

University of Michigan Law School

University of Michigan Law School Scholarship Repository

Reviews

Faculty Scholarship

2002

"How to Think about Equality." Review of Sovereign Virtue: The Theory and Practice of Equality, by R. Dworkin

Donald J. Herzog

University of Michigan Law School, dherzog@umich.edu

Available at: <https://repository.law.umich.edu/reviews/5>

Follow this and additional works at: <https://repository.law.umich.edu/reviews>



Part of the [Jurisprudence Commons](#), [Law and Society Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Herzog, Donald J. "How to Think about Equality." Review of Sovereign Virtue: The Theory and Practice of Equality, by R. Dworkin. Mich. L. Rev. 100, no. 6 (2002): 1621-38.

This Review is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Reviews by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

HOW TO THINK ABOUT EQUALITY

Don Herzog*

SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY. By Ronald Dworkin. Cambridge: Harvard University Press. 2000. Pp. 511. Cloth, \$37.50; paper, \$19.95.

Ronald Dworkin's¹ latest might well seem sharply discontinuous with his other work. The formal theoretical apparatus that kicks off the book is a forbiddingly abstract — some will say arcane — hypothetical auction, coupled with a hypothetical insurance market. There is simply nothing like it in *Taking Rights Seriously*, or *A Matter of Principle*, or *Law's Empire*, or *Life's Dominion*, or *Freedom's Law*. Then again, Dworkin first published the key papers on the auction some twenty years ago and has never flagged, as far as I know, in his commitment to the basic project.² Theorists have been waiting for the finished book for quite some time now.

It's invigorating, sometimes delightful, wrestling with the details of Dworkin's account, even or especially when one is unconvinced or even staunchly opposed to the project as a whole. And not just that it's always bracing to do a round of mental calisthenics; rather that when one disagrees, as I sometimes do in ways large and small, it is really helpful to dig in and try to focus on just what else one might say about the subjects Dworkin canvasses. Then too, Dworkin's work has the signal virtue of paying no attention to familiar skeptical objections to the possibility of substantive moral and political argument. He can urge, for instance — and rightly so — that people can make mistakes about what makes life worth living, without wringing his hands anxiously about the skeptical worry that any such view must be high-minded nonsense because realizing one's preferences is the only game in town (note particularly his contrast between external and internal skepticism) (p. 241).

* Edson R. Sunderland Professor of Law and Professor of Political Science, University of Michigan. A.B. 1978, Cornell; A.M. 1980, Ph.D. 1982, Harvard. — Ed.

Thanks to Liz Anderson, Reuven Avi-Yonah, Anne Coughlin, Hanoeh Dagan, Barbara Fried, Mika LaVaque-Manty, and Andy Stark for comments on an earlier draft.

1. Frank H. Sommer Professor of Law, New York University; Quain Professor of Jurisprudence, University College, London.

2. Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (Summer 1981); Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (Fall 1981).

Since I think skepticism about the very possibility of such arguments is extremely boring, and since I will never understand why skepticism gets to masquerade in some circles as a highly sophisticated and challenging view, or worse yet the simple truth of the matter that the more intelligent among us finally converge on, I applaud Dworkin's pointed lack of interest in engaging anything like meta-ethical or ontological queries. In the same vein, consider a slightly polemical aside: Dworkin is on record describing himself as a staunch opponent of pragmatism.³ If pragmatism is the view that judges should adopt rules to promote what they take to be sound social outcomes, then I've no interest in it. And surely nothing hangs on the meaning of the word. But if we mean by pragmatism a blithe disregard for questions of ontology, a commitment to an anti-foundationalist picture of justification, or a lack of interest in the fact/value dichotomy, then Dworkin is as pragmatist as they come.⁴ This sort of pragmatism, I'd hold, ought to be applauded and embraced. Dworkin's work demonstrates conclusively that there is no reason whatever to associate pragmatism, so construed, with any general sloppiness about or cavalier contempt for developing and defending sound arguments.

Yet the book on offer looks like more of a unified and finished treatment than it is. Dworkin demurs that the previously published chapters "have been the subject of extended comment by others, and for that reason I have decided to revise them here only in minor — typographical or stylistic — ways" (p. 7). One might respond dryly that the others in question probably would rather see how Dworkin proposes to deal with their objections than see his initial statements memorialized between covers, but he does eventually get to some of the key issues.⁵ Dworkin's prose style, too, ordinarily lucid and engaging, now and again betrays regrettable signs of an author in a hurry. So the passing reference to "deliberative deliberation" (p. 378); so too this bit of broken-backed syntax, from a discussion of abortion: "No matter how much one wants a child of one sex, it shows inadequate respect for a life in being to end it because its sex is the other one" (p. 432). Those who've had the pleasure of listening to Dworkin lecture will more than occasionally pick up the cadences of the lectern here. Even in print, there's something right about the mischievous definition in Daniel Dennett's *Philosophical Lexicon*: "dwork, v. (Perhaps a contraction of *hard work*?) To draw through a well prepared talk, making

3. RONALD DWORKIN, *LAW'S EMPIRE* 175 (1986).

4. See especially Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 *PHIL. & PUB. AFF.* 87 (Spring 1996).

5. His brief chapter 7 develops responses to G. A. Cohen and Amartya Sen.

it appear effortless and extemporaneous. ‘I bin dworkin on de lecture circuit’ — old American folk song.”⁶

