

# Anti-preferences

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*This Article offers a critical evaluation of preference satisfaction as a frame for normative thinking. It begins with an internal critique of the way preferences work in normative economics, distinguishing among three elements: welfare; preferences; and choices. For preference satisfaction to work well, it must be able to bridge two gaps, one between choice and preferences, and another between preferences and welfare. In contexts where both those gaps are bridged, preference satisfaction offers a workable normative framework; where at least one of those gaps is unbridgeable, the framework should be treated with extreme caution if not jettisoned altogether. The Article then goes on to pursue an external critique, by asking what price we pay for using the preference satisfaction framework when it appears to perform well. The point of the critique is that even when preference satisfaction provides a good normative framework on its own terms, the framework obscures considerations that should not be ignored. By pursuing one concrete example, the Article shows how broad considerations regarding the implications of the regime of wage labor are absent from legal contemplation when labor law is imagined and shaped through the lens of preference satisfaction. The Article concludes with a speculation about how different theories of welfare might be employed in concert, rather than as alternatives. It suggests that a pluralism of theory is a way to expose the political stakes in the kinds of policy discussion where preference satisfaction is often a dominant way of thinking.*

## INTRODUCTION

Preferences do a great deal of work in economics, and by direct extension, in law and economics or economic analysis of law. In fact, the idea of preference satisfaction is the central theoretical mechanism of normative welfare economics, a mechanism that has become widely generalized for almost any version of

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cost-benefit analysis.<sup>1</sup> As welfare economics has become the dominant voice in public policy discussion, preference satisfaction has taken on the role of master trope for thinking about how to arrange social affairs.

At its core, the preference-satisfaction framework is an analytical tool that sometimes functions as a methodological assumption for understanding individual well-being, or welfare. While complications and nuances abound, the basic idea is straightforward: a person's well-being is achieved to the extent that her preferences are satisfied, or in other words, to the extent that her desires are fulfilled. This idea, that welfare consists in getting what one wants, differs sharply from two competing accounts of well-being. One alternative account equates well-being with subjectively experienced positive mental states, like pleasure or contentment. Such pleasure may arise from satisfying preferences, but sometimes pleasure is completely independent from preference, and there is no necessary connection between the two.<sup>2</sup> Hedonism is the version of the mental state account of well-being that has enjoyed the most prominence, in part because of Bentham's reliance on it in founding modern utilitarianism. The other alternative account comprises objective list theories. Rather than accept that well-being amounts to getting what one wants (the preference-satisfaction account), it suggests that well-being depends on getting what one should have. There are, of course, many versions of objective list theories and one could imagine some very elaborate lists, often including things like knowledge, an ability to exercise the capacity for autonomy or self-government, longevity, and many others. Philosophically, the three types of accounts compete for dominance. In economics, however, preference-satisfaction accounts are the overwhelming favorites.<sup>3</sup>

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1 My real concern in the pages that follow is the normative branch of law and economics. Sometimes the terminology will refer to welfare economics more generally, but I do not develop (or rely on) the distinction.

2 For reductive explanatory purposes, imagine a restaurant menu. The subject decides she prefers the chicken fricassee, the waiter mistakenly brings steak au poivre. The subject enjoys the steak immensely, even thinking it is the best meal she has had in years, confident that she enjoyed it much more than she would have enjoyed the chicken. Under a mental state theory, her well-being is enhanced by this turn of events, which increased her pleasure. A strict preference-based theory would consider the mistake as diminishing her well-being. Of course, things can get more complicated when trying to generate a theory of preferences that takes into account preferences at different levels of abstraction (for instance, a preference for eating the tastiest thing on the menu, whether or not the subject knows how to identify that in advance, and so on).

3 John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Welfare as Happiness*, 98 GEORGETOWN L.J. 1583, 1617 (2010) ("On the standard economic model,

There are good reasons for the dominance of the preference-satisfaction framework. Two of those reasons stand out. First, preference satisfaction is attractively catholic in its relationship to questions of ultimate welfare. Some even argue that preferences offer a mechanism for engaging with questions of well-being without committing to any theory of welfare at all, that preference satisfaction can actually be agnostic regarding what constitutes welfare. Preference satisfaction holds out the promise of accounting for the good in general through individuals' own conceptions of the good. In that sense, it avoids direct confrontation with moral pluralism, by accommodating any vision of the good that individuals hold.

Preference satisfaction thus stands comfortably between the two competing accounts of well-being just mentioned: mental state theories, like hedonism, on the one hand; and objective list theories, on the other. Hedonism and its corollaries that equate pleasure with well-being often appear too thin to account for what makes life go well. Objective list theories, on the other hand, often appear too quick to incorporate conceptions of the good life that particular individuals might not share, thus imposing a vision of well-being dreamed up by the theory's authors. Preference satisfaction seems to elide both difficulties. The concept of preferences goes beyond simple tastes or whims and includes a reflective element, thus making room for reasons and life projects as part of the individual's well-being. At the same time, hewing to preferences ensures that only the individual's own conception of the good receives consideration, to the exclusion of what the objective list theorist might consider *ought* to be her good. This is the plausible premise for the claim that "neoclassical welfare economics can claim to uphold the non-paternalism of the liberal tradition."<sup>4</sup>

The second major reason for the dominance of preference satisfaction is that while whims and the sense of pleasure are notoriously hard to track and objective states of the good difficult to agree upon, preferences appear to be more manageable empirically because of their tight relationship to choice. As I will elaborate later, it is a mistake to believe that preferences can simply be reduced to choices. However, there are often solid reasons to infer preferences from choices, given a set of relatively modest and often plausible assumptions. By treating choices as *revealed preferences*, economic accounts of preference satisfaction aim to free economics from psychology "simply by denying [themselves] the luxury of speculating about what is going on

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preferences are the alpha and omega of welfare"); *see generally* Erik Agner, *Well-Being and Economics*, in *ROUTLEDGE HANDBOOK OF PHILOSOPHY OF WELL-BEING* 492 (Guy Fletcher ed., 2015).

4 ROBERT SUGDEN, *THE COMMUNITY OF ADVANTAGE: A BEHAVIOURAL ECONOMIST'S DEFENCE OF THE MARKET* 6 (2018).

inside someone's head. Instead, [they] pay attention only to what people do."<sup>5</sup> Preferences are indeed subjective states, and thus unobservable directly. And any theory of revealed preferences will have to take into account that choices and preferences are mediated by beliefs.<sup>6</sup> But once this mediation is accomplished, preference satisfaction becomes a tractable mode of accounting for individuals' own conceptions of their well-being.<sup>7</sup>

Nonetheless, the good reasons for the prominence of preference satisfaction tell a partial story. As preference satisfaction becomes a dominant mode of thinking about social policy, its effects as a framework of thought take on independent importance. Framing questions of policy design around the issue of maximizing the satisfaction of individual preferences raises significant challenges, and a world of intellectual energy has been poured into refining the process. The intricacies of accounting for preferences are constantly being explored and debated, leading often to more accurate and more comparable results. But the very framework also ensures that certain types of considerations are not weighed, that certain questions remain unasked. In that sense, preference satisfaction at its best clarifies vision about a wide range of considerations, while at the same time obscuring another set — in this case, goods that are not captured by the conceptual apparatus of preferences. At this level of abstraction, this claim should appear rather obvious, because nearly any framework of thought accounts for only a subset of potentially relevant considerations. The challenge of this Article will be to show that preference satisfaction limits the field of vision in ways that are actually important.

In characterizing preference satisfaction as a framework of thought, the Article has two major goals and a corollary speculative (and somewhat abstract) payoff. The first goal is to present a clear, if schematic, picture of how preference satisfaction works to orient policy discussion. The account will attempt to show preference satisfaction in its best light, pointing to those areas of policy where the framework is likely to work best. It is an attempt at internal critique: by specifying the conditions for its successful employment on its own terms, the limitations of the preferences framework should also become clear. Many of those limitations have been much studied, and some

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5 KEN BINMORE, *RATIONAL DECISIONS* 8 (2009).

