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Legal Interference with Private Preferences

Cass R. Sunstein[†]

American law generally treats private preferences as the appropriate basis for social choice. In private law, interferences with decisions freely arrived at by contracting parties are exceptions to the general practice. Some of the most well-established conceptions of public law view the state as a mechanism for aggregating private preferences.¹ Shaping of preferences, or the rejection of particular preferences as distorted, tends to be treated as at best misguided and more likely tyrannical.

At the same time, it is difficult to understand much of private and public law without questioning the assumption that private

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¹ See Robert Dahl, *A Preface to Democratic Theory* (1956); Richard A. Posner, *Economic Analysis of Law* (3d ed. 1986); Robert W. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L. J.* 1 (1971). See also Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

preferences must always be regarded as sovereign. The central example of legal interference with private choices—the prohibition of force and fraud²—may or may not disturb that general assumption. But even if it does not, other examples of interference, not justifiable on that ground, are easy to find. For example, seemingly paternalistic interventions are an important element in modern contract and tort law.³ Consider implied terms, some of them nonwaivable, intended to protect renters, consumers, and employees.⁴ Many modern statutes must be regarded as an effort to shape preferences.⁵ Similarly, the Constitution does not always allow gratification of private preferences to serve as a basis for government action; in fact, preference shaping is an important constitutional principle. The equal protection clause is a good illustration. In a recent case involving the mentally retarded, for example, the Supreme Court said that the Constitution prohibited legislators from acting on the basis of their constituents' fear of and revulsion toward the mentally retarded. According to the Court, representatives may not justify their actions simply "by deferring to the wishes or objections of some fraction of the body politic."⁶ Cases involving discrimination on the basis of race or gender make the point even more clearly; private preferences for discrimination may not serve as the basis for state action.⁷

It may generally be agreed that if actions that gratify private preferences produce "harm to others," governmental intervention is appropriate. Many of the traditional rules of civil and criminal liability may, in this relatively uncontroversial sense, be under-

² Compare Epstein, Takings at 8 (cited in note 1) (treating force and fraud as clear categories) with Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 582-83 (1982) (suggesting that the categories are indistinct).

³ See Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 Yale L. J. 763 (1983); Kennedy, 41 Md. L. Rev. at 631-38 (cited in note 2).

⁴ See, e.g., *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (implied warranty of habitability); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (implied prohibition of arbitrary discharges from employment).

⁵ The most prominent example is the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), codified at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-d, 2000a-2000h-6.

⁶ *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3259 (1985). See also *U. S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) (bare desire to harm a politically unpopular group is not a legitimate state interest).

⁷ See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984) (invalidating race-conscious child custody policy on ground that state may not defer to private racism; even the reality of private discrimination does not justify discriminatory legislation); *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating gender-based statute that could be justified by reference to economic realities that derived from past discrimination).

stood as an effort to transform preferences. But the notion of harm to others is packed with ambiguity,⁸ and often legal rules—generated by legislatures, administrative agencies, and judges—are based on a very different, and potentially more expansive, rationale. The idea is that the gratification of a person's private preferences, conventionally understood as variables exogenous to the system of legal rules, is impermissible because it will produce harm to that person himself or because the preferences are in some respects not autonomous. Sometimes this idea is based on paternalistic grounds; sometimes it can be grounded in cognitive distortions; sometimes it relates to the inevitable preference-shaping effect of the legal rules that allocate entitlements and wealth in the first place; sometimes it refers to the notion of "ideology," or preferences that derive from relations of power. In all of these respects, it may be possible to show that there are defects in private preference structures that present, at least in the first instance, a case for collective action similar to that in situations of "market failures." That case may depend on a conclusion that liberty, welfare, or both will be promoted by public control.

The principal purpose of this article is to attempt to set out the various possible arguments for the conclusion that, even outside the context of harm to others, the legal system should not take private preferences as exogenous variables. Despite the conventional wisdom that private preferences should be taken for granted, legislators, administrators, common law judges, and courts interpreting the Constitution often decide that private preferences are an improper basis for social choice. The goal here is to suggest when and why these various lawmakers should reach this conclusion. In so doing, the article draws on recent writing on the problem in such diverse areas as psychology, political theory, and economics; such writing is only beginning to find its way into law. In a more speculative vein, the article evaluates the various bases for the rejection of private preferences and outlines the circumstances in which the objections to interference are least likely to be persuasive.

I. INTRODUCTION: THE STAKES

Objections to legal interference with private preferences take two characteristic forms. The objection from liberty has it that the

⁸ See generally Joel Feinberg, *1 The Moral Limits of the Criminal Law: Harm to Others* (1984); Lloyd Weinreb, *Natural Law and Justice* ch. 9 (forthcoming 1987).

government ought not, at least as a general rule, to be in the business of evaluating whether a person's choice will serve his or her interests, or even whether the choice is objectionable, except when the choice causes harm to others. The objection from futility emphasizes that in general, interferences with private preferences will be ineffectual, for those preferences will manifest themselves in responses to regulation that will counteract its intended effects. Thus, for example, landlords confronted with implied or statutory warranties of habitability will raise their rents and thus make tenants worse off than without such warranties;⁹ similarly, the minimum wage will increase unemployment.¹⁰

Those who accept the objection from liberty acknowledge that government may intervene to protect people from force and fraud,¹¹ and it may turn out to be hard to confine those principles in the libertarian fashion.¹² But a different attack is at least as interesting. Such an attack challenges the notion that a legal system that respects all current preferences operates under a sound understanding of liberty; and it points to circumstances in which collective decisions that depart from the satisfaction of private preferences, by general agreement, can be regarded as liberty-enhancing. The objection from liberty is met if it can be shown that, after legal interference, the preferences that are expressed are in some sense more autonomous than those expressed in a system in which regulation is (or appears¹³) absent.

This view of course derives from an alternative conception of freedom,¹⁴ which understands the term to refer to a deliberative process in which a person chooses her own ends and does not

⁹ See Posner, *Economic Analysis of Law* at 445-48 (cited in note 1).

¹⁰ See Finis Welch, *Minimum Wages: Issues and Evidence* 1-2, 21-32 (1978).

¹¹ See Epstein, *Takings* at 16 (cited in note 1) ("[T]he government must have [a police power] if it is to compensate private persons for their loss of natural rights.")

¹² See Weinreb, *Natural Law and Justice* (cited in note 8); Mark Kelman, *Choice and Utility*, 1979 *Wis. L. Rev.* 769, 790-91.

¹³ The inevitable existence of some regulatory scheme is an important lesson of the legal realist attack on freedom of contract. Any system of legal rights operates against the background of public control, and the notions of interference and noninterference thus tend to depend on artificial premises. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Polit. Sci. Quart.* 470 (1923). See also notes 63-110 and accompanying text below (discussing effect of legal rules on preferences).

¹⁴ This conception has its roots in Kant's conception of freedom; consider, for example, Immanuel Kant, *Foundations of the Metaphysics of Morals* (1785), in which Kant's vision of the ideal moral character is that of one who is seeking to choose the right ends. For recent examples with similar roots, see Jurgen Habermas, *The Theory of Communicative Action*, vol. 1, *Reason and the Rationalization of Society* (Thomas McCarthy trans. 1984); Jon Elster, *Sour Grapes* (1983); Richard B. Brandt, *A Theory of the Good and the Right* (1983).

merely attempt to satisfy whatever ends she "has." Under this view, private preferences are, by virtue of their status as such, entitled at most to presumptive respect. The republican conception of politics¹⁵ treats the system of governance as a collective version of this process, in which citizens select ends through political participation. Under such a regime, purely private preferences are understood to be shaped by circumstances; they are social constructs.¹⁶ Some current preferences may thus not be autonomous, and legal intervention may be necessary in order to promote autonomy.¹⁷ The process of deciding on preferences through deliberation, at the individual or collective level, fits comfortably with this alternative conception of freedom.

In this light, one of the most striking features of modern constitutional law is the rejection of the view that the purpose of politics is to aggregate or trade off private preferences. Many constitutional provisions require government to identify a public value that can be used to support government action. The contracts, eminent domain, equal protection, commerce, due process, and privilege and immunities clauses all reflect this basic understanding.¹⁸ Thus, for example, a statute that forbids opticians, but not optom-

¹⁵ For recent discussion, see, e.g., Benjamin R. Barber, *Strong Democracy* (1985); Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* (1984); Richard W. Krouse, "Classical" Images of Democracy in America: Madison and Tocqueville, collected in G. Duncan, ed., *Democratic Theory and Practice* (1983).

¹⁶ This perception raises difficulties for the concept of autonomy. One possible conclusion is that the concept should be abandoned altogether: the fact that preferences are socially constructed may mean that there is no such entity as a purely autonomous preference. Compare Michel Foucault, *Power/Knowledge* (1980) (discussing relationship between knowledge and power) with Nancy Fraser, *Michel Foucault: A "Young Conservative"?*, 96 *Ethics* 165 (1985) (criticizing relativism in Foucault). The attraction of this view is that no preference is disembodied; the notion of genuinely independent selection of preferences seems chimerical. On the other hand, theories that do away with the notion of autonomy often end up endorsing an unacceptable form of relativism, in which it is impossible to evaluate preferences or to conceive of the phenomenon—which appears to happen every day—in which people choose preferences individually or collectively.

The strategy chosen here is not to set out an affirmative notion of autonomy; rather it is to claim that some choices are at least more autonomous than others, and to posit the existence of preferences that are nonautonomous because based on social processes that occur "behind the back" of the actor involved. See Elster, *Sour Grapes* (cited in note 14); Thomas Nagel, *The View From Nowhere* 113-20, 130-34, 166-71 (1986). See also text accompanying note 64 below.

¹⁷ No claim is made here that altered preferences are in some sense "real" or "true." The argument is instead based on a particular conception of autonomy, in which people choose preferences and preferences are not produced by social constraints—for example, the absence of available opportunities. Compare note 16 above. See also notes 64-78 and accompanying text below.

¹⁸ See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689 (1984).

etrists, to sell eyeglasses can be defended only if it is responsive to some plausible distinction between the two. The fact that optometrists exerted political power is insufficient.¹⁹ If no public value is identifiable—if the action is a “naked” interest group transfer—there is a basis for constitutional invalidation. This broad principle amounts to an attack on conventional understandings of majority rule as a system of ensuring that the numbers and intensities of preferences will be reflected in legislative outcomes.²⁰

To be sure, the prohibition on naked preferences of this sort is not vigorously enforced.²¹ Whether from separation of powers concerns or because of an underlying judicial ambivalence about the prohibition, cases invalidating interest group transfers are quite rare. But there remains a constitutional norm that rejects the understanding that the purpose of politics is to aggregate or to trade off private interests. Similarly, much of modern administrative law may be understood as an effort to ensure that government action reflects some kind of deliberation on the part of governmental actors.²²

This approach to politics has a long pedigree. In American law, it can be traced to James Madison, who justified the system of national representation precisely on the ground that it would make it unlikely that government outcomes would reflect factional pressures.²³ National representatives, operating above the fray and free from the control of locally powerful factions, were to deliberate on the public good rather than to reflect constituent desires. Under this theory, the role of government is not simply to implement preferences, but to select them through a process of deliberation and debate.²⁴

¹⁹ See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487 (1955).

²⁰ See Bork, 47 *Ind. L. J.* 1 (cited in note 1). Contrast Max Horkheimer, *Eclipse of Reason* 26-30 (1947) (attacking this understanding of majority rule).

²¹ For this reason the prohibition may be understood as a member of the class of “underenforced” constitutional norms. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212 (1978) (arguing that Congress and state courts should enforce such prohibitions where federal courts fail to do so).

²² Thus the “hard look” doctrine is designed to ensure that agencies have deliberated over relevant alternatives rather than simply responded to constituent pressures. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Ins. Co.*, 463 U.S. 29 (1983). See generally Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29 (1985).

²³ See *The Federalist* (No. 10) at 60 (James Madison) (Modern Library ed. 1937); Sunstein, 38 *Stan. L. Rev.* 29 (cited in note 22).

²⁴ The first amendment may be understood as an effort to ensure that the citizenry plays a role in that process. See Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (1948).

