEY L. REV. 417, 428 (1999); Gabriël A. Moens, *Preferential Admission Programs in Professional Schools:* DeFunis, Bakke, *and* Grutter, 48 LOY. L. REV. 411, 468 (2002); Ryan Fortson, Comment, *Affirmative Action, the Bell Curve, and Law School Admissions*, 24 SEATTLE U. L. REV. 1087, 1098 (2000).

American ideals,[16] the competitiveness of American businesses,[17] and the legitimacy of political leaders.[18] Thus, the issue and the argument remain timely.

II. UTILITARIAN FRAMEWORK

Dworkin distinguishes between *DeFunis* and *Sweatt*, arguing that DeFunis's experience is substantially different from Sweatt's and that the difference makes discrimination against DeFunis benign. Part of the difference lies in the different kinds of purposes behind the discriminatory acts to which DeFunis and Sweatt are subjected. Dworkin analyzes these differences in terms of a utilitarian calculus, distinguishing two forms of utilitarianism: "psychological utilitarianism" and "preference utilitarianism." Psychological utilitarianism is consistent with classical "rule utilitarianism" in that it identifies the maximization of aggregate utility (which may be variously relabeled as happiness, satisfaction, or pleasure in the community as a whole) as morally right. Preference utilitarianism distinguishes between kinds of utility, and in so doing departs from utilitarian tradition by branding some forms of utility more right than others.

The distinction allows Dworkin to introduce an important issue into his analysis, namely the nature or origin of particular utilities, and how different kinds of utility relate to public policy and justice in their own particular ways. In terms of a traditional (e.g., Benthamite or Millian)[19] utilitarian view, there is no conceptual difference between the psychological and preference forms: utilitarians recognize only utility as a justification for action, so pleasure and preference are analytically identical in that they both indicate choices which are finally agreeable or on the whole better than the alternatives. However, Dworkin's approach is ultimately liberal rather than utilitarian. Distinguishing preference utilitarianism from psychological utilitarianism helps Dworkin to show that in a nonutilitarian political and moral system like ours, only certain kinds of popular wants can legitimately be pursued by the public authority. Some public policies that might pass a utilitarian test must, nonetheless, be overruled on grounds of injustice.

16. The Court states that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." Grutter v. Bollinger, 539 U.S. 306, 332 (2003).

17. *Id.* at 330.

18. *Id.* at 333.

19. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1780); JOHN STUART MILL, *Utilitarianism, in* ROUTLEDGE PHILOSOPHY GUIDEBOOK TO MILL ON UTILITARIANISM (Roger Crisp ed., 1997) (1863).

The "preference" view of utilitarianism helps Dworkin develop his argument against a solely utilitarian view of the legitimacy of public policy. Some kinds of utility are illegitimate because of liberal concerns with justice, and issues of right tell us the forms of utility to which we can and cannot pay attention when forming public policy. I suggest above that the distinction, within the preference view of utilitarianism, hinges on the differences between what are called *personal* and *external* preferences. Personal preferences apply to oneself, while external preferences apply to other people. In Dworkin's example, "[a] white law school candidate might have a personal preference for the consequences of segregation . . . because the policy improves his own chances of success, or an external preference for those consequences because he has contempt for blacks and disapproves social situations in which the races mix."[20] As Dworkin notes, external preferences corrupt egalitarian principle by allowing individual personal preferences to be overwhelmed by the external preferences of others. For example, if a majority feels that the members of a minority religious group should not be allowed to build themselves a place of worship, then the members of the minority group could be denied their personal preferences. This would clearly deny the members of the minority group their right to equal concern and respect, which is a fundamental principle that Dworkin desires to use to gauge wants.[21] By the personal preferences principle, the decision whether or not to build the place of worship should depend only on the wishes of the members of the religious group and not on the mere external preferences of others.