6 DANIEL M. HAUSMAN, *PREFERENCE, VALUE, CHOICE, AND WELFARE* 33 (2012) (“The connection between preferences and choices is conditional on beliefs [...] Preferences are subjective states, that, jointly with beliefs, cause and justify behavior.”).

7 Beliefs are a necessary connective tissue between choices and preferences. In other words, the things that people believe about states of the world and about the alternatives they face are what allow an account of how their behavior is geared toward advancing their own well-being. *See infra* text at notes 23-24.

longstanding critiques have received good answers. I will not delve deeply into those debates. Instead, the first goal of the Article is simply to clarify when preference satisfaction works well (and when it fails) as a normative framework.

The second, more challenging goal is to make sense of the price of using the framework — not because of its internal limitations, but rather because of how it succeeds. The point here is that in certain important cases, preference satisfaction succeeds in orienting normative debate, but in doing so systematically obscures crucial kinds of considerations. This, then, is an external critique developed through an extended example, which is labor and employment law. The law of work seems ripe for economic analysis. It has become quite natural to think in terms of a labor market, and individuals clearly form well-developed, reflective preferences regarding work. They are accustomed to pricing labor, whether their own or that of employees. They are widely cognizant of tradeoffs between salary and benefits, or between labor and leisure. Not coincidentally, labor was one of the first areas where economics as a field took note of the importance of law.<sup>8</sup> For the past forty years, there has been a great deal of economic analysis of work, including numerous articles collected in several handbooks.<sup>9</sup>

The wealth of discussion makes it clear that labor and employment are core topics open to economic analysis based on the idea of preference satisfaction. In other words, this is not a case of forcing the language of preferences onto a field where market incentives or conscious choice among comparable alternatives is counterintuitive.<sup>10</sup> Thus, at first glance, it should appear that I am taking on a hard case for my claim — one where preference satisfaction clearly does a great deal of work, and eminently reasonable work at that. At the same time, the law of work — the regime of wage labor itself — is a core, constitutive element of an entire political economy. It structures life projects in a way that (almost obviously) transcends individual preferences. Considering labor and employment solely through preference satisfaction avoids some of the deepest questions that the law of work must take on, or at least so I will claim.

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8 JOHN R. COMMONS, *HISTORY OF LABOUR IN THE UNITED STATES* (1966).

9 LABOR AND EMPLOYMENT LAW AND ECONOMICS (Kenneth G. Dau-Schmidt, Seth D. Harris & Orly Lobel eds., 2d ed. 2009); *ECONOMICS OF LABOR AND EMPLOYMENT LAW* (John J. Donohue ed., 2007); *RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW* (Cynthia Estlund & Michael L. Wachter eds., 2012).

10 For the exemplar of the style of scholarship that injects economic incentives into contexts where they intuitively seem foreign, see Elisabeth Landes & Richard Posner, *The Economics of the Baby Shortage*, 7 *J. LEGAL STUD.* 323 (1978).

Finally, the speculative payoff of the Article deals with the relationship among the groups of theories of welfare (i.e., mental states; preferences; objective list). As mentioned above, one of the advantages of preference theories is that they accommodate pluralism. But what will emerge from the discussion below is a more general type of pluralism. Rather than search for a theory that accommodates pluralism within one answer to the question of well-being, we might be better served by adopting pluralism regarding theories. Pluralism of theory would reject the idea that either mental states or preferences or objective goods are *the* metric of well-being. Each of these elements can be important, depending on the context. Of course, it is easier to say that things are context-dependent than it is to say anything useful on how to determine which contexts require different weights for the various elements, but a speculative stab at that task will be the last point I develop below.

The Article proceeds in three parts. Part I is an account of how preference satisfaction works in normative economics. It distinguishes among three elements: welfare; preferences; and choices. It underscores the fact that for preference satisfaction or maximization to work well, it must be able to bridge two gaps, one between choice and preferences, and another between preferences and welfare. In contexts where both those gaps are bridged, preference satisfaction offers a workable normative framework; where at least one of those gaps is unbridgeable, it should be treated with extreme caution if not jettisoned altogether. Part II uses the example of the law of work to claim that even when preference satisfaction provides a good normative framework on its own terms, the framework obscures considerations that should not be ignored. In order to scale back the abstraction of the claim, Part II considers the history of labor in the U.S. It shows how broad considerations regarding the implications of the regime of wage labor are absent from legal contemplation when labor law is imagined and shaped through the lens of preference satisfaction. Part III concludes with a speculation about the implications of the analysis of preference satisfaction for an overall theory of well-being. It suggests that the choice among mental state theories, preference theories, and objective list theories is in some sense a false start. Rather than adopt one of these theories, the challenge for a working conception of well-being is to specify the contexts in which each of these theories should receive the most weight.

## I. THE QUEST FOR WELFARE

Welfare economics is ultimately concerned, as its name implies, with welfare or well-being. In principle, at least as a matter of abstract theory, any vision of welfare could underwrite economics. But as a practical matter, economists rely almost exclusively on preference satisfaction in formulating their fundamental concepts, so that it is typical for foundational texts to include statements like, “allocative efficiency concerns the satisfaction of individual preferences.”<sup>11</sup> Welfare is a slippery concept, and preference satisfaction offers a thick enough conceptual framework to overcome some of the principal weaknesses of competing theories. In a sense, it is a middle ground between mental state theories and objective list theories. By recognizing preferences as influenced by and in some sense accounting for reasons, it surpasses the thinness of hedonism<sup>12</sup> and opens the possibility of circumventing the problem of interpersonal utility comparison.<sup>13</sup> By conceptualizing preferences as subjective valuations, it avoids the tendency of objective list theories to detach themselves from things individuals actually desire.

Nonetheless, preference satisfaction is not a panacea for the welfare theorist. In fact, precisely those elements of preference satisfaction that promise to overcome the limitations of other theories present significant challenges, conceptually and practically. Perhaps the most important (and most discussed) challenge is generating a conception of preference with a tight enough link to well-being. It is easy to recognize that fulfilling a whim may bring pleasure without advancing welfare.<sup>14</sup> To consider the satisfaction of preferences to be indicative of well-being, preferences must be subject to some rationality criteria. The thickness of those criteria, or the process sometimes referred to as laundering preferences, is likely to pose conceptual challenges.<sup>15</sup> And identifying preferences, which are subjective states, will

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11 ROBERT COOTER, *LAW AND ECONOMICS* 14 (6th ed. 2012).

12 Recall that in basic form, hedonistic accounts equate well-being with pleasure or other positive mental states, denying any importance to the reasons for experiencing a particular state as pleasurable.

13 Most economic accounts try to circumvent the problem entirely, but some preference-based accounts claim that interpersonal utility can in fact be compared. *See infra* at notes 66-67.

14 At least it is easy for those of us who have desires (sometimes strong desires) for things that are harmful to our well-being.

15 Laundering preferences refers to the attempt to overcome the difficulties involved when actual preferences do not reflect the person’s well-being. The disconnection between actual preferences and well-being might have many sources, including (among others) bad information, preferences that are not self-interested, or evil



pose practical challenges. The methodology of welfare economics works with responses to those challenges, sometimes explicitly formulated and often implicitly accepted.

It pays to consider these two challenges separately. The first is to conceptualize preferences themselves in a fashion that will provide a tight enough link to well-being. The second is to specify the connection between choices (which are objectively observable acts) and preferences (which are the subjective states thought to induce choice). I take these up in turn.