This understanding of government rejects the notion that a well-functioning pluralist system,²⁵ in which all affected groups have access to the political process, is an appropriate basis for social choice. The political process, under this conception, must be to some degree autonomous from private desires. The justification for this approach is that efforts to aggregate or trade off private preferences—even if such efforts might be made coherent²⁶—ignore the risks of factional tyranny that lie in any system of preference aggregation, and devalue the effect of public deliberation on the enactment of public-regarding legislation.²⁷

In other settings, the understanding that politics should not merely implement private preferences conforms with common intuitions. Laws may, for example, reflect the public's "preference about preferences." The phenomenon of conscious selection of preferences is hardly uncommon; its manifestation in law suggests that people in their capacity as citizens may seek laws that differ from their choices in their capacity as consumers. Preferences may also depend on legal rules that allocate entitlements and wealth; if so, it is hard to justify, without circularity, legal rules by reference to the preferences that are generated by them. Or consider preferences that can be traced to past deprivations. People may convince themselves that they do not want a good simply because they consider it to be unavailable; if the good were available, it might have a high value to them. In a converse phenomenon, people may overvalue a good, even become obsessed with it, because they have been unable to obtain it in the past.²⁸ Desires as well as acts may be irrational or wrong.²⁹ In this view, it is a mistake to treat legal

²⁵ See John Hart Ely, *Democracy and Distrust* 87 (1980) (arguing in favor of a "participation-oriented, representation-reinforcing approach to judicial review," which leaves the selection of substantive values to the political process).

²⁶ On the conundrums in majority rule, see William H. Riker, *Liberalism vs. Populism* (1982); Allan Feldman, *Welfare Economics and Social Choice Theory* 202-10 (1980) (discussing demonstration by Gibbard and Satterthwaite that no plausible procedure of social choice is strategy-proof); Kenneth J. Arrow, *Social Choice and Individual Values* 22-33 (2d ed. 1963).

²⁷ In a system in which actors feel free to justify legislation solely by invoking its benefits to them, the probability that laws will amount to naked wealth transfers increases. The requirement that legislation be discussed and justified, rather than simply fought for, has a filtering effect on the sorts of measures that can be enacted. See Alexis DeTocqueville, *Democracy in America* 184 (Max Lerner and J. P. Mayer eds. 1966); William Nelson, *On Justifying Democracy* (1980); Elster, *Sour Grapes* (cited in note 14).

²⁸ See Elster, *Sour Grapes* (cited in note 14). See also notes 63-78 and accompanying text below.

²⁹ See Derek Parfit, *Reasons and Persons* (1984); Brandt, *A Theory of the Good and the Right* (cited in note 14).

rules as purely "facilitative";³⁰ such rules are part of a system that constitutes, and does not simply reflect, the social order.³¹

If nonautonomous preferences of these various sorts were changed through a collective process of discovering and countering the distortions that underlie them,³² it would be proper to say that freedom was promoted rather than undermined as a result. At least some categories of nonautonomous preferences can be readily identified. There are familiar dangers with this notion that people might be "forced to be free";³³ it raises the prospect of tyranny, as government becomes licensed to affect private preference structures on the ground that they are not autonomous. Moreover, the notion also suggests the troublesome conclusion that no preference is truly autonomous. But as we shall see, the legal system operates with an understanding that at least some preferences are not autonomous in a number of settings, and it does so rather uncontroversially. The objection from liberty is therefore met if one shows that regulation increases the autonomy of private preferences. The task is to identify, with as much precision and refinement as possible, the settings in which legal interference will promote rather than undermine autonomy.

The objection from futility, deriving from utilitarian or welfarist understandings of the role of law, is difficult to evaluate in the abstract. To determine whether regulation is futile, one must know something about the structure of the relevant market, which may limit the ability of the regulated actors to counteract regulation.³⁴ But if regulation changes preferences, the objection loses all of its force: people will not attempt to avoid regulation through alternative means. Regulation will thus not have the costs normally associated with it. In this sense, the endogenous character of preferences has important implications for the objection from futility. Regulation might, in short, be justifiable on grounds of welfare or utility; and such justifications will not be grasped if preferences are taken as exogenous. Whether the goal is autonomy

³⁰ See, e.g., Epstein, *Takings* at 6 (cited in note 1) (the state "only enforces the rights and obligations generated by theories of private entitlement"); Posner, *Economic Analysis of Law* (cited in note 1).

³¹ This view, of course, has a long pedigree. For recent discussion, see, e.g., John E. Roemer, *Rational Choice Marxism*, in John E. Roemer, ed., *Analytical Marxism* (1986); Alison M. Jaggar, *Feminist Politics and Human Nature* (1983).

³² See Brandt, *A Theory of the Good and the Right* (cited in note 14). On the problems with the notion of autonomy, see note 16 above.

³³ See Jean Jacques Rousseau, *The Social Contract* bk. I, ch. vii at 181 (Cole trans. 1762).

³⁴ See Kennedy, 41 *Md. L. Rev.* at 568 (cited in note 2).

or welfare, there may be significant gains from intervention that does not take preferences for granted.³⁵

Consider, for example, a law requiring the use of seatbelts. Suppose that the costs of initial use are quite high; when drivers and passengers first buckle the belts, they do so unwillingly. Suppose too that the costs associated with buckling decrease sharply once one has gotten into the habit. In such circumstances, the subjective costs of buckling will shrink. Regulation then is far from futile: after a change in preferences, people will not try to counteract it. Or consider a law prohibiting sexual harassment on the job, in circumstances in which harassment is pervasive and not controlled by contracting parties themselves. As in the case of minimum wage legislation, one might predict that such a law would provoke contracting parties to affect some other part of the "deal."³⁶ But a central purpose of a prohibition of sexual harassment is to alter the preferences of employers, and the law may well have that effect. If so, the employer will not exact some compensation for the nonwaivable term.

More generally, preferences may themselves be a function of legal rules: if this is the case, a change in legal rules will produce a change in preferences, and people will not attempt to circumvent the new rules. It may in fact be this general function of regulation—the change of objectionable preferences—that is captured in the notion of a moral function for law.³⁷ It follows that the *ex ante* perspective³⁸ on government action is sometimes defective, since it disregards the phenomenon of *ex post* changes in preference structures.

The possibility that private preferences ought, at least in some

³⁵ The term "welfare" is not used here in any technical sense; it is designed to capture any approach to social choice that is utilitarian in character. For general discussion, see Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 *Hofstra L. Rev.* 509 (1980). There are of course difficulties of measurement under such approaches. But recognition of the endogenous character of preferences may make regulation defensible on any welfarist criteria, including those that are economic in character.

³⁶ See Richard A. Epstein, *In Defense of the Contract at Will*, 51 *U. Chi. L. Rev.* 947 (1984).

³⁷ The fact that preferences are endogenous, and change over time, raises difficult questions about the concept of the "person." The phenomenon of changing preferences suggests that it might be possible to understand a person over time as in some respects different people—an explosive idea that cannot be explored here. See Parfit, *Reasons and Persons* (cited in note 29); Donald H. Regan, *Justifications for Paternalism*, in J. R. Pennock and J. Chapman, eds., *XV Nomos: The Limits of Law* 189 (1974); Jon Elster, ed., *The Multiple Self* (1986).

³⁸ For an example, see Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 *Harv. L. Rev.* 4 (1984).

circumstances, not to be regarded as autonomous thus has powerful implications for both objections to government interference. If preferences are shown not to be autonomous, and if the purpose and effect of the interference are to promote autonomous preferences, the objection from liberty loses much of its force; regulation may be a process of collective self-determination that operates to enhance rather than to curtail liberty. If regulation succeeds in changing preferences, the objection from futility is met. But the discussion thus far has been quite general and abstract. It is time to explore the problem in more specific settings.

II. REJECTING PREFERENCES: A CATALOGUE

This section outlines some of the principal situations in which legislatures, administrators, and courts might intervene to overturn choices that do not cause harm to others. Straightforward paternalism is the most obvious case; it may also be the most controversial. But the notion of paternalism—forcing people to do something they prefer not to do on the ground that it is in their “true interests”³⁹—is undifferentiated; it conceals a number of distinctions. One might reject paternalism as a general ground for disruption of choices but at the same time deny tautologies that rely on “revealed preferences.” The principal purpose here is to untangle the different arguments that might call for public intervention.

It will be useful to begin by setting out, in general terms, the four basic categories of cases in which interference with a system of private consumption choices is justified. All of these categories are sometimes understood as species of “paternalism,” but in some ways they belong in a different category altogether.⁴⁰ First, a majority may have a collective preference; the public, acting through government, may attempt to bind itself against the satisfaction of its own misguided choices. People may have “preferences about preferences” that are reflected in government action.

The second category includes preferences that are a product of legal rules allocating entitlements and wealth. If the legal rules were changed, the preferences would shift as well; the rules are thus hard to justify by reference to the preferences. For example, preferences may result from the absence of available opportunities resulting from legal rules. Deprivations can produce contentment

³⁹ This definition collapses some complex issues. See, for general discussion, Donald VanDeVeer, *Paternalistic Intervention* (1986).

⁴⁰ See notes 145-49 below. Throughout the discussion, general competence on the part of private actors is assumed; impaired deliberative capacities are not discussed.

with a status quo that, if changed, would appear unjust and unsatisfying. To reduce cognitive dissonance, people may become satisfied with a tyrannical status quo. Consider views of the proper role of women: many such views are held by women themselves and are produced, at least in part, by legal rules that perpetuate gender roles. Or beliefs and desires may be distorted by an interest in maintaining a certain level of power and prestige. When preferences can be traced to legal rules, the rules must be justified by something other than the current preferences; and if the rules cannot be independently grounded, there is a powerful case for collective intervention.

The third category includes preferences that depend on the sorts of motivational distortions that characterize addictions, habits, and myopic behavior. The unifying themes here are that the preferences are endogenous to the act of consumption and that the short-term costs of altering behavior may be overvalued when compared with the long-term gains. There is thus an "intrapersonal collective action problem"⁴¹ that parallels the sorts of collective action problems that are frequently thought to call for government intervention. When there is such a problem, government intervention may make people better off in terms of welfare and perhaps autonomy—at least a partial justification for intervention.

Finally, private preferences are sometimes based on inadequate information, a large category that includes cognitive distortions in dealing with low-probability events, a subject on which there is growing data. When a decision is based on imperfect information, government may either provide the relevant information or under some circumstances ban the decision altogether.

In the discussion that follows, the various arguments for intervention will be offered quite briefly. The goal is not to make a final evaluation of each particular intrusion, but instead to set out some of the advantages and risks in basing government intervention on these grounds. It is important to note that the arguments are not paternalistic in the ordinary sense; they attempt instead to isolate particular defects in private preference structures that lead to gains—in terms of welfare, autonomy, or both—from collective action. It is important to note as well that the identification of defects in a system based on private preferences is a necessary but not sufficient condition for a regulatory solution. A detailed body of writing on the regulatory process demonstrates that the fact of a

⁴¹ See Jon Elster, *Weakness of Will and the Free-Rider Problem*, 1 *Econ. & Phil.* 231, 238-40 (1985).

“market failure” does not necessarily mean that collective action will make things better rather than worse.⁴² Indeed, the “market failure” analogy is the precise one here; the various categories of cognitive distortions present a similar case for collective action. The ultimate purpose of the discussion that follows is to suggest that in cumulative effect, these and other cases for intervention⁴³ suggest that the legal system should not treat private preferences as exogenous and inviolable,⁴⁴ and that it is possible to be relatively precise in showing why and when this is so.

A. Collective Preferences: Voluntary Foreclosure of Consumption Choices and Others⁴⁵

Sometimes a collectivity will have a preference that is different from the choices of its individual members. For example, when government acts in order to prevent people from satisfying short-term consumption choices, it is frequently thought to be acting paternalistically, but in fact its conduct belongs in a quite different category. Suppose that government is responding to efforts by a majority of the public to use state force to prevent the satisfaction of harmful desires. Laws may, in short, reflect the majority’s “preference about preferences,” or second-order preferences, at the expense of first-order preferences. This phenomenon—voluntary foreclosure of consumption choices—is the political analogue of the story of Ulysses and the Sirens.⁴⁶

Numerous possible examples come readily to mind: laws requiring nonentertainment broadcasting on television, preventing the advertising of cigarettes, requiring the wearing of seatbelts, outlawing the use or possession of narcotics, protecting the environment, calling for a balanced budget, and establishing social se-

⁴² See, e.g., Stephen G. Breyer, *Regulation and its Reform* 2-4 (1982) (outlining criticisms of regulation).

⁴³ See note 13 above.

⁴⁴ For defenses of the inviolability of private preferences, see Epstein, *Takings* (cited in note 1); Richard A. Posner, *The Economics of Justice* (1981).