This utilitarian framework provides a basis for evaluating *Sweatt* and *DeFunis*, and in particular for supporting Dworkin's claim that Sweatt was constitutionally and ethically wronged by the University of Texas while DeFunis was not wronged by the University of Washington. Arguments against Sweatt's admission to the University of Texas turn out to be either ideal—that is, referring to a relationship to goals, wants, or purposes—or utilitarian. Dworkin abruptly dismisses ideal arguments against Sweatt's admission, stating that "[t]he University of Texas . . . cannot make an ideal argument for segregation. It cannot claim that segregation makes the community more just whether it improves the average welfare or not."[22] Dworkin then turns to the utilitarian questions and concludes that arguments

20. DWORKIN, *supra* note 1, at 234–35.

21. This raises a much broader question than can be answered in the scope of this Essay, namely whether a right to equal concern and respect should be taken as a guiding principle of justice. My argument assumes that it should, as Dworkin has argued elsewhere. "Equal concern and respect" is a principle that Dworkin derives from John Rawls's political theory; it is a fundamental right, and a core element of justice as fairness. *See* DWORKIN, *supra* note 1, at 180–83; JOHN RAWLS, A THEORY OF JUSTICE (1971).

22. DWORKIN, *supra* note 1, at 232.

against Sweatt turn out to be based on external preferences that violate liberal principles of justice by denying equal concern and respect.

III. INTERNAL AND EXTERNAL PREFERENCES

I think it is helpful to pause at this point to consider the reasons that such ideal arguments are unavailable to the University of Texas, because the reasoning that applies in this case is used later to evaluate the merit of utilitarian claims. Though Dworkin does not discuss ideal aspects of the argument against Sweatt, there are certainly a variety of racist "ideal" arguments that one can imagine being placed in opposition to Sweatt's claim. (I use the word "ideal" in the same analytic sense that Dworkin does, referring to a relationship to goals, wants, or purposes.) For example, in a white supremacist ideology a scheme of justice or morality may regard the oppression of non-whites as good. That this position is offensive does not indicate that it is not "ideal" in the sense of referring to goals or purposes. In the *Sweatt* case (or any similar one), an ideal racist claim would be unacceptable on its face if the Fourteenth Amendment were construed to enjoin all race-based discrimination. However, what the Fourteenth Amendment does is guarantee equal protection of the laws, and Dworkin's claim is that the right of equal protection bars some forms of racial discrimination but not others. Specifically, he claims that it bars discrimination against Sweatt but allows it against DeFunis; barring traditional racist discrimination but allowing remedial discrimination.

In Dworkin's interpretation, the principle behind the Fourteenth Amendment's equal protection guarantee is the ideal that people are entitled to equal concern and respect. Given this principle, racist ideal arguments of the variety described above are plainly unacceptable because they rely upon a denial of equal concern and respect for blacks; they rely upon a general devaluation of black applicants on the basis that black people are somehow dislikeable or underqualified. Any argument holding that it is intrinsically better to educate members of one race than members of another necessarily runs afoul of the Equal Protection Clause by treating members of one race with less respect and concern than those of the other, and is thus not allowable. However, a different vein of pro-segregationist argument is possible which carries no theoretical requirement of prejudice (although as a practical matter one supposes that such arguments would likely arise as rationalizations for prejudice). As Dworkin notes, one could argue that discrimination against blacks produces so much benefit for whites that the overall welfare, in a utilitarian calculus, is improved; or one could argue that there is so little demand for black lawyers compared to whites that there is no need to train any black lawyers; or one could argue that alumni gifts to the law school would drop off sub-

stantially if black students were admitted, so the cost to the school is too high to warrant the admission.[23] However, all arguments of this ilk meet their demise by the same logic: they rely upon the external preferences of people who deny blacks the level of concern and respect they accord whites. Alumni giving would only fall because of such external preferences; demand for black lawyers would only be near zero because of such prejudice; the utilitarian calculus in which white supremacy is of sufficient magnitude to outweigh blacks' level of disadvantage is also obviously based on a scheme that has less concern and respect for the welfare of blacks than it does for that of whites. Thus, all the arguments against the claims of Sweatt are utilitarian in an unacceptable, unconstitutional sense that violates the right of equal protection by denying blacks concern and respect equal to that accorded whites. Even if there is no special dislike for blacks, but merely a white same-race preference, blacks are slighted by the sentiment and the policy.

There are some difficulties with the distinction between personal and external preferences,[24] and these difficulties create weaknesses in Dworkin's use of utilitarianism. While the distinction has commonsense reasonableness to it, the distinction of preferences as personal or external is subjective, contingent upon the salience of various aspects of the case. Take for example preferences for watching football games. Assuming that one holds some opinion of football, one may hold a personal preference to watch or not to watch football games, and an external preference that other people watch or not watch. It is possible that such preferences held by an individual could be in conflict. For example, an Oakland Raiders fan might acknowledge that San Francisco 49ers fans have every right to attend games, and even think it good that they should do so, while feeling at the same time that going to games with 49ers fans in attendance is less enjoyable than going to games that are 49ers-fan-free. This is a case of a personal preference in conflict with an external preference.