Serious engagement with preference satisfaction begins with the recognition that preferences are not mere whims. In fact, to establish any plausible connection between preferences and welfare, preferences must be understood as comparative evaluations. Comparative evaluation assumes that there are alternatives, and that those alternatives are susceptible to ranking. Preferences, for economics, must be the kind of thing that can be ordered. Further, for that ordering to do any work in policy analysis, it must be rational in at least two different senses. First, the ordering must meet minimal formal rationality conditions, usually described under the headings of completeness and transitivity.<sup>16</sup> In other words, preferences must rank all available alternatives, and the ordering must not suffer from circularity (transitivity guarantees that if *a* is preferred to *b*, and *b* is preferred to *c*, *a* is preferred to *c*). Just as importantly, however, preferences must have an element of what might be termed substantive (or means-ends) rationality. This means that preferences are “choice-determining” or that people will choose the highest ranking alternative available. In other words, “preferences are not just judgments. They motivate action.”<sup>17</sup> The

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or antisocial preferences. Many preference-based theories seek to discount these preferences and to replace them by considering idealized preferences, or in other words, by laundering actual preferences. For one influential account, see Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted*, 29 J. LEGAL STUD. 1105 (2000).

16 ANDREU MAS-COLELL, *MICROECONOMIC THEORY* 6 (1995). Reflexivity also generally appears in these conditions, but does not affect the discussion below. For the claim that reflexivity is trivially true and should not be considered, see COOTER, *supra* note 11, at 19. For a critical elaboration of different ways economics uses preference, see Lewis A. Kornhauser, *The Domain of Preference*, 151 U. PA. L. REV. 717 (2003).

17 HAUSMAN, *supra* note 6, at 15-17. Hausman also links choice determination to consistency, to which I refer in passing below, and to context independence, which I assume and will not elaborate on. In addition, he opens up a wider question of whether preferences are total comparative valuations or may be partial and thus mitigated by moral (or other) commitments. That issue was raised and developed initially by Amartya K. Sen, *Behavior and the Concept of*



substantive aspects of the rationality of preferences are the key to linking preferences with welfare. But before examining those substantive aspects in some detail, I turn to the question of choice.

Because preferences are subjective evaluations, they are unobservable directly. Choices, on the other hand, are actions that are directly observable. When preferences are in fact choice-determining, when preference “*generates* the choice structure,”<sup>18</sup> choices appear to reflect preferences accurately, at least at first glance. Choices, under those conditions, are thus translated into *revealed preferences*, suggesting that “the theory of individual decision making need not be based on a process of introspection but can be given an entirely behavioral foundation.”<sup>19</sup> But the theory of revealed preference cannot assume that choices always and unproblematically reflect actual preferences. Instead, “[i]t assumes that we already know what people choose in some situations, and uses this data to deduce what they will choose in other situations.”<sup>20</sup> In other words, revealed preference theory looks only at choice, and in that sense brackets the possibility of disjuncture between choices and preferences.

An extreme version of revealed preference theory in essence does away with preferences altogether. Ken Binmore’s account is worth quoting at some length:

In revealed-preference theory, it isn’t true that Pandora chooses *b* rather than *a* because the utility of *b* exceeds the utility of *a*. This is the Causal Utility Fallacy. It isn’t even true that Pandora chooses *b* rather than *a* because she prefers *b* to *a*. On the contrary, it is because Pandora chooses *b* rather than *a* that we say that Pandora prefers *b* to *a* and assign *b* a larger utility.

The price of abandoning psychology for revealed-preference theory is therefore high. We have to give up any pretension to be offering a causal explanation of Pandora’s choice behavior in favor of an account that is merely a description of the choice behavior of someone who

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*Preference*, 40 *ECONOMICA* 241 (1973) [hereinafter Sen, *Concept of Preference*]; Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 *PHIL. & PUB. AFFAIRS* 317 (1977) [hereinafter Sen, *Rational Fools*]. While I think Hausman’s view makes for a more tractable conceptual framework, my arguments in this Article do not ride on adjudicating between Hausman and Sen.

18 MAS-COLELL, *supra* note 16, at 12.

19 *Id.* at 5.

20 BINMORE, *supra* note 5, at 8-9.

chooses consistently. Our reward is that we end up with a theory that is hard to criticize because it has little substantive content.<sup>21</sup>

This extreme position is internally consistent, but it empties the theory of any capacity to provide normative content — it in essence means that revealed-preference theory can deal only with the consequences of choices, but would have nothing to say about explanation of choices, thus limiting its predictive potential to tightly similar situations.<sup>22</sup> In fact, however, economists do not adhere to an extreme version of revealed preference theory. Instead, most economists (certainly those working in a normative vein) accept, explicitly or implicitly, “that inferences concerning preferences can be drawn from choices given premises concerning belief . . . These inferences depend on assumptions about the constraints and the ways in which the agent individuates the alternatives.”<sup>23</sup>

The gap between choice and preference is obvious when we consider trivially mistaken beliefs. If I step into the road believing it is clear of traffic, it is apparent that I have no preference to be run over, even if I am mistaken and indeed do get run over.<sup>24</sup> More generally, choices are dependent on beliefs and constraints. Importantly (and more on this momentarily) constraints include ability to pay, which drives a wedge between the concept of willingness to pay and the concept of preferences.

The upshot of the discussion is that for normative analysis through preference satisfaction to get off the ground, it must bridge two potential gaps: between preferences and well-being; and between choices and preferences. Revealed preference theory, which some take to be a straightforward entailment of

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21 *Id.* at 19-20.

22 HAUSMAN, *supra* note 6, at 29.

23 *Id.* at 33. He continues: “The view that preferences and beliefs jointly cause actions is sensible and embedded in everyday explanatory and predictive practices. Belief-dependent revealed-preference theory is compatible with the traditional view of preferences as subjective states whose connection to choice is causal rather than definitional.” For a related perspective, suggesting a range of usages by economists regarding the connection between preferences and beliefs, see Kornhauser, *supra* note 16.

24 If someone is tempted to shift the issue to my preferences for exerting precautions, we could change the example to one where precautions are less relevant, and the only consideration is beliefs about how others will behave. Without specifying beliefs, there is no way to model choice. Assumptions about beliefs are therefore always present in game theory, where they become part of the informational structure of the game.

marginalism,<sup>25</sup> actually performs a two-step jump, or relies on a double proxy: preferences are a proxy for welfare; choices, in turn, are a proxy for preferences.

Much attention has been focused on the gap between welfare and preferences, so I will mention just a few of the challenges here. The common thread among those challenges is that preferences must be substantively rational for the link between preferences and welfare to remain plausible. Preferences may not track welfare when they are based on bad information, either because good information is hard to come by, or because people have developed preferences under systematically oppressive conditions. Preferences are not always self-interested, and when they are not they typically will not track individual well-being.<sup>26</sup> Preferences might not be stable over time, which would raise difficulties in determining which preference should be accorded weight. An individual may have conflicting preferences (especially between first-order and second-order preferences), which would undermine the formal rationality assumptions. The combination of time and the tension between first- and second-order preferences highlights the complex, self-evaluating nature of human activity.<sup>27</sup> In addition, some preferences may be distinctly antisocial.<sup>28</sup> One answer to many of these well-known problems is to consider only laundered or “spruced up” preferences (i.e., idealized preferences that

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25 “The theory of revealed preference is a child of the marginalist revolution. As such, it is an official doctrine of neoclassical economics, enshrined in all respectable textbooks.” BINMORE, *supra* note 5, at 20.

26 The problem of self-interest is acute, and has generated much discussion. I am not concerned with the details here. For some of the critiques, see DEREK PARFIT, *REASONS AND PERSONS* (1984); Sen, *Concept Of Preference*, *supra* note 17; Sen, *Rational Fools*, *supra* note 17.