A more serious problem is that the book cobbles together independent publications from different venues, ranging from academic journals to *The New York Review of Books*, over some seventeen years (p. 475). The reader sometimes despairs at the thankless task of figuring out how tightly unified Dworkin means his presentation to be — or, authorial intentions shoved firmly aside, what the most illuminating account of his text is. Just for instance, in discussing *Bowers v. Hardwick* and *Romer v. Evans*, Dworkin draws a contrast familiar from his previous work. Some believe our constitutional rights are limited to those clearly affirmed in our history. Others believe we should interpret our history in light of the political morality that makes sense of it and then feel free — indeed, obliged — to extend whatever principles of political morality emerge to cases they properly govern, even if we haven’t done so historically. (No points for guessing which side of that debate Dworkin is on.) He concludes by describing *Romer* as “a victory . . . for the conviction that equality is a principle not only of justice but of constitutional law as well” (p. 465). Stirring words, no doubt, but I found myself in sputter-frazzle-hairpull mode: does “equality” here point to the hypothetical-auction story? Can we construct a plausible account leading from that latter, abstract theory to any stance about constitutional interpretation? Or is the equality in question just that of offering gays the same political chances to secure antidiscrimination protection that other groups in the community enjoy? Alas, Dworkin’s text is calmly, forbiddingly silent on the point.

But now I am jumping ahead of myself. I proceed by sketching the lineaments of the hypothetical auction and insurance markets. I consider Dworkin’s treatments of money in politics as a test case of how his theoretical commitments bear on concrete questions of politics and law. And I conclude by making more explicit some of the sensibilities that fuel my discussion — and by briefly saying something about what I take to be more promising ways of thinking about equality.

I. OF AUCTIONS AND INSURANCE

Dworkin doesn’t underline what must be a deliberate and significant shift in his language. After years of insisting on “equal concern and respect,” he routinely refers in this volume to “equal concern.” But the omission of “respect,” whatever it finally signals, can’t signal any retreat from generally Kantian sensibilities towards utilitarianism. Dworkin wants to develop an account of what he calls equality of resources. He wants to argue that this account is a fundamental alterna-

6. DANIEL DENNETT, *PHILOSOPHICAL LEXICON* (8th ed. 1987), available at <http://www.blackwellpublishers.co.uk/lexicon/> (last visited Feb. 26, 2002).

tive to a more familiar picture of equality of welfare, indeed that other views turn out on closer inspection to collapse into one of the two, so that actually equality of resources turns out to be *the* fundamental alternative on offer. And he wants to resolve longstanding worries that equality and liberty are somehow at odds by showing that equality of resources presupposes a robust conception of liberty.

The general architectonic strategy of the book is to show that all our deepest commitments in morality and politics are interlocking and mutually supportive, that we can work up views of equality, liberty, justice, autonomy, and so on that will fit together (see for instance p. 4). The fit, of course, will be complex and intricate: as his readers have come to expect, Dworkin spins off one binary distinction after another in describing and defending his views. (And as Dworkin has probably come to expect, some readers will find the distinctions deeply illuminating, while others will think they won't bear the weight he is putting on them and are really just there to evade problems.) But the aspiration is to show that the fit is elegant.

To the theory. Imagine a group of shipwreck survivors who have to divvy up the resources on their previously uninhabited island. Imagine that they agree to divide the island's resources equally and that they interpret that as meaning no one should envy whatever basket of resources someone else commands. (The category "envy-free distribution" does lots of work in welfare economics. Still, one might worry that it unwittingly capitulates to centuries of conservative insistence that the apparently dignified demand for equality is nothing but a polite veil for mean-spirited envy and resentment.) Imagine their adopting an auction — and remember that the auction in question is wholly imaginary. Yes, Dworkin thinks, there are actual social practices besides literal auctions that have some of the relevant properties — he adduces markets and democratic politics (p. 72) — and we will be able to draw important inferences from observing them. But the imaginary auction launching the theory is explicitly a matter of "the ideal ideal world of fantasy," not the "ideal real" world in which people are devoted to equality but face various problems implementing it, let alone the "real real" world in which many powerful players have contempt for equality, not least — but not only — because it doesn't serve their interests (p. 172). It's an attempt to get clear on, and to structure, some of our intuitions, so that we can then begin attacking our practical problems with some real machinery.

The auctioneer will not insist on any arbitrary division of the island's resources into lots, but will permit any party to splinter whatever lot is proposed into smaller lots. He will allocate everyone an equal amount of some arbitrary currency and then keep trying various price structures on all the lots until all markets clear and no one, inspecting the final allocations and wishing on reflection that she'd bid differently, wishes to do the whole thing over again. The model invites

— and receives — lots of refinement, but you can immediately see the sharp departure from equality of welfare. If you're lucky enough to wash onto an island that happens to have stuff useful for realizing your preferences, or lucky enough to have eccentric preferences so that the goodies you crave don't command a high market price, or lucky enough to be a good-natured bloke who's easily made happy, you will probably end up enjoying much more welfare than your compatriots. But that counts not a whit against the claim that they have received equality of resources.

But so far we have on the table only external resources, things in the world one might claim property rights in. What about one's own tastes, preferences, abilities, and disabilities? Some thrill to the taste of fabulously expensive wine, others cheerfully gulp down swill; some are witty, others boorish; some gorgeous, others plain or even ugly; some able-bodied, others blind or deaf or paraplegic. What does equality of resources, or our hypothetical auction, have to say about such matters?