However, one supposes it more common that personal and external preferences should be consistent. The problem with finding a clear distinction between the two, as Dworkin wishes to do,[25] lies in the fact that personal preferences may follow directly from external prefer-

23. *Id.* at 230.

24. For criticism of Dworkin's view, see, for example, John Hart Ely, *Professor Dworkin's External/Personal Preference Distinction*, 1983 DUKE L.J. 959; and Joseph Raz, *Professor Dworkin's Theory of Rights*, 26 POL. STUD. 123, 131–32 (1978).

25. Dworkin does acknowledge that "[s]ometimes 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." But in almost all such cases, he claims that "it is a personal preference that is parasitic upon external preferences." DWORKIN, *supra* note 1, at 236.

ences, or external preferences may follow directly from personal preferences, thus eliding the separation. One may reason from the general case to the specific, forming an opinion about how good it is to watch football and using this opinion as a cue for one's own behavior. For example, one could form an opinion that football is a good thing for people to watch because it is exciting, athletic, challenging, and teaches people to strive for achievement and teamwork. Conversely, one could form an opinion that football is a bad thing for people to watch because it is violent, brutal, dehumanizing, and teaches people to be physically aggressive and combative. Whatever the opinion, the personal and external preferences may stem from the same ideas, and as in this case, the personal preference may arise as a consequence of the external preferences. But more significantly, the distinction between personal and external preferences can be obscured in a social activity like watching football in a crowd of fans. One's personal preference could be to watch a game with other people, to be part of a large, enthusiastic crowd sharing the same source of enjoyment. If one wants other people to watch the game, that counts as an external preference, but if one wants to watch with them, to share a sense of solidarity in football fanaticism, the preference becomes simultaneously personal. The proper characterization depends upon the relative salience of the personal and external aspects of preference. (The person who dislikes football suffers the same confusion of personal and external preferences—disapproving of the sport, he or she chooses not to watch, but desiring the solidarity of a peaceful society that disdains such violence, the anti-fan wants others not to watch football either.)

In addition to the inherent ambiguity in the distinction between personal and external preferences, there is further reason to object to Dworkin's emphasis of the utilitarian calculus in his differentiation of the *Sweatt* and *DeFunis* cases. Utility's ability to indicate appropriate public policy is subject to severe limitations because of what non-utilitarians view as utilitarian theory's moral inadequacy. Thinking in terms of utility does have some value, of course. We can make utility comparisons among things in a class of objects, like the class of material goods (and since money is so readily fungible, it is commonplace to discuss material goods in terms of monetary values, which makes utility calculations easy). However, there is at least one other class of entities which is distinct from the class of material goods, namely that of moral claims. Within the moral category or the material goods category, there can be a utility function or calculus of values. There can be a calculus of monetary values, which can be performed with most, if not all material objects. There can also be a calculus of moral values, such as value placed on life, in which people might be willing to lose their lives in order to save others, or might be willing to take lives to

save others (including their own), as in a case of defense against attack. However, between the two categories of moral and material or monetary values the utility functions do not translate, and it is this translation difficulty that places severe limits on utilitarian theory. Comparisons of utility between these two classes are not intelligible because of the incommensurability of the two kinds of goods. One may talk of combining them in rather loose terms, perhaps the way one can say that if you add three apples and two oranges you have five round pieces of fruit. But there is a logical distinction that does not admit a conversion from one unit to the other. The exchange of material goods for life or death is not an intelligible state of affairs because there can be no reasonable calculus equating things in the two categories. Thus, while utilitarianism offers the advantage of a very parsimonious conceptual core, it is inadequate as a moral scheme for anyone committed to a notion of incommensurable goods or to rights or Kantian ethics.[26]

Thus far I have explicitly asserted the impossibility of constructing an equation between items in the calculus of material goods and human or moral goods (such as life and liberty), or perhaps more aptly, rights. I wish to note also the second feature of the relationship between the categories of morality and material goods, and this is that whatever the calculus by which moral claims are weighed against one another, moral claims have priority over whatever utility might be associated with material goods. This condition is described by the liberal theorist John Rawls as the lexical or serial priority of the right over the good.[27] Regardless of whether one accepts the various nuances of Rawls' theory, though, the distinction between moral principle and utility is a critical feature of contemporary liberalism. It is part of a persuasive body of moral philosophy and is well integrated with our constitutional sense of justice.