27 By way of simplistic example, a first-order preference might be my comparative valuation that places chocolate higher than broccoli (or more generally my preference for sweets over green vegetables). A second-order preference would relate to which preferences (for food) I would prefer to have, so I might prefer to have a preference for vegetables over sweets because I believe that vegetables are healthier. In that case, I might even try to accustom myself to eating vegetables, in the hope of changing my first-order preference. For the connections among self-evaluating behavior, the dynamics of changing preferences, and the tension between first- and second-order preferences, see Albert O. Hirschman, *Against Parsimony: Three Ways of Complicating Some Categories of Economic Discourse*, 74 AM. ECON. REV. 89 (1984).

28 Racist or misogynistic preferences are common examples of antisocial preferences, but the list could be extended with ease. For elaboration of the mistranslations between preference and welfare, see Daniel M. Hausman & Michael S. McPherson, *Preference Satisfaction and Welfare Economics*, 25 ECON. & PHIL. 1, 6-8 (2009).

accord with what well-informed rational individuals would prefer). While this answer helps to overcome the obstacles, it should be recalled that it does so by leaning toward objective list theories of well-being, since it replaces what people *actually* want with what they *should* want.<sup>29</sup>

Somewhat less attention has been devoted to the gap between choices and preferences, and my brief comments on it may be controversial. The gap between choice and preference is a bit more subtle than the gap between preferences and welfare. It should be relatively clear that beliefs about the state of the world are relevant to translating preferences into actions. False beliefs as to what my action actually is (say, drinking poison when intending to imbibe a soft drink) undermine the connection between action and preference. This is a parallel to the way false beliefs about consequences of preferences undermine the connection between preference and well-being. Luckily, the chances of making dramatic mistakes about the state of the world are somewhat smaller than the chances of bad information feeding preference formation. But when beliefs about the state of the world are false, we cannot learn much about preference from choice.

Constraints on choice are also liable to unmoor choice from preference, in ways that are less obvious than false beliefs. Sometimes, constraints are packed into the feasibility of alternatives when considering what preference packages consist of. But a crucially important constraint in real world policy analysis is ability to pay, which acts as a brake on willingness to pay. Willingness to pay is a key concept in determining efficiency, and in essence is a translation of the idea of revealed preference. When people actually make consumption choices, willingness to pay can be based on actual choices; when the consumption bundles are not available in the market, policy analysts look to hypothetical choice (i.e., estimates of willingness to pay). But unless initial endowments are equalized, ability to pay skews any measure of willingness to pay, making standard efficiency analysis biased in favor of the rich.<sup>30</sup> The insight here is

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29 “To take well-being to be the satisfaction of informed self-interested rather than actual preferences shifts the emphasis from what people prefer to what it is rational for them to prefer in order to benefit themselves.” *Id.* at 14.

30 For a cutting-edge critique that may prove to be the last word on the topic, see Oren Bar-Gill, *Willingness-to-Pay: A Welfarist Reassessment*, 38 *YALE J.L. & REG.* 503 (2021); For a recent in-depth treatment highlighting the distributive skew, see Zachary Liscow, *Is Efficiency Biased?*, 85 *U. CHIC. L. REV.* 1649 (2018). The basic problem is widely acknowledged, but often brushed off by noting that efficiency analysis may not be the last word. Posner’s *Economic Analysis of Law*, at least until the third edition, contained such an acknowledgment with an example of poor and rich families who would pay different amounts for a medicine that would be more important for the happiness of the poor family.

that willingness to pay is a form of thinking about choice, and that choice is constrained by ability to pay. That makes it a poor proxy for actual preferences. While the conceptual point regarding ability to pay has long been recognized, actual policy decisions often do not take this distortion into account, leading to grossly discriminatory results.<sup>31</sup> It bears emphasis that willingness to pay is a stand-in for choice; thus, this problem arises because of the gap between (hypothetical) choice and preferences, and not because of the gap between preferences (properly conceived) and well-being.

To sum up: When we consider the entire package that includes well-being, preferences, and choices, it should become clear that policy analysis typically works with a double proxy, or a two-stage substitution. The ultimate goal is to advance well-being. Preferences are distinct from well-being, but in many cases they can be good evidence of what the individual takes to be her well-being, and choices (coupled with beliefs) can be used to infer preferences:

[W]elfare economists can draw inferences concerning well-being from people's choices without committing themselves to any theory of well-being. Although what people prefer does not *determine* what is good for them, it is sometimes *evidence* concerning what is good for them . . . An alternative is preferred by self-interested and well-informed people because it is good for them, not good for them because they prefer it.<sup>32</sup>

Each stage of inference drawing presents distinct obstacles. When the obstacles are overcome, preference satisfaction enjoys solid grounding as a normative

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He sums up: "As this example shows, the term efficiency, when used as in this book to denote the allocation of resources in which value is maximized, has limitations as an ethical criterion of social decision making – although perhaps not serious ones, as such examples are very rare." The discussion has since been omitted, perhaps because Posner no longer believes such examples are rare. In fact, they are ubiquitous. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 11-12 (3d ed. 1986).

31 A recent study on how algorithms have made this mistake is particularly telling. See Ziad Obermeyer et al., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 *SCI.* 447 (2019). For additional examples of this type of skewing, see Liscow, *supra* note 30.

32 HAUSMAN, *supra* note 6, at 89. The quotation perhaps goes one step too far. At least for some versions of preference theory, the very fact that the agent's preferences are *her own* is actually an element of their connection to the agent's welfare. While interesting in its own right, this intersection between preference theories and visions of autonomy's role in well-being is not central to the argument I develop here.

framework; when either of the obstacles is insurmountable, it loses its normative footing.

Often, both sets of obstacles are easy to clear. For example, consumer choices in thick markets are well documented, and in many contexts the product bundles of goods are largely experienced as comparable. Consumer behavior is typically self-interested and for many settings, reasonably well informed. Exceptions are widespread, and many have given rise to the flourishing of behavioral law and economics in consumer contexts. But run of the mill consumer behavior, including for some large-scale spending (like that on durable goods), seems well-captured by standard preference satisfaction modeling. Similarly (with even fewer problems stemming from cognitive biases), when business corporations are the targets of policies, their actual choices seem to accord well as a general matter with their preferences, and their preferences with their individual welfare.<sup>33</sup>

Perhaps just as often, it proves extremely difficult to cross the two bridges connecting choice to preference to well-being. In some areas, both bridges are absent. For example, policies that might be presented as alternatives are not market options and include features that do not allow for well-formed comparisons (my guess is that much of family law is more like this than the happy vision of consumer choice, for example).<sup>34</sup> Under these circumstances, preference satisfaction probably does not get much traction as a normative framework to begin with.

In other cases, significant scientific and policymaking energy has been poured into attempts to deal with the bridges through strategies of contingent valuation. These efforts have been particularly intensive in the context of healthcare and environmental policy. These two central areas highlight the differences in the two bridges. For healthcare, the central problem is in creating a reasonable set of willingness to pay formulae for the benefits of healthcare interventions. It seems that people might have preferences that are actually linked to their well-being regarding healthcare (that is, they might have some internal ordering of the alternatives of which they are aware, and information problems, while difficult, are in principle solvable). However, it

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33 Whether corporate welfare corresponds to aggregate social welfare or even the welfare of all stakeholders in the corporation is a much more difficult question, but the kinds of externalities likely to generate a mismatch are a separate issue.

34 It does not seem accidental that Raz's discussion of constitutive incommensurability uses family as a central example. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 345 (1986).

is demonically difficult to discover those preferences, no matter how many surveys one conducts.<sup>35</sup>

Environmental policy seems to suffer from a different problem, stemming from the fact that environmental policy touches on values that typically go way beyond any single individual's enjoyment (i.e., preferences would be distant from any reasonable conception of individual well-being, based on self-interest). Thus, even if meaningful willingness to pay measures might be devised, it is unclear whether the preferences thus "revealed" would have any normative weight in thinking about the environment.<sup>36</sup> Consider climate change: in order to imagine that preferences had any normative weight, we would have to consider (perhaps predominantly) preferences of millions of people who do not yet exist. It is clear that when preferences become so hypothetical that they have no connection to actual people, we are not really basing our normative recommendations on preference satisfaction, but rather smuggling in objective theories of well-being under some preference-based metaphors.