The view puts extraordinarily heavy pressure on the distinction between traits properly belonging to the person and those belonging to his circumstances. But that's not the distinction between what's in the head and what's in the world; indeed it can crosscut that distinction. Dworkin's official account of the distinction is not, I think, what he means; at least it's not how he uses it. It's best, I think, to set out his language, in case I'm missing something. What belongs to the person, Dworkin urges, are "those beliefs and attitudes that define what a successful life would be like"; what belongs to his circumstances are "those features of body or mind or personality which provide means or impediments to that success" (p. 82). But this threatens to make the person nothing but a conception of the good, to make *all* your skills, talents, and the like part of your circumstances. Elsewhere, Dworkin's language shows he doesn't mean to do that: "We cannot think that we would be better off if we gave up some ambition or no longer found satisfaction in what we now find deeply satisfying. On the contrary, it is our various tastes, convictions, and ambitions that define for us what a satisfying or gratifying life would be, and treating these as impediments to our realizing such a life would be incoherent" (p. 293). The claim seems wrong, at least put so bluntly. A mathematician whose brain aches at the end of the day but who thrills to the chase of the elusive proof or new theorem every morning might perfectly coherently say that her work is deeply satisfying, but that she'd be better off if she could ditch the relevant "tastes, convictions, and ambitions" and do woodworking instead. She doesn't even need the aching brain to entertain the thought. She might just admire the serenity of the craftsman. Still, his claim shows that Dworkin means to include more than a conception of the good in the person — or, if you like, that he has a surprisingly inclusive account of one's conception of the good.

Still we need a crisper account of the distinction between person and circumstances.

Happily, Dworkin's surrounding discussion (pp. 80-83) of people who find themselves afflicted with unfortunate tastes suggests three different and more useful distinctions (note too pp. 322-23). Some people who find themselves in the clutches of a craving for splendid hot fudge sundaes may experience the craving as internal to their identity, part of who they are. Others with the same craving may experience it as an impetuous but alien demand, one they still feel they must submit to. One way to draw the person/circumstances line would run this way: *either* craving here could belong to the person, if the person in question believes (in the first case) that part of the good life is experiencing and gratifying such burning desires or (in the second) that part of the good life is grappling with what feel like external demands. So too either craving could belong to the person's circumstances, if regardless of how he experiences it he takes it to detract from realizing goals he properly cares about. The second way to draw the line, which comports more with Dworkin's own application in these pages, runs this way: the question is whether the agent experiences the taste in question as his own — within his ego boundaries, as someone in the psychoanalytic tradition would put it — or as afflicting him from outside. So too with talents or more generally traits: does the agent think of them as partly constitutive of his identity? or as afflictions from outside? A third sense adds a rider to the second: reassign traits from person to circumstances if the agent would rather be without them. (Such a rider would explain Dworkin's focus on handicaps, addiction, and the like.) These three distinctions aren't coextensive, and the differences will matter. Think for instance of the person who has a talent that turns out to be useful for advancing projects he cares about, but who doesn't experience the talent as part of himself at all: it's just this lucky thing he's stuck with. (This possibility isn't gimmicky or contrived: I have precisely this attitude about my own perfect pitch.) Precisely because of the weight the distinction between person and circumstances bears in the theory, it is especially important to have as clear an account of its content as we can.

However we construe the distinction, though, equality of resources is targeted solely at one's circumstances, not one's person. Now it strains credulity to imagine the auctioneer of even an imaginary ideal auction setting out lots with tastes, preferences, abilities, and disabilities, and inviting people to bid on them. But, urges Dworkin, we can naturally extend the exercise by imagining a hypothetical insurance market to cover such matters. What would you bid for an insurance policy to compensate you for the adverse consequences of, say, a desperate craving for alcohol that hinders your pursuit of the good life? If, finessing worries about adverse selection and moral hazard, we can imagine the insurance market offering coverage against such risks

at reasonable prices, and if we assume that people would in fact purchase such coverage, then we infer that equality requires offering compensation to people with such afflictions. If I understand him (see especially pp. 93-97), Dworkin believes the case of ordinary shabby looks — or for that matter downright ugliness — is no different in kind. We ask the same question. But here we find, one imagines, that the price of such policies would be too high: at the going rates, no one would reasonably invest in them. And then even if bad looks are a matter of one's circumstances, one gets no compensation for them. The insurance market seems to be covering against downside risk, not requiring payments for lucky draws in the genetic lottery, except in the indirect and attenuated way that the subsidy payments to the disadvantaged will come in part from those luckier.

So far, we have a story only about initial entitlements. What happens over time? Dworkin concedes that equality of opportunity, properly understood, requires some background conception of equality of starting points. But he rejects equality of opportunity, even so understood (pp. 87-89). Over time, the fortunes of individuals will diverge. Some will grow rich, others poor, and not merely in their checkbook balances. There are grave complications here, aggravated when we turn to intergenerational questions of justice that Dworkin concedes he has not yet fully worked out (pp. 488-89 n.12). Here Dworkin sharply distinguishes "option luck" and "brute luck." Equality of resources, he argues, isn't threatened at all by — quite the contrary, it makes room for — inequalities that emerge as a result of people's choices. If the ants put their stock of resources to work and the grasshoppers idle away their hours on the beach, the ants will likely have more in the future. Not necessarily: the most prudent investments can go sour, and then the ants will have to swallow their losses. But win or lose, at least within limits their portfolios reflect choices they've made, and the consequences should flow to them accordingly. But suppose instead that something bad just happens to you. Your roof falls in and leaves you with debilitating injuries. No, you've not been negligent maintaining your house; maybe the accident happened in a freak storm. Then equality of resources is threatened, for now you envy others' shares in a way we can't see as stemming from your choices and theirs. So the view also puts extraordinary pressure on the distinction between choice and chance.⁷