⁴⁵ See generally Jon Elster, *Ulysses and the Sirens* (1984). See also VanDeVeer, *Paternalistic Intervention* at 45-58 (cited in note 39); Joseph L. Sax, *The Legitimacy of Collective Values: The Case of the Public Lands*, 56 U. Colo. L. Rev. 537 (1985); Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J. L., Econ., & Org. 357 (1985); Thomas C. Schelling, *The Intimate Contest for Self-Command*, 60 Pub. Interest 94 (1980); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 Phil. & Pub. Affairs 317 (1977).

⁴⁶ See Elster, *Ulysses and the Sirens* (cited in note 45). In the story from *The Odyssey*, Ulysses, in the course of his voyage home from Troy, orders his sailors to tie him to the ship’s mast to keep him from following the seductive songs of the Sirens to his death.

curity and welfare measures. Each of these measures may be regarded as in part an effort by the public to protect itself against its own misguided choices. Sometimes, of course, similar ends can be achieved either through self-help or through private, voluntary organizations. Private pensions are an example, and more modest examples can be found in everyday life.⁴⁷ But sometimes public assistance will be the most effective avenue. The Constitution itself may be regarded as an effort to prevent present or future majorities from engaging in imprudent conduct; constitutional rights may be understood as the protection of second-order preferences.⁴⁸ At first glance, it is hard to see what objection might be invoked in principle to voluntary conduct of this sort.⁴⁹

Indeed, the reflection of second-order preferences through law fits comfortably with the understanding of autonomy, set out above, that understands the term to mean selection rather than mere implementation of ends. Second-order preferences are a pure example, at the individual or social level, of conscious choice of preferences. This phenomenon is quite different from ordinary paternalism or from a system in which majorities impose their will on minorities because they disapprove of the conduct in question. The majority is seeking to bind itself, and the legal system is the best way to accomplish that task.⁵⁰

If the measure at issue is adopted unanimously, there should be no ground for objection. But more serious difficulties are produced if the law imposes on a minority what it would regard as a burden rather than a benefit. Suppose, for example, that a significant percentage of the population wants to use narcotics, but that a majority succeeds in obtaining a ban because of its desire to foreclose itself.⁵¹ It might be thought that those who perceive a need to bind themselves should not be permitted to do so if the conse-

⁴⁷ Examples range from savings incentive plans to New Year's resolutions. See Schelling, 60 *Pub. Interest* at 94 (cited in note 45).

⁴⁸ See Elster, *Ulysses and the Sirens* at 94-96 (cited in note 45); Laurence H. Tribe, *American Constitutional Law* § 11-1 (1978).

⁴⁹ Note, however, the suggestions in Robert A. Burt, *Commentary on Schelling's "Enforcing Rules on Oneself,"* 1 *J. L., Econ., & Org.* 381 (1985), that motivations "bottled up" by voluntary mechanisms of foreclosure may manifest themselves in other forms, and that a plausible conception of free will would permit rejection of past commitments.

⁵⁰ See Schelling, 60 *Pub. Interest* 94 (cited in note 45), for a discussion of self-binding through law. In one sense, however, paternalistic intervention is more easily justified than self-binding through politics; in the former case, there is an effort to help minorities, whereas in the latter, minorities are victims.

⁵¹ Of course, narcotics laws might also be justified on the ground that narcotics use causes harm to others.

quence is to deprive others of an opportunity to satisfy their consumption choices. Those who prefer not to buckle their seatbelts, and who regard their decision as wholly rational, will resent measures that burden them simply because others are unable to resist a decision that they regret. The weaknesses of a majority, it might be thought, are an insufficient reason to bar a minority from doing something that it wants to do.

The foreclosure of the preferences of a minority is unfortunate, but in general it is hard to see what argument there might be for creating an across-the-board rule against self-binding through politics. If the majority is prohibited from vindicating its second-order preferences through legislation, its own desires will be frustrated; the choice is between the preferences of the majority and those of the minority. A decision to forbid voluntary foreclosure of choices through government would be a significant intrusion on what is by hypothesis the preference of a majority.⁵² On the other hand, the voluntary foreclosure of choice will interfere with minority desires, and it should for that reason be permitted only when less restrictive alternatives, including private arrangements and limitations to those who wish to be bound, are impossible or ineffective.⁵³

The argument for codification of second-order preferences in law will be weakest in three categories of cases. Assume, first, that the particular choice foreclosed has some special character. If it is possible to characterize that choice as a constitutional "right," the majority has no authority to intervene. Some rights represent second-order preferences reflected in the constitutional text; second-order preferences produced through ordinary politics are of course subject to constitutional constraints. Electoral majorities are not permitted to intrude on rights, even if they have good reasons for doing so.⁵⁴ But the category of rights is a small one.

⁵² It is assumed here that the legislature is not responding solely to political power but is instead acting in deliberative fashion. See notes 64-83 and accompanying text below. See also Sax, 56 U. Colo. L. Rev. at 550-52 (cited in note 45) (discussing statements of national purpose).

⁵³ Compare *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707, 718 (1981) (state may justify an encroachment on religious liberty if it is the least restrictive means to achieve a compelling state interest).

⁵⁴ Examples here may include some sexual activities: even if a majority is seeking to bind itself, it may not be able to do so because this may interfere with a right of personal autonomy on the part of a minority. See *Carey v. Population Services*, 431 U.S. 678 (1977) (right of access to contraceptives). But see *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (no right to engage in sodomy). If the state's justification is exceptionally powerful, of course, the intrusion may be permitted.

The second problem occurs when the second-order preference is itself objectionable or distorted.⁵⁵ A second-order preference against racial intermarriage, for example, should not be respected—though an independent argument, challenging that second-order preference, is required to explain why. The mere fact that a majority seeks to vindicate a second-order preference through law is thus insufficient to justify its action; a substantive argument, derived from the Constitution or political theory, may rule out some such preferences.

A similar problem arises if the second-order preference reflects some special weakness on the part of the majority. Suppose, for example, that a majority in a small town enacts a curfew law to prevent its members from waging war on one another. Suppose too that a substantial minority is entirely peaceable. In such circumstances the availability of a legal remedy, in the form of a curfew law, might remove desirable incentives for self-control, reward the absence of willpower, and prove unnecessary in light of the existence of alternative remedies. When these concerns arise—as they may in a significant number of cases—self-binding through politics is undesirable.

Another difficulty has to do with the possibility that preferences “bottled up” by voluntary restrictions may manifest themselves in especially destructive forms.⁵⁶ Enforcement of a decision to foreclose consumption of a good may simply induce people to make choices that are even worse; for example, people who prevent themselves from engaging in a particular form of high-risk activity may find that they end up taking even greater risks. Because of this possibility, the case for voluntary foreclosure is strongest when the preference in question is endogenous—when, in short, the voluntary foreclosure ensures that the preference does not become formed, or become strong, in the first place. Legal restrictions on the consumption of addictive substances can be thus understood.⁵⁷ But even when the preference is “bottled up,” there is no reason in principle to oppose voluntary foreclosure. The possibility that the majority’s decision to bind itself will turn out to have unfortunate consequences is not a sufficient reason to prohibit it from doing so if it chooses.

A final problem has to do with the problem of deciding when citizens have voluntarily limited their own consumption, and when

⁵⁵ See notes 85-110 and accompanying text below.

⁵⁶ See Burt, 1 J. L., Econ., & Org. 381 (cited in note 49).

⁵⁷ See notes 111-18 and accompanying text below.

a law results instead from self-interested or otherwise illegitimate motivations of a politically successful group. Instead of seeking to bind itself, a majority may be attempting to impose its views on an unpopular minority. Legislative action of this sort often is illegitimate.⁵⁸ Identification of voluntary foreclosure of consumption choices is likely to be especially difficult in light of the familiar problem of mixed motivations on the part of lawmakers. The laws outlined above—seatbelt requirements, prohibitions of narcotics, social security—have complex origins; the desire to foreclose misguided consumption choices is at most a partial motivation. A particular difficulty here is the familiar disjunction between rulers and ruled.⁵⁹ It would be odd to claim that government is always responding to the wishes of a majority when it forecloses options. Sometimes it will be acting in response to a faction that seeks to impose its parochial preferences on the country, or that believes that its economic welfare will be promoted by foreclosing a certain option. If a government decision is made pursuant to a referendum, of course, there is good reason to believe that it reflects the majority's preferences.⁶⁰ But in a representative democracy, where citizens vote on candidates rather than on issues and do not have continuous control over representative processes, it is fanciful to say that government intrusion on consumption choices is always responsive to electoral demands.

On the other hand, it is equally odd to suggest that government foreclosure of options is never responsive in that sense. Perhaps the most that one can say is that the possibility that a majority is seeking to control misguided consumption choices is a real one, and that if the phenomenon is occurring, the interference may be justifiable. In some cases, then, voluntary foreclosure of this sort is a legitimate basis for legal interference with private preferences.

⁵⁸ See *Moreno*, 413 U.S. at 528 (invalidating exclusion of "hippie communes" from food stamp program). The voluntary foreclosure of choice thus provides a legitimate reason for interfering with a minority, a reason that is absent if the majority is trying merely to "get" a minority. In some cases, harm to others or some sorts of paternalistic reasons also may serve as a justification. See notes 39-42 and accompanying text above (discussing paternalism).

⁵⁹ The economic term is "agency costs," on which there is a large literature. See, e.g., Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. Fin. Econ.* 305 (1976).

⁶⁰ Proposition 13 in California and proposition 2 ½ in Massachusetts are referenda in which majorities foreclosed future spending. For general discussion, see David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (1984).

It is true that even a referendum only imperfectly reflects voters' preferences and the intensity of those preferences. A well-organized interest group may mobilize forces; and each vote is of equal weight regardless of the strength of the voter's preference.

The institutional implication is that constitutional provisions and statutes that reflect second-order preferences are often unobjectionable.

A closely related phenomenon occurs when regulation is necessary to prevent private pressures from undermining actual private choices. In such cases, the force of law is required in order that people may be allowed to do what they in fact want; paradoxically, restrictions may facilitate the satisfaction of preferences. For example, suppose that a restaurant in the south wants to serve blacks but fears reprisal from such private organizations as the Ku Klux Klan. The restaurant may seek legal protection to permit it to do what it already, in an important sense, wants to do.⁶¹ Or, to return to the seatbelts context, suppose that a number of people want to wear seatbelts but refuse to do so because peers will scorn their cowardice. A law may enable them to wear seatbelts and to attribute their action to legal requirements. The phenomenon suggests another ground on which people may, in their capacities as voters or citizens, behave differently from the way they act in their purely private capacities. A majority of citizens might vote for a regulation that would prevent them from engaging in the very conduct which, in an "unregulated"⁶² system, they are led to choose because of justifiable fears or a collective action problem.

The point is a general one: government regulation may permit people to express preferences by using the shield of the law to lessen the risk that private actors will interfere with the expression. Here, as in the case of Ulysses and the Sirens, the difficulties lie in the foreclosure of the voluntary choices of a minority and in the problems of ensuring that the phenomenon is in fact occurring. Here, as there, the fact of foreclosure of minority choices is unfortunate but not always decisive. The problem of identification is a real one in practice, but it does not weaken the theoretical case.

B. Preferences and Legal Rules

The problem of voluntary foreclosure of consumption choices is quite distinct from a different category of cases, in which preferences are traceable to a legal rule or an existing legal regime. When this is the case, the rules cannot be justified by reference to the preferences. The case for maintaining the status quo must there-

⁶¹ This in fact happened before the 1964 Civil Rights Act and contributed to its passage.

⁶² The term is used with the usual disclaimer. See note 13 above.

fore depend on something else—for example, a theory of distributive justice or natural rights.⁶³ Moreover, defects in the rules that produce preferences may generate defective preferences; thus there is a strong case for collective intervention.

Preferences that depend on legal rules fall into three principal categories: adaptive preferences, or preferences that result from the lack of available opportunities; endowment effects, or preferences that are attributable to ownership or nonownership; and ideology, amounting to interest-induced beliefs on the part of the well-off and adaptive preferences on the part of the badly off. All of these effects might be regarded as cognitive defects to which the legal system should and sometimes does respond.