## II. THE PRICE OF THE PREFERENCE FRAMEWORK

### A. Preference Satisfaction and the Law of Work

Up to now, I have been concerned with showing how preference satisfaction works as a normative framework, and with some very general claims about the contexts in which the framework is promising. Following Daniel Hausman, my claim has been that preferences should be understood as evidence of well-being, and when that evidence is convincing, preference satisfaction provides a workable normative frame. This Part of the Article takes a specific example of an area where preference satisfaction is a sensible framework — the law of labor and employment — in order to raise the question of what we give up when we adopt that framework. There are three steps to the argument. First, I will show how preference satisfaction operates in the labor context, by providing actual examples. Next, I will elaborate a set of considerations that are obscured in the preference-satisfaction framework, while arguing that those considerations should be relevant. Finally, I will show that historically, the obscured considerations were central to understanding the law of work. The

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35 For a review of the challenges, see Mandy Ryan et al., *Methodological Issues in the Monetary Valuation of Benefits in Healthcare*, 3 EXPERT REV. PHARMACOECONOMICS & OUTCOMES RSCH. 717 (2003).

36 For a critical review of some of the difficulties, see JERRY A. HAUSMAN, *CONTINGENT VALUATION: A CRITICAL ASSESSMENT* (1993).



underlying message is that it is the preference-satisfaction frame of thought that helps to hide the missing considerations; that is the price of adopting a particular mode of thought.

Law and economics (that is, the preference-satisfaction framework) of labor and employment has gone through several phases, beginning with a belief in the capacity of markets to promote an efficient labor regime, followed by an era of attention to market failures, and most recently by intensified attention to empirical testing of theoretical hypotheses.<sup>37</sup> In a recent review article on law and economics in the labor and employment context, Stewart Schwab makes a persuasive case for the idea that preference satisfaction can track multiple goals that workers pursue:

Law and economics counts as valuable anything that a worker values. For example, suppose a worker chooses job 1 over job 2, where both offer the same salary but job 1 offers more autonomy, dignity, or opportunity for meaningful work. The worker has revealed that he or she values the non-material aspects of job 1, and thus job 1 is more valuable. Indeed, many labour scholars have revealed that they prefer the (mostly non-material) benefits of their jobs rather than higher paying (but more onerous) law-firm jobs.<sup>38</sup>

Schwab's stylized examples, showing a possible tradeoff between salary and vacation time, and the bargaining range that opens up surrounding that tradeoff, drive the point home. Elements of the work relationship that may not be priced individually are nonetheless alternatives in contracting packages. Because those packages are sufficiently varied, it is sensible to portray workers as choosing among available packages, and thus revealing their preferences. And it seems likely that workers, in choosing among such options, base their preferences on their own understandings of their self-interest. Further, because there is little reason to suppose that workers are not well-placed to understand their own interests, there is little reason to doubt that their preferences reflect their individual welfare.<sup>39</sup> This is important, because it shows that the preference-satisfaction framework is not limited to trivial comparisons (say, between

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37 For this three-era timeline, see Stewart J. Schwab, *Law-and-economics Approaches to Labour and Employment Law*, 33 INT. J. COMP. LABOUR L. IND. RELAT. 115, 118-21 (2017).

38 *Id.* at 133.

39 A claim that workers, as a group, do not understand their own interests seems difficult to formulate without a strong theory of false consciousness, which I assume is unattractive.

two similar limited-use consumer products); rather, it is an apt framework to evaluate the legal rules that structure important life choices.

Schwab writes as a law and economics insider. But preference satisfaction has also become central for scholars working outside the genre, and an example of such work highlights just how prevalent preference-based thinking has become in the field. Cynthia Estlund's *Why Workers Still Need a Collective Voice in the Era of Norms and Mandates* asks whether "workers' desire for greater voice at work" is any different from their desire for better terms that are left to individual bargaining.<sup>40</sup> The backdrop for this question is the claim, advanced by some, that "workers no longer need collective representation (whether or not they want it) because their interests are adequately protected by a combination of legally enforceable mandates and self-enforcing norms."<sup>41</sup> After describing the decline of union representation and acknowledging that legislated minimum standards and informal norms against harsh management practices offer partial replacement for unions, Estlund sets out to determine how well the replacement regime actually performs. This is an attempt to track actual well-being, as it compares to survey results regarding workers' preferences. In other words, the frame for the discussion is the tension between workers' revealed preference for additional voice, and the possibility that the same welfare goals they desire from voice are already guaranteed by alternative means (which would indicate that their preferences are not indicative of their welfare). She shows that both mandates and informal norms rely on reputational sanctions for their enforcement, and that reputational sanctions differ widely from the top to the bottom of the labor market. In other words, strong (high-skilled, in demand) workers are likely to enjoy strong protection (reputational sanctions work on the high end), while weaker employees (low-skilled, high supply, vulnerable also outside the workplace) are likely to enjoy almost no protection at all.

Estlund's analysis is nuanced and sophisticated. Its conclusions make sense of a seeming paradox, showing why workers could want additional voice, even though voice is geared toward achieving something the law already supplies. But the key feature to note within the analysis is the way employee voice is translated into enforcing basic protections against harsh management practices. The preference for voice (revealed in surveys), including mechanisms of voice that would run afoul of existing labor law (because they involve worker-management cooperation, in violation of the NLRA), is portrayed as a piece of machinery that substitutes for a contractual term of decent behavior

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40 Cynthia Estlund, *Why Workers Still Need a Collective Voice in the Era of Norms and Mandates*, in RESEARCH HANDBOOK, *supra* note 9, at 463.

41 *Id.* at 463.

within the employment relation's minimum mandated standards. The idea that employee voice might be geared toward any fundamental change in the employment relation falls off the table. The reason is that for currently surveyed workers (perhaps in distinction to some activists and a few academics<sup>42</sup>), such fundamental change does not appear on the horizon of feasible alternatives. As such, it cannot become part of the structure of their preferences.

Examples of this sort, and many simpler examples that look at particular rules in isolation through the lens of preference satisfaction, could be multiplied with ease. They clearly teach us a great deal about the law of labor and employment. At the same time, they draw rather severe limits on the horizon of thought about labor and employment. In a way, thinking through preference satisfaction is like purposely adopting an availability bias for policymaking, because only options that appear feasible to the individuals whose preferences are supposed to count enter into the preference calculus. In some contexts, such a limitation of the horizon of alternatives is perfectly reasonable, in two senses. First, the closer we are to applied policy choices in concrete situations, the more justified we might be in limiting the horizon of options under consideration. And second, it seems plausible that there may be contexts in which all the normatively attractive or genuinely relevant alternatives are actually feasible. But the opposite is true as well: the closer we are to theorizing (the more distant we are from direct application), the less justification there is for limiting alternatives; and the more attractive the ignored alternatives, the more problematic is their disappearance.

## **B. The Law of Work Beyond Preferences**

As I will attempt to show presently, academic consideration of labor and employment is one context where such limitations are deeply problematic, and in a sense overdetermined. The development of American labor and employment law for the past three generations has seen a progressive narrowing of options for collective action by workers. That narrowing means that the feasible options for U.S. workers, those options that become ordered alternatives in workers' preferences, do not even include actually available choices from other industrialized countries.<sup>43</sup> Feasibility tends to cleave to the status quo, and the

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42 For the possibility that labor law could strive for fundamental change, see Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2 (2016).

43 In discussing the limited possibilities for significant change in U.S. labor policy, Estlund notes:

This dynamic of union decline is not independent of our policy choices. It reflects in part the basic structure of labor relations under US labor law, by which organizing and wage bargaining is conducted, with rare exceptions,

American workers' current situation makes that starting point a narrow base of operations. When organized labor is consistently under attack, feasibility is a significant brake on the imagination.