In the real world, there's no auctioneer, no phony currency, and so on. But we can, Dworkin thinks, cast many of our policies in an illuminating light by seeing them as what such an apparently rarefied theoretical apparatus would require. If the auction and insurance story do theory from the "outside in," so too, Dworkin thinks, we can do it

7. For a critical treatment of the distinction, see Andrew Stark, *Beyond Choice: Re-thinking the Post-Rawlsian Debate over Egalitarian Justice*, 30 POL. THEORY 36 (Feb. 2002).

from the “inside out” (p. 3), surveying actual policy dilemmas and trying to work up principles to make sense of them. And we can hope that as we shuttle back and forth and revise things, the inside-out and outside-in accounts connect, in what Norman Daniels has called “wide reflective equilibrium”⁸ and (the slightly polemical aside again!) some of us call a pragmatist approach to justification. Curious about welfare reform? Wondering whether we should withhold support from people who can’t be bothered to try to find paying jobs? Or whether we should have an absolute limit on the number of years over a lifespan that anyone can collect welfare payments? Curious about health care? Wondering what if anything the government should provide to the medically needy? Or whether it offends equality if only the wealthy can afford cosmetic plastic surgery? Then ask about the shape of the hypothetical insurance markets. Dworkin almost mischievously emphasizes how loose or impressionistic the enquiry is: “ask roughly what level of coverage against risks of the character in question would seem reasonable to the majority of people in the community, or to the average person, or something of that sort, given the likely premium structure and given most people’s needs, tastes, and ambitions” (p. 345). We’d like to hear more, of course, about just whose judgment about the policies in question is binding, and why. And one might well wonder why someone who would have purchased a policy, even a very expensive one, that most people wouldn’t should be left uncompensated if the dreaded contingency she would have wished to protect against actually arises. Is it just that it’s impossible for her to produce convincing evidence that she would have so insured herself? Or is there something more authoritative about the judgment of “the average person, or something of that sort”? Regardless, the basic project of reconstructing what judgments people would make *ex ante* is straightforward and alluring enough. Dworkin’s view is instructively different from Rawls’s in ways I shan’t discuss here, but in this general way — cashing out our judgments about fairness by asking what people would choose without knowing how they’d fare — they are as one.

II. MONEY AND DEMOCRATIC POLITICS

I turn to one of Dworkin’s more grounded policy discussions. Many readers will already know that Dworkin is a defender of campaign finance reform. His language here is scathing: “Our politics are a disgrace, and money is the root of the problem” (p. 351); “[w]e have as much a parody of democracy as democracy itself” (p. 369); “the most degraded and negative political discourse in the democratic world” (p. 369); “no one could mistake our huckster politics for democratic

8. NORMAN DANIELS, *JUSTICE AND JUSTIFICATION: REFLECTIVE EQUILIBRIUM IN THEORY AND PRACTICE* 21-46 (1996).

deliberation” (p. 385); “when politics are drenched in money, as our politics now are, then we risk not simply imperfection but hypocrisy” (p. 385). But the Supreme Court largely gutted Congress’s last (odd) attempt at campaign finance reform in *Buckley v. Valeo*.⁹ Dworkin argues that that was a bad decision.¹⁰

How, Dworkin asks, should we make sense of what many writers have sensed to be a deep structural link between free speech and democracy? He offers two rival conceptions of democracy, each of which acknowledges the link but each of which offers sharply different accounts of its implications. First is the majoritarian conception. Dworkin quickly brushes aside a flat picture of preference aggregation as obviously not very attractive. (I quite agree, but alas the flat picture is motivating a whole lot of work in political science and economics these days.) Instead, the majoritarian picture he has in mind depends on citizens having the opportunity to get information about policy issues, deliberate, and vote for representatives “whose policies match their will” (p. 357). Second is the partnership conception. This more complex conception has three salient dimensions (pp. 363-65). First comes popular sovereignty: the people, not any elite caste, are to govern. (“The people” here are to be seen as a corporate actor, not as shorthand for whatever most individuals want.) Second is citizen equality: individual citizens must be able to participate, and not just vote, in democratic politics on reasonably equal terms. Those terms can be threatened in any number of ways, not least by the access and media presence commanded by the rich and powerful. “No one can plausibly regard himself as a partner in an enterprise of self-government when he is effectively shut out from the political debate because he cannot afford a grotesquely high admission price” (p. 364). Third is democratic discourse: there must be ongoing social practices of deliberation, in which citizens meet together and hash out competing arguments on the merits.

Consider the famous maxim from *Buckley*: “The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed ‘to secure ‘the widest possible

9. 424 U.S. 1 (1976).