Often, of course, the preference in question is not directly traceable to the legal rule but is instead a product of larger processes of socialization of which the legal system, or any particular law, is but a minor part. The preference may, for example, result from the existing distribution of wealth. Preferences in the existing system are different from what they would be in a system in which wealth was distributed differently. On the other hand, intervention itself will result in changes in preferences, changes brought about by legal rules. It is hard to imagine a preference not shaped in part by legal arrangements. The point here is that in some circumstances the endogenous character of the preference will justify intervention on grounds of both autonomy and welfare and in any event will make it difficult to invoke the preferences as the sole argument against change.

1. *Adaptive Preferences.* The phenomenon of adaptive preferences results from the fact that what people want is sometimes a product of what they can get. This phenomenon is reflected in the tale of the fox who does not perceive himself deprived in his inability to obtain “sour grapes.” As Jon Elster has argued, the phenomenon amounts to a powerful attack on utilitarianism: “For the utilitarian, there would be no welfare loss if the fox were excluded from consumption of the grapes, since he thought them sour anyway. But of course the cause of his holding them to be sour was his conviction that he would be excluded from consuming them, and then it is difficult to justify the allocation by invoking his preferences.”⁶⁴

⁶³ See generally John Rawls, *A Theory of Justice* (1971), which can be understood, like most social contract theories, as an effort to abstract from current preferences in order to see what preferences would emerge from a well-ordered society.

⁶⁴ Elster, *Sour Grapes* at 109 (cited in note 14).

The phenomenon of sour grapes, or adaptive preferences, points to the distinction between welfare and autonomy. Preferences that have adapted to the absence of opportunities are in important respects welfare-promoting; they diminish frustration and envy, and prevent people from cursing a fate that they perceive themselves powerless to change. The reduction of cognitive dissonance⁶⁵ is hardly an unambiguous evil. On the other hand, if adaptive preferences are not a part of conscious "character planning,"⁶⁶ and if they come about during a process of conditioning over which people exercise no control, there is an important sense in which the resulting preferences are not autonomous.⁶⁷ Those preferences are produced by the lack of opportunities which, if they were available, would result in a different preference structure and perhaps greater welfare. Although there appears to be no welfare loss from failure to satisfy adaptive preferences, there is an important loss all the same: people fail to obtain goods that would turn out to be extremely rewarding, precisely because they do not want those goods, and their lack of desire turns on a lack of opportunities. In such cases, autonomy concerns point in favor of rather than against a change in legal rules.

The phenomenon of sour grapes is a powerful explanation of acceptance of traditional forms of discrimination by its victims, in the context of gender, class, and even race.⁶⁸ Acceptance of traditional distinctions tends to reduce cognitive dissonance. It is thus possible to attack those traditions even if some or many of the purported beneficiaries of the attack appear content with the status quo. The notion of "false consciousness"—that people do not know what they really want—is vulnerable on many grounds, including its tendency to tautology and frequent lack of cognitive foundations. But the notion may be more plausible once it is recognized that, for example, the hostility of many women to equal rights may result from the cognitive dissonance produced by new conceptions of the role of women.⁶⁹ Ideas of this sort help to account for Su-

⁶⁵ See generally Leon Festinger, *A Theory of Cognitive Dissonance* (1957).

⁶⁶ See Elster, *Ulysses and the Sirens* at 77-85 (cited in note 45) (arguing that people choose to be bound to protect themselves from their own harmful, first-order preferences).

⁶⁷ See notes 32-33 and accompanying text above.

⁶⁸ See Leon F. Litwack, *Been in the Storm So Long* (1979) (discussing ambivalent reactions of newly freed slaves). An alternative approach to the problem, set out in Ronald Dworkin, *Taking Rights Seriously* (rev. ed. 1978), draws on a distinction between "external" and other sorts of preferences; that approach cannot be evaluated here. See generally John Hart Ely, *Professor Dworkin's External/Personal Preference Distinction*, 1983 *Duke L. J.* 959.

⁶⁹ Consider, e.g., Jane Mansbridge, *Why We Lost the ERA* 107 (1986). Men may also

preme Court decisions rejecting gender-based classifications that derive from real-world differences between men and women.⁷⁰ Such real-world differences—including differences in preferences—derive from legal and social structures that have produced gender inequality. Invalidation of rules that perpetuate these distortions is necessary to achieve more autonomous preferences.

Consider another example of how an argument for regulation on the basis of adaptive preferences might run. Workers seem not to be willing to trade much in the way of money for self-government. But that preference may be a product of a belief that self-government in the workplace is unavailable.⁷¹ Were the option to be one that workers conventionally thought available, the option might be highly valued. If the preference for wages over self-government is a product of sour grapes—to be sure, a controversial proposition⁷²—there is a defect in cognitive processes that provides at least a potential justification for government action.

But it is not clear what follows from the fact of adaptive preferences. The first problem here is that it is possible to identify a parallel distortion: some people will want things precisely because they are unavailable. The “grass is always greener” phenomenon parallels the story of the fox and the sour grapes.⁷³ A second problem is that it is extremely difficult to tell when a preference results from the perceived unavailability of an opportunity. If the fact of adaptive preferences is to be used as a basis for government regulation, it is important to be sure that the phenomenon is in fact occurring.

have been victims of similar processes. Because men have been expected to work, rather than stay home with children, many of those who would have preferred the latter option may have adapted to the status quo by acquiring preferences against child care. Laws that encourage paternity leaves, or that give welfare to parents of both sexes, thus tend to promote the welfare and autonomy of men as well as women.

⁷⁰ See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977) (social security entitlement determinations cannot presume that women are more dependent on men than men are on women); *Craig v. Boren*, 429 U.S. 190 (1976) (minimum drinking age cannot be higher for males than for females).

⁷¹ It may also be an “endowment effect.” See notes 79-84 and accompanying text below.

⁷² Compare Daniel R. Fischel, *Labor Markets and Labor Law Compared to Capital Markets and Corporate Law*, 51 U. Chi. L. Rev. 1061, 1076 (1984) (“Workers prefer to be able to delegate firms’ decisionmaking . . . in exchange for a slice of the larger pie.”) with Oliver Williamson, *Corporate Governance*, 93 Yale L. J. 1197, 1206-09 (1984) and Oliver Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. L. & Econ. 233, 257 (1979) (workers with firm-specific skills would accept lower wages in exchange for a voice in governing corporation).

⁷³ See Elster, *Sour Grapes* (cited in note 14).

Even if that problem can be solved, the question of remedy remains. The least intrusive remedy for sour grapes is to make the devalued option available. If there is reason for assurance that workers undervalue self-government because of its unavailability,⁷⁴ government might take steps to ensure that it is available, at least in some firms. The problem with the less intrusive remedy is that once the preference structure is in place, making the option available is insufficient: people will not take advantage of an opportunity which, because of previous deprivation, they no longer value. But people whose preference structure is not yet formed, or is subject to change, may benefit from a newly available option. After a period of time it will be possible to tell if the sour grapes phenomenon actually is occurring, as people form their preferences in circumstances not distorted by limitations in available opportunities. Finally, some people whose preferences are affected by sour grapes may change immediately after the undervalued option is made available.⁷⁵

The more intrusive remedy—one whose effects are not undermined by current preference structures—is not merely to make the opportunity available but also to make it exclusive, so that people try it even if they do not want to do so. Legislatures seldom undertake such action, in light of the absence of enthusiasm for it by its purported beneficiaries, who are by hypothesis content with the status quo; but one might understand at least some of American labor and civil rights law on this ground.⁷⁶ If people do not want an opportunity because they have considered it to be unavailable, the only way to solve the problem is first to make it available and second to force them to take advantage of it. But there are obvious

⁷⁴ I put to one side the problems produced by the market's reliance on the criterion of private willingness to pay. One's willingness to pay for something is of course not equivalent to one's desire to have something; willingness to pay is affected by ability to pay. See Charles E. Lindblom, *Politics and Markets* (1977).

⁷⁵ The fact that the change may be a product of the new legal regime, rather than an increase in autonomy, raises a problem taken up below at notes 79-84 and accompanying text.

⁷⁶ American labor law displaces the private market, generating a certain amount of worker control of the workplace even if the market would not provide it. For a critique, see Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Legislation*, 92 *Yale L. J.* 1357 (1983).

In the area of civil rights, consider the Supreme Court's rejection of "freedom of choice" plans for school desegregation, a rejection that may depend in part on the fact that preferences are produced by a history of discrimination. In light of that history, blacks might choose not to send their children to white schools. See *Green v. County School Board*, 391 U.S. 430 (1968). For a general discussion, noting the presence of distorted and adaptive preferences, see Paul Gewirtz, *Choice in the Transition*, 86 *Colum. L. Rev.* 728 (1986).

problems with such a solution. To require people to engage in an activity that they would prefer to avoid will diminish welfare, at least in the short run, and (under a certain understanding) autonomy; and it is a dangerous precedent to establish.

For this reason, it is important to be certain that the phenomenon of sour grapes has accounted for the current preference structure, that less intrusive measures are unworkable, that preferences can be changed quickly, and that in the end citizens will be glad that regulation was brought forward. The strategy of compulsion has in fact been followed in the unusual but important context of school desegregation, where freedom of choice plans have been rejected in favor of compulsory integration.⁷⁷ To point out the stringent conditions for compulsion and the unusual nature of school desegregation is not to suggest that citizens should never be forced to engage in activity when sour grapes have infected preferences; but it is to say that this remedy should be quite rare.

All this suggests that the problem of sour grapes poses a considerable difficulty for theories, utilitarian and otherwise, that take private preferences as exogenous variables.⁷⁸ Preferences produced by some kind of distortion should not be used to rule out legal change. The appeal of intervention derives from the gains in autonomy and, eventually, welfare that should result from disruption of choices that depend on limitations in the available set of opportunities. In some circumstances, therefore, legal action should be based on a realization that the absence of available opportunities has generated existing preferences. In general, however, the appropriate remedy also will be imperfect.

2. *Endowment Effects.*⁷⁹ Social psychologists have demonstrated that people sometimes value things once they have them much more highly than they value the same things when they are owned by others.⁸⁰ For example, when the legal system transfers rights to labor unions from management, the unions sometimes are unwilling to sell the rights back to management, even when trans-

⁷⁷ See Gewirtz, 86 Colum. L. Rev. at 745-48 (cited in note 76) (freedom of choice plan in school system would not remedy segregation because of ingrained attitudes due to past discrimination).

⁷⁸ Utilitarian theories need not, however, take existing preferences as exogenous.

⁷⁹ For general background, see Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39 (1980); Richard H. Thaler, *Illusions and Mirages in Public Policy*, 73 Pub. Interest 60 (Fall 1983).

⁸⁰ See, e.g., Thaler, 73 Pub. Interest at 64 (cited in note 79). See also Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 So. Cal. L. Rev. 669, 679 (1979); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 Stan. L. Rev. 387, 401 (1981).

action costs are low and when the union expressed no original interest in obtaining the rights during collective bargaining.⁸¹ The same phenomenon is at work when people value current assets much more highly than they value items of identical worth in the hands of others. Sometimes, of course, the opposite happens. Some goods are more valuable when and because they are owned by others.

The phenomenon of endowment effects has complex roots. To some degree, it derives from experience; people who use a product or have an entitlement may come to appreciate its value. To some degree, the phenomenon may be the product of strategic considerations; unions may be unwilling to give up a right because such a concession would reveal weakness in bargaining. To some degree, endowment effects depend on differences in wealth that are produced by different allocations of entitlements. Willingness to pay, for example, is a product of the existing distribution of wealth, which in turn depends on the existing distribution of entitlements. A person may be willing to pay less for a good to which she is not entitled than she would require in exchange for the same good if she possessed an ownership right. This is so simply because she is poorer (and thus less able to pay) without the good than with it.⁸² The diminishing marginal utility of income thus plays a significant role here. Moreover, endowment effects may result in part from cognitive processes whereby people prefer received income to opportunity income because of psychological attachments.⁸³ Finally, endowment effects may be an effort to reduce cognitive dissonance. High valuation of what one owns, and low valuation of what one does not (either by choice or through unavailability), is a means of reducing dissonance.⁸⁴

In this respect, the phenomenon is closely connected to that of sour grapes; indeed, endowment effects may be treated as a generalization of that phenomenon. Such effects also represent an effort to adapt preferences to the existing distribution of goods. And like sour grapes, the phenomenon of endowment effects has important implications. Above all, it suggests that a person's failure to value a particular commodity does not necessarily mean that—even *to*

⁸¹ See generally Douglas L. Leslie, *Cases and Materials on Labor Law: Process and Policy* (2d ed. 1985).