Dworkin finds fault with the arguments supporting discrimination against Sweatt because they are based on discriminatory external preferences which are essentially based upon racist malevolence. However, the difficulty of reliably discerning the kind of preferences at work in a given case suggests a shortcoming of Dworkin's analysis. It is not always possible to make such a distinction. The implication,

26. Despite my claim of the incommensurability of these two kinds of goods, people do exchange them. Prices are often affixed to priceless goods, such as life-saving medical care, and conversions of ethical and monetary values are frequently undertaken, as when plaintiffs demand monetary damages from tortfeasors. However, such conversions are forced. My point is that morals are priceless. In these examples, payments of money are expected to satisfy financial claims, not moral ones. Fees are paid for the material expenses of medical care, not for the moral benefits, and a tortfeasor's reparations are not expected to staunch the wound that his or her actions caused to the moral system. Rather, they are either punitive or *financially* (but not morally) compensatory.

27. RAWLS, *supra* note 21.

if the personal/external preferences distinction is inadequate to indicate the propriety or legitimacy of a legal rule, is that some other framework must be found to evaluate the consistency of particular rules with constitutional principles. However, as I have indicated, notions of utility are also not adequate because of the categorical distinctiveness and moral superiority of rights over preferences. The proper solution to this dilemma is in the notion of rights, not the notion of utility. Thus the evaluative framework ought to be based not on the kind of preferences (personal or external) invoked in support of a policy, but on the consistency of the preferences with applicable principles and rights. In moral terms the applicable principles stem from moral philosophy, while in legal terms the applicable principles are constitutional.

This means that, even if the preferences of the community run strongly in favor of racial discrimination of the kind perpetrated against Sweatt—that is, even if the community as a whole is much happier, and as a whole much better off in its own estimation when blacks are excluded from the University of Texas's law school—the right of Sweatt to equality under law demands that the preferences of the community be thwarted. In moral terms this is the intuitively pleasing result, and in legal terms it is the correct one. However, it raises a philosophical dilemma for democrats because it is in tension with the spirit of democracy, which supports the claim that the satisfaction of a community's preferences is a particularly esteemed goal of the political enterprise. Nevertheless, any democratic claim on behalf of Sweatt's oppressors is bound to falter, in part because of the special provisions of our constitutionalism, which is expressed through the process of judicial review of policies that seek to satisfy majority preferences.

IV. UTILITY AND DEMOCRACY

The notion of satisfying preferences is, especially in Dworkin's analysis, a utilitarian one. Utilitarianism carries about it a democratic, and particularly a majoritarian, aura. Since it seeks the maximization of aggregate utility, a majoritarian system of policy selection in which each person (either directly or through a proxy or representative) is allowed to weigh in equally in a policy vote would be highly faithful to the utilitarian maxim that the most preferable policy is the one that maximizes average utility. In turn, democratic systems exist (at least in part) to give expression to the preferences of the people living under them. In the traditional view, a main purpose of democratic government is to give the people at large an overriding voice in public affairs because those affairs are *their* affairs, and they have the right of self-determination. The right of self-determination indicates that people should be able to choose the policies that will be most ef-

fective in delivering outcomes that they value. Hence a democracy has a system of institutions that translates majority preferences into policy (or, as a special case, minority preferences in those cases in which the majority is willing to acquiesce).

Now, it is easy to suppose that because Americans bill their country as a democratic one, and because the view of democracy referred to above is utilitarian insofar as it is concerned with translating public preferences into public policy, the purpose of American democracy is to make policy out of community preferences. The Constitution certainly embraces democratic principles, so the notion that "the strong preferences of the community are precisely what the constitutional order seeks to bring about" is not without support. However, this account of democracy and the constitutional order omits a large part of the story. There is an important limitation placed on democracy's ability to satisfy community preferences, and that limitation requires us to take note of the fact that our constitutional order is not merely majoritarian and is not merely concerned with free competition among popular preferences. The Constitution instead places limits on the scope of this competition by establishing principles that override mere preference. The constitutional order exists to authoritatively and legitimately maintain just social relations, defined by a set of principles in the constitutional law that reflects the moral climate of the society. This is a key feature of our Constitution: to establish principles. While one might imagine a constitution that establishes only formal rules, like, for example, "The president must be at least thirty-five years old," that is not the kind of constitution we have. While it includes rules, ours also embodies principles of justice that constrain the preferences of the community, such as the principles of equality, free speech, free exercise of religion, and due process. These principles trump preferences at all times, and it is the task of the courts, with their capacity to review policies and reconcile them with legal principles, to discern the popular preferences that are incompatible with constitutional principles and disallow policies based on such preferences.