10. Indeed he touches on a series of recent Supreme Court decisions in this area. One might take his discussion as a model application of the approach to legal interpretation set out in *LAW’S EMPIRE*, *supra* note 3: having shown that his preferred account fits the cases at least as well as its rival, Dworkin then argues that it is normatively superior. There are plenty of complications worth pursuing: when it comes to fit, for instance, Dworkin is concerned to show only that his account generates the same result, not that it follows the reasoning set out in the actual opinion. In fact he seems decidedly uninterested in the stated reasoning, in legal doctrine itself. Or again it remains unclear whether we should finally take fit and justification as independent dimensions — and if we do, how Dworkin proposes to secure the one-right-answer thesis. (One view might do better on fit, another on justification: then what?) But all that is a topic for another day.

dissemination of information from diverse and antagonistic sources.”¹¹ The second clause seems on its face to undercut the first: surely it’s at least possible that restricting the speech of some to enhance the relative voice of others would in fact secure more diverse and antagonistic information, or more generally arguments, for public consideration. Even without the funny second clause, though, the claim is by no means obvious on its face. At least since Alexander Meiklejohn, some academics have been strongly drawn to thinking of the first amendment in terms of what range of views it offers the public, and so as only instrumentally protecting the rights of speakers.¹² Dworkin urges that what he calls the “democratic wager” secures free speech against any such incursion by urging that it is desperately imprudent to trust the state with such powers — and (though it is not entirely clear why he thinks so) that that wager finally depends for its plausibility on the majoritarian conception of democracy.

Does the partnership conception license — or require — state regulation of what some call the speech market? Dworkin notices the case that hate speech is an affront to democracy. It looks on its face like a threat at least to the second and third dimensions of the partnership conception. As part of the diffuse but powerful practices that define some members of the community as second-class citizens, it threatens citizen equality. So too, one might think it threatens deliberation by silencing some members of the community, or encouraging others to dismiss their contributions to discussion with contempt. But Dworkin abruptly dismisses this line of argument as confused in its grasp of the kind of equality required by the partnership conception (pp. 366, 368) — and drops a footnote directing the reader to his prior, savagely critical treatment of Catharine MacKinnon’s work on these matters.¹³ My own sense is that there is a genuine antinomy here — there are perfectly plausible rival cases that democracy and free speech must permit and must forbid vitriolic hate speech. So, even with the gesture towards his prior work, Dworkin’s view here seems to me peremptory. It provokes the worry that the fit between his theory and familiar left-liberal political views is all too tight. Perhaps we should infer not that those views turn out to be splendidly grounded but that the theoretical apparatus in question is woefully rubbery, so one can stretch it, within reason but still opportunistically, into whatever shapes one would like.

In the name of the partnership conception, Dworkin is decidedly cautious in sketching the possibility that some limits on campaign fi-

11. 424 U.S. at 48-49 (internal citation omitted).

12. The best account of these issues remains ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 268-89 (1995).

13. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 214-43 (1996) [hereinafter DWORKIN, *FREEDOM’S LAW*].

nance expenditures might be appropriate. He thinks we should take seriously proposals that would improve our politics on the third dimension — that would for instance rescue us from mindless campaign jingles and shrill negative advertising — without seriously encroaching on the first two dimensions. A lot, of course, will hang on the details. And it is unreasonable to expect too much from a theory. (It's not as though anyone else has, or ever has had or ever will have, a theory that leads mechanically and inexorably to concrete, detailed policy proposals. There's always going to be room for judgment and controversy.) But Dworkin's basic stance is clear enough.

Now I want to ask: what's the connection between Dworkin's discussion of campaign finance reform and his overarching conception of equality? Are we to imagine the island's auctioneer setting out parcels of political power and trying to price them so the market clears? Or are we to imagine people purchasing insurance policies hedging against the risk that they will be left powerless? Neither: when it comes to political equality, Dworkin does not crank up the machinery of equality of resources. Instead, he returns to the abstract demand of equality of concern and wonders how it bears on political equality. It's obvious, he thinks, that we have to have democracy. The real question is what conception of democracy to favor.

No objections from this quarter to this way of proceeding; I want only to emphasize that Dworkin's discussion of political equality is in a sense freestanding from his treatment of equality of resources.¹⁴ And that will mean the theory is currently lacking a key prop: it needs, but does not have, an account of the proper domain of the auction and insurance stories. On what topics do we wheel them out? On what topics do we leave them in the closet? And why? He offers each as a way of cashing out equality of concern. And here too the different strands of the theory should support one another. But we must remember that at bottom the motor is equality of concern, that how we cash that out will depend on what kind of problem we're tackling, and that the auction and insurance story, while enabling Dworkin to tackle a surprisingly broad range of issues, isn't the only trick he has up his sleeve.

Still, his discussion of political equality is itself an attempt to get clear on ideal theory. Remember Dworkin's hope that the outside-in and inside-out approaches to equality will mesh. What counsel does ideal theory offer on how to think about money and democratic politics? Arguing that equality of influence is seductive but ultimately unappealing, Dworkin suggests that our concerns in this domain are bet-

14. My point here is connected to, but different from, Dworkin's passing comment on the partial arbitrariness of the distinction between political and distributional equality. P. 12. Dworkin insists, rightly I think, that it's a mistake to conceive of political impact or influence as another resource. P. 210. I'll be suggesting that he lapses into a kind of that mistake himself.

ter captured by thinking about background inequalities. So the problem isn't, for instance, that the educated or eloquent will be more influential in democratic politics than others. The problem is that access to education is unfairly distributed. So too, urges Dworkin, for our concerns about money in politics. I want to pause over Dworkin's language:

Limits on campaign expenditures are of course appealing when these compensate for unjust differences in wealth But if resources were distributed equally, limits on campaign expenditure would be inequalitarian because they would prevent some people from tailoring their resources to fit the lives they wanted though leaving others, who had less interest in politics, free to do so. (p. 197)

There's a footnote — "I assume, in this claim, that wealth remains equal so that no small group of very rich people could dominate politics through political contributions or expenditures" (p. 485 n.4) — but the qualification is not, I think, going to rescue the claim in the text, which I boggled at on first reading and which I continue to boggle at.¹⁵

Here's the problem. Call something a commodity if it is properly bought and sold, for money, on a market. Fountain pens are commodities; so too, I suppose, are cruises on the Mediterranean, published scores of Morton Feldman's spectacular late works, and plenty of other things. But it's an open question whether or not the things we currently allocate on the market are commodities. Maybe we shouldn't buy and sell health care at all. Or maybe Feldman's actual manuscript scores shouldn't be auctioned off to the highest bidder; maybe they properly belong in a museum. So too it's an open question whether we should buy and sell things that we currently don't. An economist might wonder, for instance, why we assign citizens the non-transferable right to cast one vote apiece: the scheme obviously creates deadweight loss, so there would be clear efficiency gains from mailing citizens coupons saying, "bearer has the right to cast one vote," and then allowing a secondary market to spring up.

Now, Dworkin is emphatically not that economist. His account of citizen equality makes it impossible to attribute any such fantastic view to him. (If you're wondering, the quick answer to the economist is, yes, there would be efficiency gains — don't try to invent some odd market failure here — but we don't care.) And while he asks us to use the auction and insurance analysis to think about such topics as social welfare and health care, it doesn't follow that he believes they are commodities, properly up for sale in the world. It's wholly compatible with that analysis to think that when we leave the ideal ideal world, we should draw boundaries to markets. And it's very hard for us to

15. Dworkin has staked out the same territory before: "We do not want wealth to affect political decisions, but that is because wealth is unequally and unfairly distributed." DWORKIN, FREEDOM'S LAW, *supra* note 13, at 27.

imagine some goods as commodities. To take one of Michael Walzer's examples, the American League pennant doesn't go to the highest bidder.¹⁶ It goes to the team that wins the most games (or, as we'd now have to say, the team that wins enough games to get into the playoffs and then wins the playoffs). And that team simply can't say, we now hold a property right to play in the World Series and we propose to sell it, say on eBay, to the highest bidder. We don't want those long-suffering Chicago fans to be able to band together and raise enough money to play. Not because we hate them or delight in their abject misery, and not again because we have some contrived story up our sleeve about market failures or externalities that would plague such transactions. Rather because the pennant, or the right to play in the Series, isn't a commodity. So too, I think, political power isn't a commodity. And even though Dworkin doesn't want literally to buy and sell votes, he thinks there's nothing wrong with citizens using their wealth to advance their political agendas, provided again the background distribution of wealth comports with equality of resources. So he doesn't think votes are a commodity, in the term of art I've adopted here. But he thinks that political power, or access to political power, is in part a commodity: there are nonmonetary ways to gain it, such as eloquent, articulate argument; but there are also monetary ways to gain it, such as splashing your views across full-page newspaper advertisements.

Again, there's nothing in the structure of Dworkin's view that requires him to commodify political power. And I concede readily that in this domain it is hard to figure out what kinds of restrictions on market transactions would be defensible. But, as Dworkin would notice on any number of similar issues, that point is different from the issue of principle. And on the principle, I report that on sustained reflection my view stubbornly remains that political power isn't a commodity — and wouldn't be a commodity even in a society securing a wholly just distribution of resources. Indeed I can see Dworkin's language — “if resources were distributed equally, limits on campaign expenditure would be inegalitarian because they would prevent some people from tailoring their resources to fit the lives they wanted though leaving others, who had less interest in politics, free to do so” — only as implying, surely not deliberately, radical transformations of our culture and practices. But is Dworkin's passing suggestion an incidental or casual mistake? I think not.

16. MICHAEL WALZER, *In Defense of Equality*, in *RADICAL PRINCIPLES: REFLECTIONS OF AN UNRECONSTRUCTED DEMOCRAT* 246 (1980). I should note that Walzer further developed *In Defense of Equality* into his *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983), surrounding the view with a kind of relativism about social meanings to which Dworkin took violent exception in *To Each His Own*, 30 N.Y. REV. BOOKS, Apr. 14, 1983, at 4 (reviewing *SPHERES OF JUSTICE*). But nothing in this approach requires any such relativism.

III. EQUALITY, SOCIAL STRUCTURE, AND HISTORY

Consider the goods money — even justly distributed equal resources — shouldn't be able to buy. We already have the National League pennant and political power. Now add, oh, verdicts in criminal trials. Imagine the judge setting aside — or preventing the presentation of — the jury verdict, gazing benevolently at those anxiously assembled in the courtroom, and intoning, "this verdict is now for sale: the high bidder may decide whether to acquit or convict." This prospect too is utterly wacky. And it's wacky not because we're stuck, in the real real world, with profoundly inegalitarian distributions. Surely we would never say that if resources were distributed equally, limits on the sale of verdicts would be inegalitarian because they would prevent some people from tailoring their resources to fit the lives they wanted though leaving others, who had less interest in trials, free to do so. And we can pile on to the list of goods that aren't commodities: positions in Congress, religious salvation, friendship, love, the respect of one's colleagues, and on and on.