⁸² See Ronald M. Dworkin, *Is Wealth a Value?*, 9 *J. Legal Stud.* 191, 192 (1980).

⁸³ See Kelman, 52 *So. Cal. L. Rev.* at 679 (cited in note 80); Thaler, 73 *Pub. Interest* at 65-66 (cited in note 79).

⁸⁴ See Festinger, *A Theory of Cognitive Dissonance* at 264 (cited in note 65).

that person—the commodity is not valuable. The paradox stems from the fact that once the person is given the commodity, it may become quite valuable indeed. And the paradox works in the opposite direction as well: the legal system might remove goods from someone who currently has them, even if that person values those goods, in the expectation that he might not miss them after they have been taken. In either case, there may be welfare gains from providing the commodity to a person even if the market would otherwise allocate the commodity to a different person. There may be autonomy gains as well; if a preference is the product of an allocation of entitlements that cannot be independently justified, the preference is hardly autonomous. In any event, the legal rule or legal regime requires some justification independent of the current preference structure.

When endowment effects are present, the case for government action is analogous to that for such action in response to sour grapes. People may be substantially better off with a good than their *ex ante* preferences suggest. On the other hand, endowment effects complicate the argument for legal intervention to redress the problem of adaptive preferences. Once intervention has taken place, people may value the new system of entitlements—and downgrade the old—because of the endowment effects brought about by legal change. All of this suggests two conclusions. First, preferences that are endogenous and subject to distortion do not provide a strong justification for any particular status quo. Second, the cycle of adaptive preferences and endowment effects can be broken only by some substantive theory that allows an observer to evaluate the existing distribution of entitlements and existing preferences. In the case of gender discrimination, such a theory is readily available; in the case of self-government in the workplace, it is more controversial. But in either case, when adaptive preferences and endowment effects are at work, current preferences supply at most weak support for the existing system.

3. *Preferences and Power: Ideology, Adaptive Preferences, and Beliefs Distorted by Interest.* A third class of preferences traceable to legal rules is captured in the notion of “ideology,” or desires and beliefs that derive from relations of power. The legal system incorporates this notion, though somewhat haltingly, in constitutional doctrine that treats some preferences as an impermissible basis for statutory classifications. Constitutional law sometimes forbids legislation that amounts to a naked preference for one group over another; legislation must be defensible by refer-

ence to something other than political power.⁸⁵ The constitutional prohibition of naked preferences serves as a preface for a more expansive suggestion, one that relies on a conclusion that some preferences are objectionable or distorted.

Consider, for example, laws prohibiting discrimination on the basis of race and gender. The concern here is that preferences for discrimination⁸⁶ should not be gratified—not only because of harm to others or to the actor involved, but also because those preferences are in some sense suspect. It is highly controversial to propose that government intervention is for this reason appropriate. Nonetheless, the notion of “ideology” is designed to show that preferences may be the product of power and thus may not be defensible on grounds other than self-interest.⁸⁷ This understanding is reflected, albeit crudely, in a recent suggestion by the Supreme Court that statutory classifications must be supported by “reasoned analysis” and should not result from “traditional, often inaccurate, assumptions about the proper roles of men and women.”⁸⁸ That notion of course represents a dramatic rejection of the understanding that the purpose of politics is to aggregate or trade off private preferences.⁸⁹ The same point emerges from other cases rejecting particular private preferences as the basis for legislative action.⁹⁰ The basic idea is that preferences derive from legal rules and the legal regime more generally; as a result, the system cannot without circularity be justified by referring to the preferences that derive from it.⁹¹

The notion of “ideology” is of course highly complex, and it is hardly obvious that some social relations, and not others, can be shown to be the product of power and not to be subject to rational defense.⁹² Such issues cannot be explored here. But it may be useful to point out that ideology can be understood as a kind of cogni-

⁸⁵ See notes 18-21 and accompanying text above.

⁸⁶ For general background, see Gary S. Becker, *The Economics of Discrimination* (2d ed. 1971).

⁸⁷ See generally Jon Elster, *Making Sense of Marx* 459-61 (1985); Raymond Geuss, *The Idea of a Critical Theory* 12-22 (1982).

⁸⁸ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 726 (1982) (footnote omitted) (invalidating policy of admitting only women to state nursing school). In addition, see *Goldfarb*, 430 U.S. at 207; *Craig*, 429 U.S. at 198-99 (1976).

⁸⁹ See note 1 above.

⁹⁰ See cases cited in note 7 above.

⁹¹ Of course broader processes of socialization are responsible as well.

⁹² For general discussions of power in social relations, see Foucault, *Power/Knowledge* (cited in note 16); Fraser, 96 *Ethics* 165 (cited in note 16); Jaggar, *Feminist Politics and Human Nature* (cited in note 31).

tive distortion on the part of both its victims and its beneficiaries. From the standpoint of the victims, ideology is part of the general category of adaptive preferences.⁹³ People may become content with the status quo, even a status quo in which they are oppressed, because they believe that it cannot be changed. Ideology, understood as a mechanism for dissonance reduction, once again points to the distinction between welfare and autonomy.

In the context of gender and class, the point is especially powerful: acceptance of traditional gender and class roles is an important way of reducing frustration and preventing cognitive dissonance. In these circumstances, government action designed to change those traditional roles might be justified on autonomy and, eventually, welfare grounds. From the standpoint of its beneficiaries, ideology reflects the problem of beliefs distorted by interest:⁹⁴ beliefs that are based on perceptions that one's welfare, economic or otherwise, is served by a particular status quo. In both of these respects, ideology may serve as a mechanism for dissonance reduction.

To some, the understanding that government should reject and shape private preferences is either mystical or tyrannical.⁹⁵ But the idea that the role of government is to shape preferences⁹⁶ can be grounded in two understandings, both of which tend to undermine the view that preferences should be regarded, for purposes of politics, as exogenous variables. The first is that some preferences are objectionable or the product of distorting circumstances, principally in the form of relations of power. Such distortions can, it is thought, be revealed as such through deliberation and debate. In these circumstances, one of the most important functions of politics is the selection, evaluation, and shaping of preferences, not simply their implementation. A political process that subjects private choices to critical scrutiny will in this sense produce better laws than a process that takes them as exogenous. Recent laws forbidding discrimination on the basis of race and gender have their

⁹³ For several examples, see Elster, *Sour Grapes* at 143-57 (cited in note 14). To a large extent, of course, the behavior of victims is conditioned by direct discrimination, whether public or private, and whether or not lawful.

⁹⁴ See Elster, *Making Sense of Marx* at 465 (cited in note 87).

⁹⁵ See Holmes, *Benjamin Constant* at 48 (cited in note 15) (on Robespierre's conception of the common good); Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* 214-15 (3d ed. 1950) (discussing the Russian experience).

⁹⁶ Government will of course be doing this to some extent even if it attempts to remain above the fray. See Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 *Yale L. J.* 1537, 1541 (1983).

origin, at least in part, in an understanding that racist and sexist preferences are the product of distortions—interest-induced beliefs on the part of its beneficiaries, and adaptive preferences on the part of its victims—and that a proper role of government is to change those preferences.

This understanding is extremely optimistic about the effects of public deliberation. Such deliberation will of course be affected by disparities in power; it may be odd to suggest that those disparities can be remedied through discourse among people who are already victims of the same power relations.⁹⁷ But there are many examples of cases in which relations of power, incapable of rational defense, have been revealed as such through public dialogue. Recent civil rights movements on behalf of blacks and women are at least partial examples.

The second understanding is the same as that invoked in defense of deliberative approaches to politics. Such approaches will reduce the likelihood that official action will be produced solely for private-regarding reasons. The requirement that measures be justified rather than simply fought for has a disciplining effect on the sorts of measures that can be proposed and enacted.⁹⁸

The notion that public discourse can reveal existing relations as contingent and the product of power, rather than natural and inviolate, is not foreign to judge-made law. In the *Lochner* period, for example, the Supreme Court treated the system of market ordering, within the constraints of the common law, as if it were pre-political and inviolate. From this perspective, the Court could regard government intervention, in the form of maximum hour or minimum wage laws, as a “taking” from employers for the benefit of employees, a taking for which the community at large rather than employers should pay.⁹⁹ Such a law, in the Court’s view, would amount to an effort by the state to require employers to “subsidize” the public, and any such expenditures should come

⁹⁷ See John Keane, *Public Life and Late Capitalism* 163 (1984); Steven Lukes, *Of Gods and Demons: Habermas and Practical Reason*, in John B. Thompson and David Held, eds., *Habermas: Critical Debates* 139 (1982); Elster, *Sour Grapes* at 35-42 (cited in note 14).

⁹⁸ See *The Federalist* (No. 10) at 59 (James Madison) (cited in note 23); DeTocqueville, *Democracy in America* at 213-16 (cited in note 27); Nelson, *On Justifying Democracy* at 128 (cited in note 27).

⁹⁹ See *Adkins v. Children's Hospital*, 261 U.S. 525, 557-58 (1923). In addition, see Epstein, *Takings* at 279-80 (cited in note 1) (setting forth the same understanding). For criticism, see Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1151 (1985); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976).

from taxpayers rather than a particular subset of the citizenry.¹⁰⁰

This understanding disintegrated with a mounting perception that the market status quo was not natural, but itself a product of governmental choices. In this setting the Court could later say, in a dramatic reversal of the *Lochner* understanding, that failure to regulate the labor market would be a "subsidy to unconscionable employers."¹⁰¹ The notion of a "taking" itself depended on an antecedent, and undefended, assumption that the existing distribution of wealth, entitlements, and power had some prepolitical status.¹⁰² After the downfall of the *Lochner* approach, the existing structure, no longer seen as natural, became subject to critical scrutiny and review. The notion used here, prominent in the literature on private property,¹⁰³ adapts this understanding to the area of private preferences.

A more recent illustration comes from recent studies of the institutional and legal treatment of women. Under an approach that takes consumption choices as exogenous, it is difficult, for example, to explain what is wrong with prostitution, use of pornography, and other apparently consensual practices between men and women.¹⁰⁴ But use of both pornography and prostitutes can be understood as consumption choices that result from relations of power; interference with those choices may promote rather than undermine autonomy. In this view, it is not "a contingent fact that most prostitutes are women and customers men."¹⁰⁵ That phenomenon is a product of power relations between men and women that define the sexual identities of both. The institution of prostitution

¹⁰⁰ See *Adkins*, 261 U.S. at 557-58 ("To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, . . . a burden which, if it belongs to anybody, belongs to society as a whole.").

¹⁰¹ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937). See also Hale, 38 *Polit. Sci. Quart.* at 477-78 (cited in note 13) (arguing that government may intervene to rectify "coercive" private arrangements).

Thus the *Lochner* decision was wrong not only because it constituted impermissible judicial interference with legislative determinations, but also because it rested on a substantively unacceptable notion of the baselines from which to assess government decisions. The *Lochner* Court had erroneously viewed the common law baseline as natural and inviolable. See Cass R. Sunstein, *Lochner's Legacy*, 87 *Colum. L. Rev.* (forthcoming 1987).

¹⁰² The same assertion underlies the "tale of two pies" presented in Epstein, *Takings* at 3-6 (cited in note 1).

¹⁰³ See Bruce A. Ackerman, Comment on Fried: On Getting What We Don't Deserve, 1 *Soc. Phil. & Pol'y* 60, 64 (1983); Kennedy, 89 *Harv. L. Rev.* at 1731-37 (cited in note 99).

¹⁰⁴ See Lars O. Ericsson, *Charges Against Prostitution: An Attempt at a Philosophical Assessment*, 90 *Ethics* 335, 337-57 (1980) (rejecting arguments for regulating prostitution).

¹⁰⁵ Carole Pateman, *Defending Prostitution: Charges Against Ericsson*, 93 *Ethics* 561, 563 (1983) (footnote omitted).

might thus be understood as a result of an understanding in which "the capacities of individuals, and even women's bodies, become commodities to be alienated to the control and use of others."¹⁰⁶ Systemic distortions thus present a case for collective action even where existing practices appear consensual.¹⁰⁷ This basic notion might provide the model for attacks on consensual practices; the notion of coercion understood as consent, dominant in the *Lochner* era, might be taken as a starting point.