In another sense, however, limited imagination is only part of the challenge in thinking about labor and employment through the preference framework. A more basic problem is that some of the most compelling alternatives in building a labor regime are corporatist, as opposed to liberal-pluralist. Michael Wachter's comparison is instructive:

In liberal pluralism, only the preferences of individuals in their role as citizens get counted in the welfare calculus of government policy. Policy outcomes are determined by competition for the votes of individuals in a political marketplace. While individuals with shared interests form advocacy groups to compete for favorable policy outcomes, the interest groups themselves have no political status beyond the aggregation of their members' interests . . .

Corporatism, on the other hand, has a more complex structure and unions figure prominently into its workings. The pivotal distinction is that in corporatism, groups are enfranchised as well as individuals . . . Individuals are identified by their group, whether it be parish, occupational association, industry association, or union organization. The groups then operate as the political actors.<sup>44</sup>

Wachter locates the distinction between corporatist regulation and liberal-pluralist competition as part of a contest over the institutional structure of the society, a choice of political economy.<sup>45</sup> The important preliminary point is that this kind of choice is not amenable to analysis within the framework of preference satisfaction. The most basic reason the framework does not fit is that a choice of political economy entails wholesale shifts in how people might perceive their interests.

Wachter's account illuminates the way a labor regime is part of a larger system including antitrust and the law of corporations, showing how unions

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at the level of the bargaining unit rather than at the sectoral level . . . By contrast, in corporatist labor law systems such as those in Europe and elsewhere, wages are generally negotiated between large employer federations and the largest trade unions, and then extended to the sector as a whole.

Estlund, *supra* note 40, at 465.

44 Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 UNIV. PA. L. REV. 581, 589-90 (2007).

45 "What matters is the choice of the political economy. Once that system is chosen, the role and centrality of unions is determined. Unions are central to a corporatist regime and are peripheral in a liberal pluralist regime." *Id.* at 583.

become marginalized in what he calls the competitive regime. His outlook is individualist, and within that vision, institutions change while people remain the same. Other studies of the decline of corporatism or other versions of cooperationism are more sensitive to the malleability of individuals and groups. Mark Barenberg, for instance, while also adopting a political economy approach, unpacks the ways the architects of the NLRA sought a cooperationist solution to the labor problem in the kind of partnership “in which norms of cooperation would be implanted in ‘the hearts and minds of men,’ and in which ‘mutual understanding and trust’ would be continuously nurtured.” This was a model of collective bargaining that “marked a path that led beyond self-interested instrumental rationality.”<sup>46</sup> Rather than simply serving the stable interests of any well-defined aggregation of individuals, the ideas behind the NLRA “required a new cooperative mentality, transforming the subjective interests and perceptions of labor and management.”<sup>47</sup>

The key to achieving such change lay in collective empowerment that could structure genuine cooperation between labor and management, transforming both in the process.<sup>48</sup> The architects of the Act believed that organizational empowerment would “give employees the feeling that they have a stake in the business,” so that “organized workers would feel like enterprise citizens and partners.”<sup>49</sup> Collective bargaining, on this view, was a process that could change the way parties interacted, overcoming initial instrumental attitudes and mutual suspicion. “Consultative dealings not only may build trust but also may endogenously redefine the subjective interests, perceptions, and even identities of the parties.”<sup>50</sup>

Wachter, Estlund, and Barenberg agree that even the tempered corporatist path of the New Deal era has experienced a long decline. However, recent developments in labor activism and research point to a stubborn resilience of corporatist themes. Drawing on current activism, scholars point to the

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46 Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1475 (1993).

47 *Id.* at 1422.

48 *Id.* at 1424. Robert Wagner, the NLRA’s chief architect, believed that democratic self-government in industry required worker participation as much as democracy in politics required workers having the right to vote. As such, collective bargaining was an absolute necessity for democracy. He believed that “even if distributive justice could be achieved by tax-and-transfer policies, the latter would not remedy the injustice of authoritarianism within workplace relations. Only collective empowerment would implement ‘the new freedom – a freedom for self-direction, self-control, cooperation.’”

49 *Id.* at 1483.

50 *Id.* at 1488.

possibility of the emergence of a “new labor law” in the U.S. that would generate “a more inclusive and political model of labor relations, with parallels to regimes in Europe and elsewhere.” A new labor law would transcend the commitment to an employer-employee relation, and instead consider most decisions at higher levels of generalization, sectoral, industrial, or regional. Importantly, “the new labor law would position unions as political actors representing workers generally and would involve the state as an active participant,” creating a system of social bargaining.<sup>51</sup>

The theoretical underpinnings for a range of attempts to revitalize or reconceptualize labor and employment law are varied, but they share a focus on the distinctiveness of collective agency when imagining a labor regime. At times, that focus relies on a political economy analysis that emphasizes the differences between labor and capital. Building on Claus Offe’s analysis of the inherent obstacles to labor organizing, Guy Mundlak notes, “The nature of labour and its attachment to the person marks collective action as political by nature [...] labour’s strategies are intrinsically collective and political, and they entail competition among workers, rather than merely between labour and capital.”<sup>52</sup> Related accounts highlight the idea that gaining the freedom to do things we have reason to value is rarely something we can accomplish as individuals. Organized collectivities, such as unions [...] are fundamental to people’s ability to choose lives they have reason to value [...] Collective capabilities provide an important counterweight to more thoroughly marketized economic relations [...].<sup>53</sup>

Like many traditional visions of labor law, these new currents in theorization often begin with the claim that labor should not be conceptualized as a simple commodity.<sup>54</sup> One might suspect that the phrase *labor is not a commodity* is

51 Andrias, *supra* note 42, at 8-10.

52 Guy Mundlak, *The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers*, in *THE IDEA OF LABOUR LAW* 315, 318 (Guy Davidov & Brian Langille eds., 2011).

53 Judy Fudge, *Labour as a “Fictive Commodity”*: *Radically Reconceptualizing Labour Law*, in *THE IDEA OF LABOUR LAW* 120, 133-34 (Guy Davidov & Brian Langille eds., 2011).

54 Karl Polanyi’s analysis of labor as a fictive commodity, because it is not produced for sale and cannot be detached from the rest of life, stored, or mobilized, is foundational. KARL POLANYI, *THE GREAT TRANSFORMATION* 75-76 (1957):

[L]abor, land, and money are essential elements of industry; they also must be organized in markets; in fact, these markets form an absolutely vital part of the economic system. But labor, land, and money are obviously *not* commodities; the postulate that anything that is bought and sold must have been produced for sale is emphatically untrue in regard to them . . . For the alleged commodity labor power cannot be shoved about, used

little more than a slogan for mobilization. That would be a mistake. Resistance to the idea of labor as a commodity is the foundation of a fundamental critique of the typical economic modeling of collective bargaining. That model is a straightforward instantiation of the preference-satisfaction framework. It posits that “the primary objective of unions is to negotiate the employment of workers at wages and benefits superior to those that the employees would have received individually . . . [and can] be represented as a wage increase in simple models of unions and collective bargaining.”<sup>55</sup> The model further takes the idea of collective voice of unions as a mechanism “through which [workers] can more accurately represent their preferences.”<sup>56</sup> But the alternative theorizations I have alluded to here reject the idea that the market bargaining metaphor captures what is important, indeed necessary, for modeling the labor regime. The ability to organize collectively, the obstacles and opportunities to exert control over the regime at large, are not part of a set of preexisting preferences. Those aspects of the labor regime are as much about a conception of economic citizenship as they are about individual benefits. As such they confound the preference-satisfaction framework in at least two ways. First, the possible results of shifts in the labor regime are irreducible to self-interest in the sense that can be captured by an individualistic theory of preference. Second, and perhaps just as importantly, the labor regime becomes a crucial ingredient in the shaping of preferences, to the extent that it affects identity formation at a basic level. In other words, the relevant considerations are not self-regarding and self-interested; and the considerations in question are not stable in the way preferences must be, because the measures in question contribute to possible changes in the identities of the people affected by them.