Against the charge that this is anti-majoritarian, the answer is, "Yes, and deliberately so." The Federal Constitution uses majoritarianism as a means to assure that government does not operate tyrannically, that the public interests are represented, and that civic virtue is cultivated. But majoritarianism is not absolute. Principles of right exist that must be defended even against the popular will. Majoritarianism is an effective system for articulating the interests of the people, but the translation of these interests into public policy is constrained by constitutional principles of justice.

As it relates to Dworkin's analysis of affirmative action, the notion that the constitutional order exists precisely to bring about the strong

preferences of the community would support the University of Texas's position in the *Sweatt* case. It would allow that a strong community preference for segregation is sufficient to justify a law against blacks attending the law school. The true constitutional order, however, is not simply one anchored to majoritarian preference, but, as noted above, is one that tempers preference with principle. The principle of equal protection disallows arguments against Sweatt's admission because such arguments rely on logic denying Sweatt the equal concern and respect that the Fourteenth Amendment promises him.[28]

One of the manifestations of the denial of equal concern and respect to Sweatt is the insult delivered to Sweatt when he is the target of discrimination. It is the presence of the insult in the *Sweatt* case, and the alleged absence of such insult in the *DeFunis* case, that sways Dworkin in favor of affirmative action. This line of reasoning constructs an argument that can be characterized as empirical in a key sense, rather than analytic. More than simply relying on a particular observation of facts, as all legal arguments must, Dworkin's argument is specifically about the ways in which participants observe their situation and construct the meaning of their social experiences.[29]

V. DWORKIN'S EMPIRICAL ARGUMENT

I have argued that Sweatt's claim against the University of Texas is best defended on the basis of a right of equality that trumps the preferences of the public, rather than on the basis of the appropriateness of one form of preference versus another. I turn now to the character of Dworkin's empirical argument against *DeFunis*. In distinguishing *Sweatt* from *DeFunis*, Dworkin denies that racial discrimination is wrong per se and instead establishes theoretical loopholes through which some forms of racial discrimination may pass if they conform to certain empirical standards. These loopholes build the dual basis on which Dworkin defends discrimination against DeFunis: the purpose driving the discrimination is the just one of pursuing a more equal society, and as such there is no insult to DeFunis in discriminating against him.

Dworkin distinguishes the *DeFunis* case from the *Sweatt* case on the ground that *DeFunis* does not involve racial discrimination on the basis of external preferences, but instead involves considerations of race in a process intended to make society more equal. While the ad-

28. *See supra* note 21.

29. This is a different breed of legal and moral argument than, for example, what Robert George calls the "central tradition" of natural law theory. *See* ROBERT GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993); *see also infra*, Part V. While Dworkin demands a difficult interpretive task of judging the meaning of acts, the central tradition bases moral rules on the nature of life itself and claims that law protects actions consistent with basic human goods.

missions program discriminates in favor of blacks, it does so in pursuit of an ideal of a more equal society. Dworkin argues that it is appropriate to view DeFunis's personal stake in gaining admission to the University of Washington law school as outweighed by society's interest in making the community more equal overall by increasing the number of lawyers who are members of minority groups. Since there is no specific right against racial discrimination, but only a more general right of equality, it is DeFunis's burden to demonstrate that the right of equality (i.e., of treatment as an equal) should be conceived as barring racial discrimination in all cases, or especially in his case. However, Dworkin argues that DeFunis is being treated as an equal, because the admissions standards are meritocratic. They simply include race as an element of merit for the legitimate purpose of making the community more equal overall. As such, Dworkin finds the policy permissible. On the other hand, discrimination of the variety in the *Sweatt* case carries with it an inherent insult in that its form of discrimination against blacks is rooted in racial bigotry and the attempt to perpetuate the inferior station of blacks in a white-dominated society. Obviously such an attempt is illegitimate under the principle of equality. However, DeFunis faces no such insult—his denial of admission is neither based on hostility toward him because of his race, nor is it based on a valuation of his race as lower than blacks. Rather, it is based on an attempt to engineer more equal social relations.