Even if the concept of ideology is accepted, there remains the institutional problem of deciding who will identify private preferences as distorted. In American public law, the candidates include the citizenry, national representatives, and federal judges. In the classical republican understanding, citizens generally were to undertake this task.¹⁰⁸ An important element of the federalist departure from classical republicanism consisted of a substitution of representatives for citizens, in a system in which national officials were to deliberate on citizen preferences.¹⁰⁹ In the modern understanding, deliberative tasks have sometimes been conferred on federal judges, who are supposed to identify interest-induced beliefs with a "sober second thought" about legislation.¹¹⁰

Whether the legislature or the courts should provide a remedy for distorted preferences will depend on context. In the abstract, it is difficult to decide between these two institutions. Legislatures are more likely, and better suited, to handle social practices that result from and perpetuate inequalities in power, such as prostitution and the lack of economic democracy. Courts are more likely to invalidate legal rules (as opposed to social practices) that perpetuate inequality, such as those based on traditional conceptions of the role of women. The problem of institutional design is an im-

¹⁰⁶ *Id.* at 564. Pornography may be similarly understood. Moreover, preferences resulting from relations of power are difficult to change through ordinary processes; legal action may be required, though it carries risks of its own.

¹⁰⁷ There may of course be harm to others here as well. On the first amendment concerns related to the regulation of pornography, compare Geoffrey R. Stone, Comment: Anti-pornography Laws As Viewpoint-Discrimination, 9 *Harv. J. L. & Pub. Pol'y* 461 (1986) with Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 *Harv. Civil Rts.-Civil Lib. L. Rev.* 1 (1985).

¹⁰⁸ See, e.g., Krouse, "Classical" Images, in *Democratic Theory and Practice* at 59 (cited in note 15).

¹⁰⁹ See *The Federalist* (No. 10) at 59 (James Madison) (cited in note 23); David F. Epstein, *The Political Theory of the Federalist* 93 (1982).

¹¹⁰ Harlan F. Stone, *The Common Law in the United States*, 50 *Harv. L. Rev.* 4, 25 (1936); Alexander M. Bickel, *The Least Dangerous Branch* 26 (2d ed. 1986). See generally Michael J. Perry, *The Constitution, The Courts, and Human Rights* 9-37 (1982); Owen M. Fiss, Foreword: The Forms of Justice, 93 *Harv. L. Rev.* 1, 5-17 (1979).

portant and difficult one. But no matter how the question is resolved, the ability to identify ideological distortions provides a powerful basis for intervention into a system of private preferences.

C. Endogenous Preferences and Intrapersonal Collective Action Problems: Addiction, Habits, and Myopia

A third category of cases also involves endogenous preferences. Here, however, preferences are produced not by the legal rule or the existing legal regime, but instead by the very act of consumption. The most familiar case is addiction: the problem is that an addict might continue (rationally) to consume even though he would have preferred not to have become involved with the object of his addiction in the first place. A weaker case is habit, which might continue to produce behavior that an actor armed with perfect information would prefer to avoid. In these and other cases, the ground for collective intervention is that preferences are not static but can be changed through legal requirements, and changed in such a way as to generate gains in welfare and perhaps autonomy. The central point here is that private preference structures suffer from what might be called an intrapersonal collective action problem: the short-term costs of engaging in or stopping an activity are overvalued in comparison with the long-term gains.

To say this is not to offer a sufficient reason for government intervention. In many cases, the relevant problems can be solved by the individual or through nongovernmental collective action, and such strategies are in many respects preferable. Moreover, the previous section demonstrated that legal rules can induce changes in preference structures; to accept such changes, in and of themselves, as sufficient justification for intervention is a license for tyranny. The case for intervention must therefore depend on a conclusion that the preferences thereby generated are in some sense better—because intervention will increase either welfare or autonomy. Whether or not that argument can be sustained, the principal point here is a quite modest one: the fact that preferences are endogenous to consumption, and may depend on inadequate information, makes it much harder to rely on the preference as the reason for inaction.

1. *Addiction.* The notion of addiction is not easy to define, but for present purposes we may use the term to refer to a process in which the subjective costs of not consuming a particular good increase dramatically over time, while the subjective benefits decrease or remain stable. With an addiction, preferences are deter-

mined by the very act of consumption.

Sometimes a seller of a commodity is aware of this fact. Menahem Yaari offers the example of a group of traders attempting to induce alcoholism in an Indian tribe.¹¹¹ At the outset alcoholic beverages are not extremely valuable to the consumers; the consumers are willing to buy only for a low price, which the traders happily offer. But during the process of consumption, the value of the beverages to the consumers steadily increases, to the point where they are willing to pay enormous sums to obtain them. Typically, this change is produced by an addiction, though it may also result from a less drastic change in preference structure. The central point is that the preference was not static. The desire for the good increased during and as a result of the process of consumption.

Conscious manipulation of preferences, bringing about an addiction, provides a plausible case for government intervention. The problem, Yaari asserts, is that the trader is able "*to manoeuvre the Indian into a position where rationality conflicts with Pareto-efficiency, i.e., into a position where to be efficient is to be irrational and to be rational is to be inefficient* [T]he disadvantage, for an economic unit, of having endogenously changing tastes is in that, even with perfect information and perfect foresight, the unit may find itself forced to follow a course of action which, by the unit's own standards, is Pareto-dominated."¹¹² In these circumstances, government intervention—a ban on sales or perhaps disclosure requirements—may be appropriate. Regulation of introductory offers and of addictive substances is based on this rationale.

In deciding whether government action can be justified, one should ask whether consumers are ultimately worse off than they would have been if they had refused to use the addictive substance in the first place. If they could have been armed with perfect information, would they have preferred to become involved with (for example) alcohol at all? If the answer is yes, there likely would be welfare gains from a ban, and there might be autonomy gains¹¹³ as well. In answering the question, two considerations are important.

¹¹¹ Menahem E. Yaari, *Endogenous Changes in Tastes: A Philosophical Discussion*, in Hans W. Gottinger and Werner Leinfellner, eds., *Decision Theory and Social Ethics* 59, 65 (1978).

¹¹² *Id.* at 82 (emphasis in original).

¹¹³ See VanDeVeer, *Paternalistic Intervention* at 88-89 (cited in note 39) (discussing lack of information and "autonomy-respecting" paternalism).

The case for regulation is strongest if (a) there are powerful asymmetries in available information and (b) the addiction is one in which the benefits of consumption decrease over time, and the costs of nonconsumption increase.¹¹⁴ The case is weakest—indeed unpersuasive—if neither condition is met, even in a case of conscious manipulation of preferences by the seller.

If there are no asymmetries in information, those subject to the process of addiction might be able to take care of themselves. Their willingness to engage in a process in which their tastes will change might be the object of praise—as “character planning”—rather than public interference. Consider the decision to purchase classical music records, with full knowledge that the (subjective) value of the records will increase over time as appreciation increases, with the ultimate consequence of significant expenditures. If the purchaser knows what she is getting into—in particular, if she is aware that the preference may change as a result of consumption, and proceeds happily regardless—the argument for government action is weaker.

The case for intervention will also be more forceful if the phenomenon in question has the traditional characteristics of an undesirable addiction. What distinguishes the case of alcohol from that of classical music is that with the former, the subjective benefits of consumption decrease sharply over time. For an addict, the good is needed not to produce pleasure but to prevent pain; additional use provides much less of the original benefit; and the reason for continued consumption is not the pleasure of consumption but the costs of nonconsumption. This is of course the classic pattern with addiction to drugs and alcohol. The pleasure from use decreases, but the addiction continues because the harm from withdrawal is so great. With classical music—and other goods that can contribute to self-realization¹¹⁵—the opposite phenomenon occurs. The more one consumes, the greater the benefits to the consumer; use continues or increases not because of the pain of withdrawal but because of the pleasure of consumption.¹¹⁶

This is an important distinction in determining whether the

¹¹⁴ Regarding the second of these conditions, see Richard L. Solomon and John D. Corbitt, *An Opponent-Process Theory of Motivation*, 81 *Psychological Rev.* 119, 137-40 (1974) (discussing drug addiction).

¹¹⁵ See Jon Elster, *Self-Realization in Work and Politics: The Marxist Conception of the Good Life*, 3 *Soc. Phil. & Pol'y* 97, 99 (Spring 1986).

¹¹⁶ Of course the pleasure of consumption may be produced by arguably irrelevant factors, including the investment, financial and otherwise, in the activity, and social pressures of various sorts. For present purposes, however, those factors can be put to one side.

consumer, having perfect information, would prefer to start with the good at all. If the subjective benefits of use decrease over time, it is reasonable (though not necessary) to assume that the consumer would have preferred not to have become involved with the good in the first instance. If, on the other hand, the benefits increase, the consumer may be engaged in an entirely voluntary effort to overcome myopia—in other words, to alter her preferences in a beneficial manner—and there is no ground for government intervention.

If the trader does not consciously manipulate preferences, the case for intervention is also weakened.¹¹⁷ In such a case, it will be less likely or less important that there are asymmetries in information: if the trader is not seeking to take advantage of endogenous preferences, he may well be unaware of them; and even if he is aware of these preferences, there is less reason for intervention if he is not seeking to manipulate the consumer. But if the addiction has the characteristic structure, described above, of diminishing benefits from consumption and increasing costs from nonconsumption, intervention may be justified even if the trader is innocent. The reason should be familiar: the transaction is unlikely to be one into which the consumer would have entered in the first instance if he had been provided with full information.

These considerations suggest that government action may be justified to prevent misguided consumption choices when (1) preferences are endogenous; (2) there is conscious manipulation on the part of the seller; (3) there are powerful asymmetries in available information; and (4) the benefits of consumption decrease over time, as the costs of nonconsumption increase.

2. *Habits.* A habit has a similar structure to an addiction, but it is less intense: people continue in a form of behavior not because of the high physical or emotional costs of desisting, but simply because they have become comfortable with the behavior. The minimum conditions for justifiable “habit breaking” on the part of government are demonstrations (1) that people persist in dangerous conduct because of the subjectively high short-term costs of changing their behavior; (2) that once regulatory controls change the behavior, the subjective costs of safe conduct decrease substantially; (3) that the change can occur over a fairly short period; and (4) that the aggregate benefits of legal interference, flowing from safe

¹¹⁷ See generally Carl Christian von Weizsacker, Notes on Endogenous Change of Tastes, 3 J. Econ. Theory 345 (1971).

conduct, are higher than the aggregate costs,¹¹⁸ including enforcement costs and foregone opportunities. The central point is that preferences are conditioned by habit, and that once the habit is changed, the preference is changed as well. As a result, regulation will not be futile; people will not try to work their way around it. Moreover, people will be better off after regulation than before in terms of welfare, and in some respects, regulation will increase rather than diminish liberty.¹¹⁹ There are numerous illustrations.

Suppose, for example, that people fail to use seatbelts because the initial costs of breaking the habit of nonuse are high. But after repeated use of seatbelts, the subjective costs diminish sharply; people become habituated to buckling up, and use turns out not to be bothersome at all. In these circumstances, a legal rule requiring seatbelt use might be socially optimal. Such a rule would break the habit, which is responsible for the initial subjective costs of seatbelt use; once the habit is broken, seatbelt use is no longer costly. Subjective preferences have changed dramatically: the personal costs of use have decreased. As a result, people may well be better off with a seatbelt rule than without one.

The point is a quite general one. In theory, at least, it would justify a wide range of regulations against dangerous products whose use results from habit. Suppose, for example, that consumption of salt is dangerous because it increases the incidence of strokes and heart disease; that people are reluctant to restrict consumption because, in light of their eating habits, salt makes food taste much better; and—finally—that once people have ceased consuming salt, they find it unnecessary to add salt in order to enjoy the taste of food. In these circumstances government intervention may well be justified. Such intervention may of course take various forms. The less intrusive version is a tax on disfavored consumption; the more intrusive (and thus more difficult to justify) is a flat prohibition.¹²⁰

¹¹⁸ I do not use the terms "cost" and "benefit" in the technical sense of connoting "willingness to pay." For discussion, see generally Coleman, 8 *Hofstra L. Rev.* 509 (cited in note 35); C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 *Phil. & Pub. Affairs* 3 (1975).

¹¹⁹ There is of course a controversial conception of liberty here grounded in the notions described above at notes 13-23 and accompanying text.