While the resurgence of some form of corporatism is a recurring motif in attempts to conceptualize the regime of work today, proponents of such a conceptualization are not necessarily united regarding the normative bases of corporatism. While some in fact understand corporatism as reliant on a rejection of methodological individualism, others see groups as a necessity, but only because the groups facilitate the flourishing of individuals who remain the ultimate unit of analysis. Thus, some may lean toward considering the moral worth of groups as basic units in the makeup of society. Others may see groups as ultimately instrumental for the good of their individual members. Those who espouse theories of countervailing power may sit somewhere in between.

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indiscriminately, or even left unused, without affecting also the human individual who happens to be the bearer of this peculiar commodity.

55 Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 426 (1992).

56 *Id.* at 433.



But all point to the same conclusion regarding the analysis of the law of work, in the sense that the types of considerations that must be weighed could not be taken into account directly through a preference-satisfaction framework. It seems important, however, not to exaggerate the role of corporatism in resisting the preference-satisfaction framework. In order to avoid the impression that only anti-individualism stands against preference satisfaction, I will draw on one additional example, which is the workers' movement in the U.S. in the nineteenth century, and its conception of free labor.

Historians have linked free labor ideology with traditional republican conceptions of freedom and self-ownership. In the early republic, this Jeffersonian ideal of freedom as economic independence was widespread. Many believed that the propertyless could not be trustworthy citizens. By the mid-nineteenth century, this conception was in some senses under attack in the courts and in the doctrines of liberal political economists,<sup>57</sup> but it continued to animate much of the workers' movement for decades. Again, the commodification of labor is a central motif of critique, and the labor movement largely rejected the conception of liberty of contract advanced by liberals as illusory. The labor movement's analysis claimed that ostensibly free contracts between factory laborers and owners could not be truly free. "It was not 'the theory of freedom of contract' to which labor leaders objected. They were no less devoted to the ideal of freely associating parties to industrial enterprise than were the liberals. Rather, they insisted that no actual 'freedom of contract' could exist between labor and capital." On this analysis, when laborers are forced to sell their labor as a commodity, the terms are set unilaterally by the employer, and "the workers do not *consent*, they submit but they do not agree."<sup>58</sup>

The response of the workers' movement was a counter-ideology, highlighting the view that commodification was not "a natural state of affairs, but a contingent historical occurrence." Resisting illusory freedom of contract required a shift in republican ideals of self-ownership, and the labor movement pursued that shift in varied attempts at the "republicanization of industry." "The solution to working class poverty and degradation was not individual advancement out of wage labor but collective action to promote workers' common interests and ultimately, to abolish the wage system."<sup>59</sup> Labor organizations like the Knights of Labor attempted to join economic and political action under one banner. Their widespread successes in the legislative arena were decisively

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57 CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993).

58 William Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WISC. L. REV. 767, 811 (1985).

59 *Id.* at 807.

rebuffed by the courts, but for a time, they succeeded in generating a vision of cooperative ownership that “would restore to workingmen the kind of economic independence and equality necessary for authentic participation in the polity,” all the while preserving “the substance of traditional republicanism’s emphasis on social equality or widespread ownership of productive property as a necessary condition for an independent citizenry.”<sup>60</sup>

The particular contours of the late nineteenth century workers’ movement and the way that law in the courts (with its liberal version of liberty of contract) proved its downfall is beyond the scope of discussion here. Important for my purposes is a straightforward insight. Nineteenth century labor organizing was doggedly individualist. But like the corporatism of the New Deal era, and like current day theorizations of new directions in labor law, nineteenth century labor activism clarified the social stakes in imagining a labor regime. Any analysis that limits itself to the existing preferences of existing workers, and thus models the labor regime through the set of alternatives in a narrowly conceived wage bargain, misses the point. Whether one formulates goals through the perspective of individual independence or through group identity, it is clear that a labor regime is foundational to the constitution of individuals and groups. Imagining its design, and thus deciding on its basic rules, must entail a grappling with this constitutive political aspect. The self-interested preferences of existing people cannot be much of a guide in formulating such a regime. To the extent that we imagine that a preference-satisfaction model of bargaining exhausts the labor question, we erase considerations that any adequate normative theorizing must take into account.

### III. SPECULATING AGAINST PREFERENCES

Parts I and II of the Article advanced an internal and an external critique, respectively, of preference satisfaction as a normative framework. I argued that the framework, as typically employed, assumes that preference satisfaction is equivalent to welfare. This often implicit assumption is not warranted. Seen in its best light, the preference-satisfaction framework employs a double proxy. Observable choices stand in for preferences, and preferences are evidence of well-being. Because choices often reflect preferences, and because there are often good reasons to assume that individuals are the best judges of their

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60 *Id.* at 813. For more on the defeat of this vision, see WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985).

own well-being,<sup>61</sup> the preference-satisfaction framework can be of great value as a guide to welfare. This is particularly true when the actual individuals in question resemble the rational, informed, and self-interested beings the model posits. And they often do. In many consumer settings, for example, people are close to *homo economicus*. And corporations, who are among the most consequent individuals in our society, are quite close to that idealization indeed. For many settings, however, the assumptions regarding either the connection between choice (revealed preference) and actual preferences, or between preferences and well-being, are tenuous. When the connections break down, the preference-satisfaction framework should be employed with great care or abandoned altogether. Moreover, even when preference satisfaction performs well, as it arguably does for a field like labor and employment law, it is important to acknowledge that its use comes at a price. The framework is an especially tempting hammer, carrying with it the attendant tendency to view everything as a nail, or to ignore those things we cannot perceive as nails. Considerations relevant to the field may be ignored because they cannot be corralled into the field of visibility that focuses on the rational self-interest of holders of stable preferences.

At first blush, the internal and external critiques may seem wholly distinct, even unrelated. But a dialectical speculation connects the two. The internal critique appears, facially, to proceed with a kind of logical neutrality, as if unmotivated by any substantive normative commitment. But the external critique is not in fact completely unrelated: by historicizing the use of preference satisfaction as a mode of thought, it points to an especially important trouble spot in the logical structure that animates the framework. Analyzing the labor market at once calls for considering workers' preferences, and at the same time highlights the fact that such a market treats them as commodities, or simply the objects of preferences. Crucially, it is initially the workers themselves who resist becoming commodities, they *would prefer not to*<sup>62</sup> be considered the objects of someone else's preference satisfaction. Workers' movements see the transformation of labor into a commodity as a negation of workers' agency and humanity. In turn, highlighting this resistance points to a structural

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61 Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

62 Echoes of Melville's self-starving scrivener stirred the initial motivating reflections for this Article. Herman Melville, *Bartleby, the Scrivener: A Story of Wall-Street*, in THE PIAZZA TALES 31 (Dix & Edwards 1853) (2004). Those reflections were preempted by Robin West, *Bartleby's Consensual Dysphoria*, in POWER, PROSE, AND PURSE: LAW, LITERATURE, AND ECONOMIC TRANSFORMATIONS 191 (Alison LaCroix et al. eds., 2019).

flaw in the preference-satisfaction framework, because in order to work that framework must freeze the workers' potential for development; it must assume the stability of a subject who is actually capable of transformation. The combination of internal and external critique thus performs a negation of negation, pointing to what might be termed an inescapable political core at the heart of the preference-satisfaction framework.<sup>63</sup>