This analysis is, in one important sense, independent of empirical circumstances in that discrimination based on external preferences is just as theoretically problematic when it is based on positive affect as it is when it is based on negative affect. This is because in a zero-sum situation, where an advantage for one group results in a disadvantage for another group, the effects of violating the principle of equality hurt the disadvantaged group just as much regardless of whether the intent was to help another at their expense or merely to hurt them for spite. In Dworkin's own example, if the targets of discrimination are athletes who are admired (rather than people who are disliked, which is the more traditional source of discriminatory behavior that results in adjudication), the external preferences that establish a policy to spend money on athletic facilities at the expense of other wants disadvantages the nonathletes in the population.[30] As before, Dworkin argues that the appropriate criteria for policy decisionmaking are personal, not external, preferences.

However, Dworkin's thesis remains empirical in another key sense. The requirement of equality is violated when a policy offends the dignity of a person (the "insult" referred to above) or class of persons. Thus, what would tell empirically against Dworkin's thesis

30. DWORKIN, *supra* note 1, at 235–36.

would be evidence that his view of the nature of the insult is incorrect, either by overlooking an insult to DeFunis or by exaggerating the insult to Sweatt. His argument hinges on the social meaning of the act of discrimination. This meaning is subjective in the important sense that it consists at base of people's feelings about how they are treated. The task of the jurist, in Dworkin's framework, must therefore be to evaluate the reasonableness of popular feelings about acts of discrimination. In Dworkin's view, Sweatt has good reason to interpret discrimination against him as a personal insult because of a history of anti-black bigotry, while DeFunis has no such reason because affirmative action is designed to right the wrong of anti-black bigotry, not to further a general anti-white, or more specifically, anti-Jewish bigotry.

It is important to contrast the nature of this empirical argument with its potential alternatives, because the empirical nature of Dworkin's approach ignores a mode of philosophy that has made fruitful commentary on themes such as those involved here. George's "central tradition" bases its conclusions about moral questions on assumptions about basic human goods.[31] This is different from Dworkin's approach in that Dworkin is concerned with the preferences that seem most salient in particular circumstances; for example, Dworkin attends to the nature of the insult as experienced by people like DeFunis or Sweatt, rather than to any purportedly universal norms or hermeneutical approaches. For the central tradition there is a key psychological assumption that there are ascertainable basic human needs, wants, or purposes that can structure the specifics of social life. That humans have wants, as well as certain needs if they are to survive, is a trivial observation. What is not trivial is establishing that, apart from physical requirements such as food and water and some means of coping with extremes in climate, there is any sort of universal set of wants or needs that can give specific content to legislation. In an approach that would contrast with Dworkin's by following the central tradition, one could evaluate these cases by considering the extent to which acts of discrimination support or interfere with basic human needs, wants, or purposes.[32] An argument from the liberal human rights tradition can be cast in similar terms. Instead, Dworkin has examined the observed circumstantial experiences associated with the acts of discrimination.

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31. GEORGE, *supra* note 29.

32. *E.g.*, WILLIAM GALLSTON, LIBERAL PURPOSES (1991). Gallston makes an argument that interestingly melds natural law and liberal philosophy by accepting the natural law notion that a particular way of life can be identified as preferable to all others and may be justly supported by law at the expense of other ways of life. Such a position contrasts with the notion more prevalent among liberals, for example, RAWLS, *supra* note 21, that law (and the state more generally) should be neutral with respect to notions of the good life.

Imagining alternative observed circumstances, one can see that if the meaning of the discrimination against Sweatt were substantially different, this might make his exclusion from law school acceptable in Dworkin's analysis. Notwithstanding what I wrote above (when I noted that discrimination based on positive external preferences is no more permissible than discrimination based on negative external preferences), one could posit a set of counterfactual historical circumstances in which Sweatt's exclusion would not be insulting to him or to blacks generally. For example, if blacks had flooded into law schools in the years before Sweatt applied, producing a radical oversupply of black lawyers, while the number of white lawyers declined (for whatever reason), then in an American society not blighted by pervasive anti-black racism, the University of Texas might have had a leg to stand on in their argument against Sweatt, under Dworkin's analysis, because they could have pointed to a positive social effect—making the community more equal overall—and plausibly denied any racist motivation for their policy.