¹²⁰ The same justification may be used to defend regulation of consumption of cigarettes, coffee, and sweeteners. Once people stop using these products, their preferences for them may diminish. Of course the case for regulation is at best presumptive and may be overcome by other considerations, including the costs to the consumer and the perceived injury of intervention. Moreover, the line between a habit and an addiction is quite thin—consider, for example, cigarettes. Regulation of both is most easily justified if it is

One difficulty here is that a highly plausible conception of freedom holds that government should respect consumption choices even if there would be an ex post change in preference structures after the regulatory regime has been set in place.¹²¹ Government intervention in consumption choices does not become palatable simply because of such an ex post change; this change may be a necessary condition for collective action, but it is hardly sufficient. But when the actor lacks relevant information, and when the interference is both minimal—as in the case of seatbelt laws—and based on habit breaking, an ex post change may help to justify intervention. At the very least, nonintervention must be justified on grounds independent of the preference. It becomes harder to argue for an across-the-board rule against intervention when the preference is endogenous to consumption and when there will be an ex post change in preferences. Finally, the case for intervention is bottomed on a distinction between preferences that one “has” and preferences that emerge through deliberation;¹²² if that distinction is accepted, political action may be seen as promotion of rather than interference with liberty. Here, of course, the argument for intervention is dramatically strengthened if government action corresponds to the desires of a majority.

To say all this is not to suggest that government intervention to break habits—even risky ones—is always supportable. Consider, for example, possible laws forbidding cigarette smoking, requiring exercise, or prohibiting consumption of alcohol or cholesterol. It is unlikely that a consensus could be mustered in support of any of these laws. The reasons for such resistance include skepticism about the long-term benefits, concern about the high short-term costs of compulsion, fear that the preferences that produce the habit will persist over a long period, and a belief that the costs of intervention—to affected people and the country at large—will remain high even after the regulatory scheme is in place. Such long-term costs include the necessary enforcement mechanism.¹²³

part of the larger phenomenon of voluntary foreclosure of consumption choices. If it is not, paternalism of some form is involved, but the case for paternalism is strengthened when there are inadequacies in relevant information and when preferences are flexible. Compare VanDeVeer, *Paternalistic Intervention* at 88-89 (cited in note 39) (defending paternalism based on consent). There may of course be harm to others of various sorts here as well.

¹²¹ Compare Parfit, *Reasons and Persons* at 156-77 (cited in note 29) (discussing the valuation of past and future desires).

¹²² See notes 13-23 and accompanying text above.

¹²³ Prohibition is a familiar example of government intervention to break habits; but the costs and ineffectiveness of intervention brought about a constitutional amendment. For a historical study of enforcement problems and the amendment process, see David E. Kyvig,

There is therefore a significant danger of abuse, and efforts to change habits will often infringe on rather than promote liberty. But it would be a mistake to conclude that the phenomenon of habit breaking may never provide a persuasive justification for government action. In some settings, that justification can make people far better off after regulation than before. The case for intervention will depend on whether the various considerations identified above point in favor of it.

3. *Myopia*. The phenomenon of myopia—refusal to engage in an activity with high long-term benefits because of its short-term costs—is in some respects a generalization of that of habit. But while habit breaking is typically designed to prevent dangerous activity, efforts to overcome myopia tend to involve attempts to force people to engage in beneficial conduct. The problem here arises from the fact that people sometimes respond too emphatically to the short-term costs of engaging in an activity that may turn out to be exceptionally rewarding. More specifically, one might say that myopia is at work when four conditions are met: (1) the short-term costs of beginning an activity are very high; (2) those costs decrease sharply over time; (3) the long-term benefits of engaging in the activity are also very high; and (4) the benefits of the activity increase as one becomes acclimated to the activity.¹²⁴

The concept of myopia might be used to distinguish between consumption on the one hand and self-realization on the other. When choices are myopic, the latter goal will be undermined by consumption choices which, by hypothesis, unduly emphasize short-term costs. If self-realization is the goal, the case for regulatory intervention is substantial in some settings. One might understand the phenomenon of myopia as an intrapersonal collective action problem.¹²⁵ The aggregate payoff from overcoming myopia is substantial, and the aggregate costs are small by comparison; but every unit of cost, at least at the beginning, appears high in comparison with every unit of payoff. Collective action is therefore needed to bring about changes.

Day-to-day examples are not hard to find. Patients often are unwilling to follow doctors' recommendations; sometimes they are forced to do so and are eventually grateful that they were.

Repealing National Prohibition (1979).

¹²⁴ See Elster, 3 Soc. Phil. & Pol'y at 107 (cited in note 115).

¹²⁵ This is a subject on which there is a rapidly growing literature. See, e.g., Thomas C. Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, 74 *Amer. Econ. Rev.* 1 (1984); Elster, 1 *Econ. & Phil.* at 231 (cited in note 41).

Nonentertainment programming may be required on radio and television—and sometimes made the exclusive available option—for the same reason.¹²⁶ To some degree, such requirements might be understood as voluntary foreclosure of consumption choices; but another large element points to the myopic character of entertainment selection. Requirements of self-government in the workplace, in circumstances in which the market does not produce self-government, might be similarly justified.¹²⁷

The use of myopia as a basis for governmental intervention is associated with paternalism, but it is best regarded as belonging in a separate category, or at most as a special case. The argument is far narrower than a conclusion that people do not, as a general rule, know what is in their own best interests. The problem is that even if they do know, they may not act in their own best interests because of the high short-term costs. Moreover, the argument from myopia depends on the phenomenon of endogenous changes in preferences. Regulation becomes supportable because preferences will change once myopia is overcome. As in the case of overcoming addictions and habits and voluntarily foreclosing consumption choices, it is important to emphasize that myopia might be and is best overcome through purely voluntary conduct or through private arrangements. But here, as there, such alternatives sometimes may be insufficient.

Myopia does belong in the class of motivational defects, and therefore the case for government correction of myopia is plausible—in some respects identical to that for habit breaking. But there are good reasons to resist it. First, the costs of reshaping preferences in this fashion are considerable: forcing new conduct on citizens is quite burdensome, and it may also take a long time to accomplish. Efforts to overcome myopia tend to be large intrusions. Second, government action is likely to be skewed by irrelevant or invidious factors. The risks of factional pressures, of rent seeking, and of self-interest masquerading as public interest are considerable here. Third, the justification for counteracting myopia is far more general than that for breaking habits; in the latter case, it is possible to say that once the habit is broken, the person is in

¹²⁶ This suggests that the subject of government regulation of the broadcasting industry raises more complex issues than is suggested by conventional attacks on the "fairness doctrine." For general discussion, see Stewart, 92 *Yale L. J.* 1537 (cited in note 96). On the (inadequate) scarcity rationale, see generally Matthew L. Spitzer, *Controlling the Content of Print and Broadcast*, 58 *So. Cal. L. Rev.* 1351 (1985); R. H. Coase, *Advertising and Free Speech*, 6 *J. Legal Stud.* 1 (1977).

¹²⁷ See Elster, 3 *Soc. Phil. & Pol'y* at 112-15 (cited in note 115).

an important sense “freed.” But if the purpose is not simply to break a dangerous habit but instead to ensure that people engage in an entirely new course of conduct in the hope that it will make them better off, confinement of the principle will be difficult. Finally, as noted, the private alternatives may provide some or all of the benefits at far lower costs. All of these considerations suggest that government action to counteract myopia should be quite rare.

D. Absence of Information and Related Cognitive Errors

The fourth category should be a familiar one, and it is the least controversial basis for interfering with consumption choices. Indeed, in a sense it is not a straightforward rejection of private preferences at all. If a consumer or contracting party lacks relevant information, a decision to override the choice is not obviously an interference with liberty. Thus, for example, if people smoke without knowing about the risk to health, if employees are unaware that they may be discharged at the discretion of the employer, and if renters do not know that landlords owe them no duty to provide a habitable place to live, there is little objection, in principle, to concluding that the government should intervene.¹²⁸ Absence of information includes lack of knowledge of the facts or the law; it extends as well to characteristic cognitive biases when people deal with probabilities.

If the problem lies in lack of knowledge, it is not clear what form government intervention should take. The first and preferred option should of course be to provide the person with the relevant information—a route that the government has taken in many contexts, most notably in cigarette advertising. Other cases posing risks to health are handled in a similar fashion. Sometimes, however, public provision of information will not be a sufficient safeguard. First, it may be quite costly; to ensure that people are generally aware of certain information not provided by the market¹²⁹ may entail a significant expenditure of funds. In these circumstances, a flat prohibition—justified on the ground that informed

¹²⁸ See, e.g., VanDeVeer, *Paternalistic Intervention* at 88-89 (cited in note 39) (setting out an “autonomy-respecting” paternalism). It is possible to protest that the provision of information, or the prohibition of the bargain, creates unfortunate incentive effects: people do not have the incentive to seek the relevant information. That is of course a pertinent consideration, but it cannot be made dispositive unless one knows the extent of the effect and the possibility that “self-help,” through the acquisition of information, would be an effective alternative.

¹²⁹ Often, of course, the market itself will provide the information. But sometimes economic incentives counsel against disclosure.

people would not engage in the transaction—may be far simpler to administer.

Second, provision of information may be ineffective. Public statements may not provide the information to people who are ignorant, uncomprehending, or inattentive. A detailed literature suggests that people use simplifying devices for analysis of risks, devices that in some circumstances make them ill-equipped to evaluate dangers even when armed with perfect information.¹³⁰ In such circumstances a regulatory solution, foreclosing a certain opportunity, is the best alternative.¹³¹ Consider occupational safety and health regulation, particularly in the area of toxic substances, including carcinogens. Here the information is so complex, and so difficult to communicate, that there is a *prima facie* case for regulatory measures.

There are of course risks in such an approach. Government may have less information than affected citizens;¹³² its own incentives may skew the regulatory process. There is always a danger of factional intrigue and self-dealing on the part of government actors. But such risks hardly justify an across-the-board rule against either provision of information or prohibitions on certain transactions in cases of lack of information. In some cases, the absence of information will provide a powerful justification for intruding on private consumption choices.

A similar problem is raised by the fact that in some settings, many people discount the probability that a dangerous event will occur when the probability of its occurrence is quite low.¹³³ Thus, for example, people sometimes treat a risk that a tornado will occur as if its discounted value were zero.¹³⁴ The refusal of more than 80 percent of Americans to wear seat belts can be similarly under-

¹³⁰ See, e.g., Paul Slovic, Baruch Fischhoff, and Sarah Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, in David Kahneman, Paul Slovic, and Amos Tversky, eds., *Judgment under Uncertainty: Heuristics and Biases* 463, 464-78 (1982).

¹³¹ See generally Oliver E. Williamson, *Saccharin: An Economist's View*, in Robert W. Crandall and Lester V. Lave, eds., *The Scientific Basis of Health and Safety Regulation* 131, 150 (1981); Alan Schwartz and Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 *Va. L. Rev.* 1387, 1456 (1983); Alan Schwartz and Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 *U. Pa. L. Rev.* 630, 673-77 (1979). In addition, see Regan, *Justifications for Paternalism* at 199-200 (cited in note 37).

¹³² See sources cited in note 131 above.

¹³³ Howard Kunreuther, *Limited Knowledge and Insurance Protection*, 24 *Pub. Pol'y* 227, 250 (1976). For more general background, see Amos Tversky and Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *Cognitive Psychology* 207 (1973).

¹³⁴ See Kunreuther, 24 *Pub. Pol'y* at 235.

stood.¹³⁵ It is possible that the same phenomenon occurs when workers decide whether to seek a "for cause" provision for their contracts that would forbid arbitrary discharges; they may discount the probability that a discharge will occur.¹³⁶ Similarly, the implied warranty of habitability in rental housing may be justified as a compulsory insurance scheme: tenants may (irrationally) discount the probability of nonhabitability.¹³⁷ On the other hand, there is evidence that workers demand and obtain considerable wage premiums for exposing themselves to workplace hazards.¹³⁸ In any event there is no violation of autonomy if government intervenes into a system operating on the basis of imperfect information.

The phenomenon of irrationally discounting low-probability events is part of a more general problem. In sorting out probabilities, people tend to rely on devices that simplify complex problems, devices that often are useful generalizations but that sometimes "lead to severe and systematic errors."¹³⁹ When this phenomenon occurs, there is a persuasive case for government intervention to correct for the cognitive error. Many forms of intervention can be thus understood. Compulsory seat belt laws, various safety requirements in the workplace,¹⁴⁰ and nonwaivable implied terms in contract and tort law may stem in part from this concern.

But there are characteristic dangers in grounding government action on this concern. What appears to be an irrational evaluation of a danger may in fact be a subjective attraction to risk, a preference that should not be interfered with if there is no independent

¹³⁵ See Richard J. Arnould and Henry Grabowski, *Auto Safety Regulation: An Analysis of Market Failure*, 12 *Bell J. Econ.* 27, 27 (1981).