The foregoing analysis opens onto two quite general speculations, with which I conclude. The first deals with the temptations of rigorous methods. Revealed preference theory was initially a way to circumvent the difficulties of determining utility.<sup>64</sup> The idea was that choices (rather than, say, statements) were the best indication of what people preferred. It gave a strong empirical basis to a large set of inquiries. For the moment, let us take it as a given that revealed preference theory is largely successful as a predictive mechanism. Predictive tools are obviously of great value, especially if one is interested in marketing. Prediction is also crucially relevant for legal theory, especially when we are trying to determine in advance the likely outcome of the adoption of a particular legal rule. But success in prediction can also lead normative analysis astray. Predictive capacity has the tendency to make existing options or their near alternatives seem like a complete description of the field. We are liable to mistake predictive success for the kind of evaluation that matters most. Normative thought often requires that we see beyond the closely available options.<sup>65</sup>

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63 Thanks (and blame) to David Grewal (with an assist from Chris Tomlins) for encouraging me to articulate this point explicitly. The intricacies of negation of negation for Marxist dialectics are the topic for a separate article and would take us too far afield here. Suffice it to say that the attempt to link internal and external critique, and thus to bridge the gap between studying something through logic (searching for universal principles) and studying it through history, is the crux of the method of political economy. For an entryway into those intricacies, see in particular the section on Dialectics and the chapter on Negation of Negation in FRIEDRICH ENGELS, *ANTI-DÜHRING, HERR EUGEN DÜHRING'S REVOLUTION IN SCIENCE* (Progress Publishers 1947) (1878), <https://www.marxists.org/archive/marx/works/1877/anti-duhring/index.htm>.

64 D. Wade Hands, *Paul Samuelson and Revealed Preference Theory*, 46 *HIST. POL. ECON.* 85 (2014); STANLEY WONG, *THE FOUNDATIONS OF PAUL SAMUELSON'S REVEALED PREFERENCE THEORY: A STUDY BY THE METHOD OF RATIONAL RECONSTRUCTION* (1978).

65 The tendency for legal thought to get trapped into the limitations set by a method that privileges closely available options with their limited capacity for significant change is a theme developed in ROBERTO MANGABIERA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996).

The second speculation deals with varying levels of pluralism. One of the attractive aspects of the preference-satisfaction framework is that it seems to accommodate plural ideas of the good life. As long as someone is rational enough to order their desires, they are considered to have preferences, and those preferences count.<sup>66</sup> Preference satisfaction thus appeals to anyone who is wary of a theory of well-being that is too quick to impose ideas of the good life on people who might have other visions of the good. There may be reasons to doubt that the preference-satisfaction framework actually succeeds in circumventing direct moral argument. That would certainly be the local conclusion regarding certain types of preference laundering, for example, the idea that sadistic or racist preferences should not be taken into account. But for the moment, let us assume success. That assumed success seems to give preference satisfaction an advantage over objective list theories of well-being.

Perhaps, however, it would be best to accommodate pluralism in a somewhat different manner. In certain settings, preference-satisfaction theory actually smuggles in a great deal of objectivism.<sup>67</sup> Its conclusions in these settings may be perfectly plausible, but the price is actually a retreat from what made preference theory attractive in the first place — its tight connection to people's actual preferences. My speculation is that we would be better served by adopting a pluralism among theories, rather than expecting one theory to suffice. In other words, we could give up trying to find one theory that accommodates a pluralistic world (but then muddying its analysis by injecting objective conditions in its mechanism). Instead, we would acknowledge that well-being is best understood through multiple theories — mental state theories, preference theories, and objective list theories. If it is true that “philosophers are trying to overcome the stalemate between the three approaches,”<sup>68</sup> they might be pursuing the wrong task.<sup>69</sup> If these theories are durable because they

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66 MATTHEW D. ADLER, *WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS* 160 (2012). There are many subtle questions about whether preference satisfaction can truly avoid dealing with moral pluralism head-on, and whether it can circumvent the difficulty of interpersonal utility comparisons. It is clear that stringent rationality conditions bring preference-satisfaction theory closer to objective list theory.

67 Harsanyi's account, as elaborated by Adler, of *extended preferences* that require the individual to adopt impartial and impersonal attitudes seems like an extreme example of smuggling in objectivism. *Id.* at 192 ff.

68 Philip Brey, *Well-Being in Philosophy, Psychology, and Economics*, in *THE GOOD LIFE IN A TECHNOLOGICAL AGE* 15, 21 (Philip Brey et al. eds., 2012).

69 For the possibility that well-being is amenable to reasonable argument without developing a *theory* of well-being, see THOMAS SCANLON, *WHAT WE OWE TO EACH OTHER* (2000).

are all true in some ways, the more important task might be trying to find out which theories do the best work in which contexts.

The advantage in opting for different theories in different contexts is a clarification of what kinds of considerations enter the well-being calculus. When one theory is slated to do all the work, considerations that fit poorly with the framework but nonetheless demand attention find their way in through side doors. The problem is particularly acute when objective considerations, that is, the theorist's own ideas about what rational people ought to prefer, sneak in as part of the mechanism of preference. This allows the preference theorist to make normative claims ostensibly based on people's preferences, when in fact the dominant considerations have determined the range of preferences in the first place. It mutes the politics of decision making in ways that actually undermine self-determination.<sup>70</sup>

Pure mental state theories seem most plausible in those areas that merit genuine neutrality. To the extent that people's happiness rests on choices that are matters of pure taste, there seems to be every reason to respect those tastes.<sup>71</sup> In matters where preferences do a good job of tracking well-being, preference-satisfaction considerations would receive a great deal of weight in normative reflection. In the myriad situations in which the preference framework does not track welfare, or in those important situations in which the framework banishes considerations that ought to receive attention, we would do well to acknowledge that the normative framework must engage directly with the reasons to value particular outcomes. My sense is that such a pluralism within theory would mean that the political stakes of social decisions would receive more direct attention. The challenges of making convincing claims for the value of different options would be harder to avoid. That would make deciding more contentious, but at the same time, more responsible.

At this point, the suspicious reader might object along the following lines: this is not a pluralistic theory at all, but simply an objective list theory

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70 In a brief aside, Daniel Hausman makes this point quickly, and moves on: "Models of action in terms of preferences, beliefs, and constraints are also not appropriate tools to respond to many of the hard questions philosophers have asked. For instance [...] what is it to be an agent? How should self-governance be understood?" HAUSMAN, *supra* note 6, at 71.

71 The trivial example would be a taste for chocolate over vanilla (though even there, environmental concerns could eventually intervene, as they have, for example, for a choice between tuna and trout). Only a few centuries ago, the color and fabric of clothing was thought to be a matter for legal regulation (with different social classes regulated differently, in sumptuary laws). In even somewhat liberal states, such regulation of matters of taste would be difficult to justify.

that includes, as members of its objective list, positive mental states and the satisfaction of some preferences, some of the time. In other words, the suspicious reader may sense that under the guise of pluralism, I am subsuming the competing theories by granting them some, albeit limited, traction.<sup>72</sup> As a matter of strict logic, the suspicion may be warranted. Nonetheless, I believe the label of pluralism offers a better orientation for inquiry. The idea of pluralism highlights the fact that context matters, as it emphasizes the separability of our analytical tools. Perhaps most importantly, it cautions wariness towards those analytical tools that purport to be all-purpose implements. Where the preference-satisfaction framework has held sway, it seems to become such an all-purpose tool, obscuring the judgment and the controversy necessary for productive normative inquiry by purporting to circumvent disagreement over accounts of the good. Recognizing the multiplicity within welfare is a reminder that law's work in advancing well-being should ultimately rest on acknowledgment of and grappling with different conceptions of the good, rather than on the avoidance of hard choices.

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72 Adler argues that this is often a feature of “philosophical views that draw a nexus between well-being and mental states or objective goods, rather than reducing an individual’s well-being to the satisfaction of her actual preferences.” ADLER, *supra* note 66, at 155. His own account creates that nexus around idealized preferences, rather than around an objective list.