Similarly, if DeFunis had been excluded because of anti-Jewish bigotry, he would clearly win his case. Likewise he would win if he could show that exhibiting a preference for blacks over whites is inherently demeaning to whites, or was in this case, or if he could show that such preferences were demeaning to blacks. For instance, if racist blacks had instituted the admissions policy at the University of Washington's law school for the purpose of keeping whites out of the legal profession, then Dworkin would not countenance a decision in the law school's favor because the actions deny whites equal concern and respect, even though the practice might make the community more equal overall. Thus, making the community more equal overall is not sufficient; the policy can still fail if it is otherwise unjust. Also, if the need for affirmative action were viewed as testimony of the uncompetitiveness of blacks compared to whites, as insulting them by being an act of pity deemed necessary by their alleged inferiority, this seemingly would also poison the argument in favor of affirmative action.

VI. WEAKNESS OF EMPIRICISM AND THE ECOLOGICAL FALLACY

How plausible is Dworkin's reading of the meaning of the act of affirmative action? The empirical argument presented by Dworkin was made, in a rougher form, by the Supreme Court in *Brown v. Board of Education*,[33] in which the Justices cite social science evidence of the feelings of inferiority and resulting psychological harm caused by racial segregation in schools. The Court quoted a Kansas

33. 347 U.S. 483 (1954).

court's remarks that "the policy of separating the races is usually interpreted as denoting the inferiority of the negro [sic] group."[34] Indeed, it does not seem controversial to say that the insulting nature of the act of discrimination is a debilitating blow against any claim that such discrimination is just. But it is easy to take exception to Dworkin's claim that no one is insulted by affirmative action.[35] As I already mentioned, another variety of insult is the potential that affirmative action has to make people suppose that its beneficiaries are inferior to others. Dworkin's only reply to a black applicant's claim that affirmative action makes him or her feel like an inferior object of pity and charity is to explain that this is not the intent behind the policy, and that it is instead based on an attempt to remedy the inferior position that affirmative action's beneficiaries unjustly face in competition with others.

To this explanation, the applicant might reply, "But I haven't experienced that disadvantage. That's a valid generalization, but it doesn't describe my experiences." This example illuminates the shortcoming of the line of argument about insults, which is that it fails to address the crux of the matter: affirmative action's defense commits the blunder of collectivizing the individual.[36] The right to "treatment as an equal," in Dworkin's language, is an individual right.[37] The defense of affirmative action is that it works properly (fairly and effectively) in the aggregate—that is, it makes society better off. However, the individual right of equality demands that affirmative action work properly in each individual case, and this cannot be true of affirmative action because the policy is based on an ecological fallacy,[38] collectivising the individual.

Dworkin claims that

> [t]here cannot be a good legal argument in favor of DeFunis . . . unless there is a good moral argument that all racial classifications, even those that make society as a whole more equal, are inherently offensive to an individual's right to equal protection for himself. . . . . [DeFunis] argues that the Washington

34. *Id.* at 494 (citation omitted).

35. *E.g.*, SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1991); Madeline E. Heilman et al., *Intentionally Favored, Unintentionally Harmed? Impact of Sex-Based Preferential Selection on Self-Perceptions and Self-Evaluations*, 72 J. APPLIED PSYCHOL. 62–68 (1987). *But see* Marylee C. Taylor, *Impact of Affirmative Action on Beneficiary Groups: Evidence from the 1990 General Social Survey*, 15 BASIC & APPLIED SOC. PSYCHOL. 143–78 (1994) (suggesting that the perception of insult is not the prevalent reaction).

36. The focus here is Dworkin's defense. Other defenses of affirmative action that do not commit this blunder are conceivable.

37. Note that *McCabe v. Atchison, Topeka & Santa Fe Railway*, 235 U.S. 151 (1914), holds that the Fourteenth Amendment protects the rights of individuals; groups are not the focus of concern.

38. The ecological fallacy is the logical error of drawing inferences about individuals from data about groups. William S. Robinson, *Ecological Correlations and the Behavior of Individuals*, 15 AM. SOC. REV. 351–57 (1950).