¹³⁶ See Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 *Harv. L. Rev.* 1816, 1831 (1980).

¹³⁷ Kronman, 92 *Yale L. J.* at 773 (cited in note 3).

¹³⁸ See, e.g., Richard Thaler and Sherwin Rosen, *The Value of Saving a Life: Evidence from the Labor Market*, in Nestor E. Terleckyj, ed., *Household Production and Consumption* 286-89 (1975); W. Kip Viscusi, *Risk by Choice: Regulating Health and Safety in the Workplace* 42-45 (1983); Craig A. Olson, *An Analysis of Wage Differentials Received by Workers on Dangerous Jobs*, 16 *J. Human Resources* 167, 173-80 (1981).

¹³⁹ See Amos Tversky and Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, in Kahneman, Slovic, and Tversky, eds., *Judgment under Uncertainty* at 3 (cited in note 130).

¹⁴⁰ Such requirements may also stem from straightforward paternalism or an interest group deal. Note also that other justifications explored above tend to overlap with the problem of irrational discounting of the likelihood of low-probability events: to some degree, responses to that phenomenon may be understood as voluntary foreclosure of consumption choices, a foreclosure that is a response to myopia; such responses may also be understood as reflecting a concern about lack of information.

basis for concern.¹⁴¹ The line between an irrational discount and risk attraction can be drawn sharply in theory—the former, unlike the latter, is based on imperfect information—but it will be hard to do so in practice, and the difficulty counsels in favor of caution in intervening at all. But if it is clear that irrational discounting is occurring, and if the short-term costs of intervention are small, government action is justified.

III. INTERFERING WITH PRIVATE PREFERENCES: IN GENERAL

The various bases for intervention into private consumption choices span a wide range. Even if some of them are rejected, their cumulative effect is to undermine in significant ways the notion that the legal system should understand its purpose as the satisfaction of private preferences. Voluntary foreclosure of consumption choices points to the existence of “preferences about preferences,” a necessary qualification to rational choice theory with important practical implications. Second-order preferences, expressed in collective action, may sometimes foreclose preferences expressed in markets. Much political activity should be thus understood.

A more difficult problem is that preferences can sometimes be traced to legal rules; when this is so, the rules cannot be defended by reference to preferences. Preferences that reduce cognitive dissonance by adapting to available opportunities are an important case here. Moreover, endowment effects counsel against accepting market outcomes as invariably operating in the mutual interest of the parties. Indeed, such effects suggest that the notion of “mimicking the market” is unhelpful when the idea of a market cannot be understood independently of the legal rule; the “market” is a construct of the system allocating entitlements and wealth. In this respect, rules that allocate entitlements and wealth inevitably shape preferences. Finally, the attempt to remove or undermine the effect of preferences based on power—reflected in adaptive preferences and beliefs distorted by interest—should not always be controversial; consider the areas of race and gender.

In any event, the phenomena of adaptive preferences and endowment effects suggest that the mere fact that a preference currently exists cannot be a dispositive argument against legal change. This is, of course, a relatively modest point. To go further and distinguish troublesome from acceptable adaptive preferences—that

¹⁴¹ The candidates for that independent basis include paternalism and cognitive distortions. See Brandt, *A Theory of the Good and the Right* at 46-47, 163-64 (cited in note 14).

is, to determine when regulation is justified—an independent substantive theory is required.

Endogenous preferences present a somewhat different case. Addictions, habits, and myopia belong in the category of motivational distortions. The problem here is that preferences result from the act of consumption, and an actor armed with perfect information might select rules that would compel or forbid a certain course of conduct. There is an intrapersonal collective action problem that might be remedied through government. All three categories present cases for collective intervention, although, as we have seen, those interventions must be selective and finely tuned. Finally, the absence of information, as a basis for intervention, can be accepted even within traditional economic and utilitarian frameworks. But cognitive errors in dealing with low-probability events—a part of the larger category of absence of information—are somewhat more troublesome. As knowledge about such errors increases, it should become easier to formulate legal rules.

All or most of these cases for intervention derive from an alliance between a particular conception of liberty and a particular conception of politics. The conception of liberty understands freedom to be an outgrowth of the selection of ends rather than the mere implementation of ends. The conception of politics generalizes this understanding, treating politics as a mechanism for collective decisions about ends. The distinction between private preferences and collective outcomes is thus best understood as the product of these understandings of individual and political freedom. At the same time, all of the categories discussed above can be accepted under welfare-based criteria.

Lurking beneath the surface, however, is a serious risk: the recognition that desires are social constructs, or are distorted by various factors, may tend to undermine the notion of autonomy altogether. If the ideas of endogenous preferences and cognitive distortions are carried sufficiently far, it may be impossible to describe a truly autonomous preference.¹⁴² No desire is unaffected by social forces. If the notion of autonomy is abandoned, the realm of permissible legal interferences may become limitless—hardly a comforting prospect. It is difficult indeed to generate a baseline from which to describe genuine autonomy, and an approach that tries to abstract entirely from social pressures is unlikely to be

¹⁴² Elster, for example, recognizes this problem in restricting his definition of autonomy to residual desires left after the removal of cognitive distortions. See Elster, *Sour Grapes* at 24 (cited in note 14).

fruitful.¹⁴³ But it would be a mistake to give up on the idea entirely, or to refuse to make distinctions in degrees of autonomy and in the nature of the processes by which preferences emerge. There is, for example, a difference between a preference that adapts to the absence of available opportunities and a preference that is self-consciously chosen.¹⁴⁴ It is possible to identify distorted preferences and to act upon them, although the best strategy is to be quite careful in identifying distortions, and even more so in basing legal action on the identification.

It is important to note as well that the categories for interferences in private consumption choices can be accepted without recognizing paternalism as a permissible general ground for legal action. There is, of course, a large literature on the subject of paternalism,¹⁴⁵ the troublesome nature of which—if the preceding grounds, sometimes treated as species of paternalism, are put to one side—stems from the fact that the government is claiming to know better than the individual whether a particular course of action will serve that individual's interests. The paternalistic claim is that there is a difference between actual interests and interests as subjectively perceived.¹⁴⁶ Subjectively perceived interests may be the products of some kind of distortion.¹⁴⁷ If so, "paternalism" may be justified. But if no such distortion can be identified, government generally ought not to intervene even if it disfavors the preference; intervention of that sort may be regarded as an impermissible form of paternalism. Distorted preferences, as catalogued here, therefore constitute a narrower and more precise ground for intervention than paternalism in general, which often lacks both clear limits and cognitive and motivational foundations.

The distinction between actual and subjective interests also may depend on a "two-tiered" conception of the person, a concep-

¹⁴³ See Jurgen Habermas, *The Theory of Communicative Action*, (cited in note 14), and Brandt, *A Theory of the Good and the Right* (cited in note 14), might be understood as modern efforts. See also note 145 below.

¹⁴⁴ See generally John Roemer, *Optimal Endogenous Preferences* (unpublished manuscript on file with *The University of Chicago Law Review*).

¹⁴⁵ See generally Joel Feinberg, *2 The Moral Limits of the Criminal Law: Offense to Others* (1985); VanDeVeer, *Paternalistic Intervention* (cited in note 39); Rolf Sartorius, ed., *Paternalism* (1983); Regan, *Justifications for Paternalism* (cited in note 37); Kennedy, 41 *Md. L. Rev.* at 563 (cited in note 2); Kronman, 92 *Yale L. J.* at 763 (cited in note 3); Gerald Dworkin, *Paternalism*, in Richard A. Wasserstrom, ed., *Morality and the Law* 107 (1971).

¹⁴⁶ See Isaac D. Balbus, *The Concept of Interest in Pluralist and Marxist Analysis*, 1 *Pol. & Soc'y* 151, 151-54 (1971).

¹⁴⁷ See Brandt, *A Theory of the Good and the Right* at 70 (cited in note 14); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 *Harv. L. Rev.* 384, 400-04 (1985).

tion that underlies many paternalistic arguments.¹⁴⁸ The continuing exploration of the endogenous character of preferences¹⁴⁹ should eventually help to illuminate that conception.

However such questions may be resolved, the various categories of malfunctions in a system based on private preferences justify the general conclusion that neither private nor public law should treat such preferences as exogenous variables. While that conclusion perhaps should be unsurprising, the nature and extent of these malfunctions will support considerable legislative and judicial intrusion into private preference structures. Legislatures sometimes should seek to promote welfare and autonomy by enacting laws that alter preferences; and in some contexts, courts should invalidate measures that are based on and perpetuate nonautonomous preferences. While legislators are the most appropriate institutions for the voluntary foreclosure of consumption choices and for combating addictions, myopia, and habits, courts may be better able to deal with preferences resulting from legal rules. When preferences are affected by sour grapes or endowment effects, legislative action is highly unlikely: citizens are unlikely to demand laws that do not conform to existing preferences. Federalism concerns, allowing a measure of decentralization, also are relevant here.¹⁵⁰

It is important to emphasize the practical difficulties in implementing the approaches set out in this article. Legislators, administrators, and judges may not have the competence to determine when preferences are distorted through the various mechanisms. The argument that preferences are nonautonomous may be used as a pretext to disguise illegitimate motivations; and a court or other institution will not have an easy time distinguishing pretext from reality.¹⁵¹ The existence of implementation problems is important, but it does not undermine the claims that there are significant malfunctions in a system based on private preferences, and that the malfunctions sometimes do and should serve as the basis for legal intervention. A legal system might therefore avoid tautologies

¹⁴⁸ For examples of such arguments, see John Kleinig, *Paternalism* (1983); Regan, *Justifications for Paternalism* (cited in note 37); Parfit, *Reasons and Persons* (cited in note 29).

¹⁴⁹ For examples, see Schelling, 60 *Pub. Interest* 94 (cited in note 45); Gordon C. Winston, *The Reason for Being of Two Minds: A Comment on Schelling's "Enforcing Rules on Oneself,"* *J. L., Econ., & Org.* 375 (1985); Roemer, *Optimal Endogenous Preferences* (cited in note 144).

¹⁵⁰ See Richard B. Stewart, *Federalism and Rights*, 19 *Ga. L. Rev.* 917 (1985).

¹⁵¹ Of course this problem pervades judicial review of statutes; many constitutional provisions make the legislature's motive critical. See generally Sunstein, 84 *Colum. L. Rev.* 1689 (cited in note 18) (discussing contracts, eminent domain, equal protection, commerce, privileges and immunities, and due process clauses).

that rely on "revealed preferences" without at the same time justifying undifferentiated intrusions on the ground that consumption choices are invariably misguided.

CONCLUSION

There are distortions in a system based on private preferences, distortions analogous to the problems of "market failure" that frequently call for collective action. Because of such distortions, significant dangers lie in any approach that would treat private preferences, as expressed in markets, as exogenous variables. Even outside of the traditional category of harm to others, the legal system does and should attempt to shape private choices. Whether the ultimate goal is liberty or welfare, there will often be important gains from collective action that decides on ends rather than simply implements them.

To say all this is not to deny that government intervention will have risks of its own. In particular, intervention raises two concerns. First, as recent literature has repeatedly emphasized, the fact that a "market failure" is identifiable does not mean that government action will necessarily make things better. Such action itself will have significant costs, and there is always a risk of factional intrigue and self-dealing on the part of governmental actors. Identification of some kind of breakdown in a system based on private preferences is a necessary but not sufficient reason for a governmental solution. To be justified, the governmental solution must make the situation better rather than worse. Second, the risks created by rejecting private preferences are formidable, as the framers were well aware.¹⁵² Such a system raises the spectre of tyranny, as government attempts to change preferences in response to a perception that the current structure is not autonomous. Current as well as past experience suggests that the risks of abuse here are significant.

The discussion here, however, supports the conclusion that the risks of inaction¹⁵³ are considerable as well. It would be a grave mistake to conclude, from the possibility of abuse, that government should take private preferences as exogenous in all circumstances. It is possible to identify a number of categories of breakdowns in a system based on private preferences. Those categories have remained—for too long—one of the great unexplored areas of

¹⁵² See *The Federalist* (No. 10) 52 (James Madison) (cited in note 23).

¹⁵³ See note 13 above.

the law. And even if the effort at identification does not lead inexorably to any particular solution, it should make it much easier to understand and to evaluate otherwise mysterious legal developments, and perhaps to propose new ones as well.