There's a formidable literature, about which Dworkin is curiously silent, exploring the right reasons for allocating all kinds of social goods.¹⁷ The enquiry is often launched by thinking about the line between commodities and other goods, but we can easily generalize it to explore other kinds of differences and barriers. Religious salvation can't be sold — that's why simony created upheavals for the Church — but that doesn't mean it should be given out for the same reasons friendship is, either. Teachers can't sell grades ("okay, pay attention: What am I bid for this A?"), but they also can't swap them for sexual favors.

These issues are already all about equality. Justice is blind: we demand, with partial success, that the criminal justice system ignore whether defendants are white or black, male or female, rich or poor, straight or gay, Republican or Democrat, Christian or atheist, and so on. Straights and gays are treated as equals at law when cops, prosecutors, judges, and juries blind themselves to irrelevant facts of sexual orientation. It of course remains controversial in some settings when such facts are irrelevant: thus for instance our ongoing struggles over whether hate crime statutes that offer harsher penalties for crimes directed at minority groups flout or respect equality under the law.

Now we can shift to a sociological perspective. Don't think (only) of particular goods and the right reasons for allocating them. Think (also) of different social settings and what considerations are properly

17. In addition to Walzer's crucial work, see especially ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); Bernard Williams, *The Idea of Equality*, in *PHILOSOPHY, POLITICS, AND SOCIETY* 110 (Peter Laslett & W. G. Runciman eds., 2nd ser. 1962).

relevant in them. Take the fabled separation of church and state. Whatever it's up to, whatever goods it's allocating or rules it's adopting, the government isn't supposed to notice whether you are Christian, Jew, Muslim, atheist, or whatever else. This mandate represents a concrete historical change and once was wholly unimaginable.

It gives equality a distinctive social-structural form. A differentiated society, one marking reasonably clear jurisdictional boundaries between institutions and dictating that in different roles and settings we ignore contextually irrelevant facts, is a society that treats people as equals. We can generalize the separation of church and state, or for that matter the line between commodities and other kinds of goods, by charting the contours of modern social structure: church, state, science, family, market, universities, clubs, and so on. In any and all of these settings we are equal when others blind themselves to irrelevant facts. In this sense, there's no inequality when the most talented actress wins the role. But there is an inequality when the actress related to the director wins it (because of the relation, that is), or an actress who happens to take communion with the director (because of that religious link). I emphasize, again, that there are deep controversies about deciding which facts matter, in what ways, and which don't. So, for another example, take labor markets. Should the employer's private property rights include the right to discriminate on grounds of race? Or does Title VII help force employers to treat workers as equals? Notice that the state plays a double role in this view. On the one hand, it's one institution among many, with its own jurisdictional boundaries and affairs to tend to. On the other, we often turn to law to draw new boundaries and enforce them among other social institutions. Some have seen something viciously paradoxical in this double role,¹⁸ but I don't.

Someone committed to equal concern (and respect) could surely wrestle seriously with these crucial considerations of social structure. But Dworkin doesn't. His approach, working through the ideal ideal auction and hypothetical insurance markets, or for that matter working "inside out" from particular problem areas, is somehow insistently unsociological. There are individuals, the picture is, and we should ensure they enjoy equality of resources, and then they go on to pursue their life plans. In the margins of the view we can detect social institutions: some will devote themselves to democratic citizenship and some won't. But the institutions remain in the margin, our view of them dangerously occluded. That, I conjecture, is why Dworkin finds it easy to suggest that were wealth justly distributed, we shouldn't worry about money in politics. That too is why he thinks of "resources" as an unspecified bundle, instead of sharply focusing on what sorts of re-

18. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., 1976) (1932).

sources are helpful in what sorts of social settings for what purposes. It's not enough to respond that bidders in the auction can be perfectly well aware that some lots are more useful in some social settings than others, and will bid with that awareness in mind. For — remember that Dworkin doesn't turn to the auction or insurance markets to analyze democratic equality — it's a mistake to think of "resources" as a disparate but ultimately fungible set of goods and simply leave it up to individuals to bid for shares of what they want. Remember, we don't let people swap their votes for money, or any other goods for that matter. So the weird abstraction of the auction and insurance approach, its distance from the sociological landscape, tends to summon up a view of the entire world as a market. Dworkin writes, for instance, that "[n]o one would be forbidden by law, in a defensible distribution, to use his resources in whatever way he chooses, except as necessary to protect security or to correct for different sorts of auction or market imperfections" (p. 171). But it remains hazy at best for what resources, over what range of practices, this principle is supposed to apply.

My purpose is not to replace one picture of equality with another. Indeed I am skeptical that equality lends itself to any single analysis or portrait. After all, the concept has been invoked by a host of actors in wildly different settings for utterly disparate purposes over the centuries. Sure, it's possible that at bottom all of them were talking about the same thing or struggling, as Dworkin might put it, only over competing conceptions of the same concept. It's even possible that these actors were only hazily aware of quite what they had in mind, that it takes graduate training in economics or analytic philosophy to be fully cognizant of, and comfortable with discussing, what they were referring to. I suppose it's even possible that their talk about equality was so desperately confused that it failed to refer to anything at all. But it must be an open question whether any of those possibilities obtain. It's also possible that the endless invocations of equality are united only by loose-knit Wittgensteinian family resemblance. Or that they're united not even that much, that we'll finally have to say that equality is a homonym standing in for different concepts. The grammatically clumsy but correct question may be, what are equality?