> Law School violated his individual right to equality for the sake of a policy of greater equality overall, in the same way that double tuition for arbitrarily chosen students would violate their rights for the same purpose.[39]

This claim is overstated, however. While it is true that DeFunis would win if there were a good moral argument that all racial classifications violate equal protection, DeFunis can win on the more narrow ground that this particular racial classification violates the right to equal protection because of the ecological failing of affirmative action.

It is a valid generalization that blacks in the United States, compared to whites, are disadvantaged in numerous important ways because of the legacy of slavery and racism, and the enduring problem of racial prejudice and stigma.[40] However, assuming that an individual black applicant has suffered the same kind and degree of disadvantage as blacks as a whole are known to suffer is an ecological fallacy. When looking at an individual black applicant, about whom the only datum under consideration is race, the label "disadvantaged" is a stereotype. Admissions policies that use race as a criterion in and of itself, rather than using it as a cue to alert admissions officers to the possibility that certain other characteristics are present, work by applying racial stereotypes to individuals.

The application of racial stereotypes to individuals is highly problematic because they are wrong in many individual cases, and in those cases in which they are wrong, they do an injustice to the individual who is wrongly appraised. They also do an injustice to whomever is denied an award in place of the award granted to the wrongly appraised applicant, such as DeFunis. Since people have a claim to treatment based on their individual merit and a constitutional right to equal protection of the laws, the injustice experienced in individual cases cannot be deemed to be outweighed by the good done for the disadvantaged by the policy of affirmative action. Also, since racial stereotypes are overgeneralizations, they are not narrowly tailored policies, and should therefore be regarded as unconstitutional because

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39. DWORKIN, *supra* note 1, at 226. Dworkin makes essentially the same claim in his book *Law's Empire*, arguing that "the only principle available [to support the 'banned categories' theory, in which it is wrong to discriminate on the basis of certain characteristics,] is that people must never be treated differently in virtue of properties beyond their control." RONALD DWORKIN, LAW'S EMPIRE 394 (1986). Dworkin goes on to point out that such a principle is preposterous. However, the ensuing discussion is a red herring because all that really matters is the relation of the properties on which discrimination is based (such as sex, race, etc.) to the position or benefit that the applicant has sought.

40. *E.g.*, IAN AYRES, PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001); CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE (Jennifer Eberhardt & Susan Fiske eds., 1998); GLENN LOURY, THE ANATOMY OF RACIAL INEQUALITY (2002).

they violate the standard applied to suspect classifications.[41] As I argued earlier, the question is not one of measuring the strength of preferences in a utility function; instead, the constitutional principle of equality dictates that individuals' rights to equal protection trump the real and important advantages that might result from a policy.

VII. CONCLUSION

Dworkin emphasizes a particular social engineering agenda of affirmative action: making the community more equal overall. There is indeed a compelling moral basis to be concerned about inequalities in our society. It is unfair that some people discriminate against others on the basis of their race, sex, or a variety of other contextually irrelevant characteristics. It is further unfair that the social system compounds or reinforces the advantages already enjoyed by those whom chance or practice has endowed with a relative bounty of assets, as when competitiveness in college admissions is influenced by participation in extracurricular activities that may be unavailable to the poor. Therefore, in the interest of fairness, it is often appropriate to make policy that accounts for the differing advantages and disadvantages that applicants have experienced. Such policy may attempt to overcome the stratification by giving the disadvantaged a boost. However, the right of equality (and the potential for affirmative action to violate this right) demands that remedies be applied on an individual basis in proportion to individual disadvantage. Affirmative action in the *DeFunis* model gives boosts not on the basis of actual disadvantage but on the basis of a stereotype. Thus, the reasoning by which applicants are deemed deserving of affirmative action is fallacious. Consequently, such affirmative action wrongly discriminates against people on the basis of characteristics that are irrelevant to their qualifications. It violates rights inherent in the person, and a preference calculus of the variety Dworkin offers cannot justify this. Because it violates essential rights, such discrimination is unconstitutional and wrong. Affirmative action programs must account for actual disadvantage or qualifications in individual cases rather than stereotyping people on the basis of their group identity.

41. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), held that state classifications based on race are subject to "strict scrutiny," and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), held the same for race classifications by the federal government. Strict scrutiny requires that policies be narrowly tailored to satisfy a compelling government interest.