Even if our interests are "normative," it would be rash to discard the history of equality as of little or no interest. By scrutinizing the history, we might well learn things — what's attractive and feasible, what's not, where the unpredictable or counterintuitive wrinkles are, and so on — that we couldn't figure out by reflecting on our intuitions or by trying to sort out what finally we properly care about and why. I won't try to cram in a rapid-fire history, something like the political theorist's *1066 and All That*. But consider two connected points.

One: there's much of interest to collect from the curiously wandering history of the Christian insistence that each and every one of

us, however humble, has an immortal soul, each equally prized in the eyes of God. Personhood is now officially a binary concept: you either are a person or you're not. Arguably it used to be dimensional: some were more fully human than others, and that mapped quite nicely onto conventional social hierarchies, so that persons of quality and noble lords were more fully human than simple clowns, serfs, and peasants. Nor should it surprise you — but it should distress you — to notice that despite our official understanding, we covertly trade on the older model all the time. It was always possible to argue that Christian equality didn't threaten and indeed legitimated everyday social and political inequalities. But the privileged and powerful were anxious for good reason. No wonder Henry VIII insisted on vetting the translation of Scripture into English (and notice that a sense of equality is clearly in play in the Protestant campaign to give ordinary men and women sacred writ in a language they could understand, in the priesthood of all believers that shatters the privileged epistemic access of the Church — and in the ensuing experience of democratic government that Presbyterians and others adopted). He wanted to ensure that none of the tricky passages about equality seemed to have dangerous political implications:

Where the *Bishops' Book* stated that all men, rich and poor, “the free and the bond” are equal in God's eyes, Henry cut down this egalitarianism with the proviso that the equality existed “touching the soul” only. Where the book called upon the rich to succour the poor, he added the warning “that there be many folk which had liever live by the graft of begging slothfully” and that these “should be compelled by one means or other to serve the world with their bodily labour.”¹⁹

I don't think equality of concern and respect depends for its justification on any theological or religious background, but it's still eye-opening to explore that background.

Two: hierarchical social orders, at least in the West, depended on unsavory emotional economies. Elegant superiors — “the world,” in the enormously revealing locution of early modern England — looked down on the great unwashed with unvarnished hostility, mocking amusement, or even cold indifference. In the English case, which I happen to know best, condescension, insolence, impudence, and especially contempt served as hotly contested political battlegrounds.²⁰ Here it's helpful to think of equality not as an independent and affirmative ideal — no wonder some have trouble attaching any concrete content to equality of concern and respect — but as the name of a campaign to eliminate pressing inequalities and oppression.²¹ Don't

19. J. J. SCARISBRICK, *HENRY VIII* 405 (1968).

20. DON HERZOG, *POISONING THE MINDS OF THE LOWER ORDERS* 191-402 (1998).

21. See especially Elizabeth S. Anderson, *What Is the Point of Equality?* 109 *ETHICS* 287 (Jan. 1999).

say that we don't know what counts as inequality until we identify equality, because it is by no means obvious that equality is the logically prior notion or that we need any priority in these matters. (A schematic suggestion you could use for beginning some historical enquiry: assailing pressing inequalities of the day, people generate provisional understandings of equality; ongoing social change and that new understanding give them new inequalities to assail, in turn leading them to revise their old understandings of equality and articulate new ones; and on and on. Don't ask here — or elsewhere — for an end of history.)

Selective blindness to irrelevant facts, a binary conception of personhood, war on practices of contempt and second-class citizenship: these are among the chief strands we knit — or tangle — together as equality. I rather doubt they have any deep unifying structure. (One could make similar observations about liberty. Recall the tantalizing question, “do liberty and equality cohere or conflict?” The right has long wanted to say, they conflict!²² To which Dworkin wants to respond, triumphantly, they cohere! Better, I think, to deflate the question and say, well, it depends on which sense of each you have in mind. Yes, unrestricted market accumulation conflicts with the commitment to keeping everyone's wealth and income closely in line. No, the right of citizens to pursue their own plans in security doesn't conflict with equality under the law and the rule of law's commitments to impartiality and notice. And so on. Notice that all of these senses of liberty and equality are normative ideals, not “flat description[s]” (pp. 125-26). The question, again, is whether at the end of the day there is one basic ideal of liberty and one basic ideal of equality.) No surprise that Dworkin announces here a pending book developing his 1998 Dewey Lectures, “Justice for Hedgehogs” (p. 4). In Isaiah Berlin's famous distinction, Dworkin has always aspired to be a hedgehog, to know one big thing. In this crucial respect, Dworkin is indeed at odds with the pragmatist tradition and its commendable fixation on nitty-gritty facts and stubborn anomalies, its native distrust of sweeping abstractions and flaccid categories. But I suspect his chosen terrain lends itself to foxes who know many little things. Vulpine theorists can't supply the architectonic elegance to which Dworkin aspires. But they may be able, in their sly and partial ways, to get more stuff right.

22. A canonical version of the claim haunts Alexis de Tocqueville's *DEMOCRACY IN AMERICA* (Phillips Bradley ed., 1945) (1835); for a hilariously snotty updated version, see KURT VONNEGUT, *Harrison Bergeron*, in *WELCOME TO THE MONKEY HOUSE AND OTHER STORIES* 7 (1969).