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EQUAL PROTECTION AND THE RIGHTS OF GROUPS: ARE THERE GROUP RIGHTS?

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I

I shall begin by describing a case recently decided by the United States Supreme Court which highlights an issue of general interest to political philosophers and philosophers of law. The case is *City of Mobile. Alabama v. Bolden*[1] and the underlying issue is whether the right to be treated as an equal should, in some cases, extend to groups (understood as corporate entities and not merely as aggregations of individual persons). Althoug I have chosen a case from U.S. constitutional law, the issue it raises is of more than arcane significance. Numerous constitutional schemes worldwide provide legal recognition to groups by securing to them guarantees of representation in the parliament or national legislature. Some of these arrangements have been praised for effecting stability and a spirit of accomodation amongst otherwise contentious political factions (e.g. Switzerland, although some might challenge the current validity of this judgment) while other such schemes seem to have exacerbated political strife and made more intractable its peaceful resolution (e.g. in Lebanon).

I shall not be interested in evaluating the question whether consequentialist criteria (of whatever sort) recommend political arrangements which secure constitutional or legal recognition to groups. Clearly this is an important question but I shall not be addressing it. I shall be interested in the question whether groups, as corporate entities, possess moral claims which call for the creation of legal arrangements which secure to them a distinctive status irrespective of the recommendations of a calculus of social interests. People who believe in the existence of moral rights think that individual persons have a claim against the state not to be tortured which deserves to be legally secured even though, under some conceivable circumstances,

[1] City of Mobile, Alabama, et. al. v. Bolden et. al., No. 77-1844 (Slip Opinion), Decided, April 22, 1980.

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a calculus of social interests would insist that it be ignored. Moral considerations based on rights are always potentially in conflict with moral considerations based on consequentialist grounds because they are essentially incommensurable. Rights are not derived from utilitarian considerations and those who take rights seriously refuse to allow that acting rightly always requires maximization of aggregate good.

My strategy in dealing with the question whether groups have rights will not involve asking what we would be inclined to say about complex and interesting matters of law and social policy. The question whether there are rights of any kind is a theoretical question. A right is a theoretical entity whose nature is governed by the constitutive and regulative rules or principles of some (but not all) political moralities. Taking inspiration from Quine, the question whether there are rights at all, or rights to particular good or states of affairs will be answered by investigating whether one must suppose them to exist in order to make the statements of a particular political morality true.[2] Rights exist for a particular political morality if it accepts as a decisive argument in favor of a state of affairs that it is preferred by an individual (or perhaps a group). A definitive answer to the question about group rights will not be attempted. What I hope to do is sketch a way in which this question can be fruitfully approached.

II

Let us return to the case mentioned above. This is what happened. Black citizens of Mobile, Alabama brought a class action claiming that the City's at-large system of electing its commissioners had the effect of diluting their votes in violation of rights secured to them by statute and the U.S. Constitution. In Mobile, candidates for City Commission run for numbered seats. There is no requirement that they reside in subdistricts and to be elected they must receive a majority of the vote. Plaintiffs did not claim that the black community was a victim of a gerrymander or other form of perfidious districting shenanigans. Their claim was that by *including* the black community in a unitary district, the impact of their votes was reduced. The remedy they sought was to be electorily circumscribed (through a single-member district plan) in such a way that members of the black com-

[2] Cf. W.V.O. Quine, *From a Logical Point of View* (New York: Harper and Row, 1963, pp. 1-19). Ronald Dworkin uses the same test to determine whether a certain attitude towards rights exists (a "serious" attitude). Cf. *Taking Rights Seriously,* (Cambridge: Harvard University Press, 1978).

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munity would be (or could be expected to be) elected to the Commission in numbers commensurate with the City's black population.

Among the trial court's findings were the following: 1) the City's system was an old one, having been put in place in 1911; 2) because of the Voting Rights Act of 1965, Mobile's black citizens are currently able to register freely and vote without hindrance; 3) although the black community comprised 35.4% of Mobile's population, no black had ever been elected to the City Commission; 4) Mobile politics exhibited severe racial polarization over the past twenty years, with white voting for white and black voting for black if a white were opposed by a black, resulting in the black candidate's defeat or, if two white opposed each other, the white candidate most identified with blacks was defeated. Regression analysis on City and County electoral contests throughout the 1960's and 1970's showed racial bloc voting on both sides; 5) The City Commission had been less responsive to black areas than white areas in dealing with complaints of police brutality and in providing basic services; 6) blacks were severely underrepresented in the higher levels of city service; 7) initiatives brought to the State legislature which sought to replace the at-large system with single-member district representation were defeated in a climate of debate dominated by concern over how many blacks might be elected under such a plan.

The City defended its electoral system by arguing that it had been put in place under circumstances which all but ruled out discriminatory motivation on the City's part. Alabama's State Constitution of 1901 had, for all practical purposes, denied blacks the vote. With blacks effectively disenfranchised by the State Constitution, it could not have been the City's motivation to devise a plan which diluted the black vote when it put the at-large system in place in 1911. Since the Supreme Court had earlier refused to declare atlarge systems unconstitutional *per se* (cf. *White v. Regester,* 412 U.S. 755 at 765) and since plaintiffs could not bear their burden of showing invidious motivation on the City's part when the system was put in place, the City should be permitted to retain its system.

The trial court agreed with the City's contention that plaintiffs bore the burden of showing invidious motivation before the protections secured to them under the 14th and 15th Amendments could be triggered striking the city's system. However, the Court rejected the view that it was necessary for plaintiffs to prove invidious motivation in the enactment of the system. Invoking a doctrine from an earlier 5th Circuit decision (*Kirksey v. Board of Supervisors,* 554 F. 2nd 139), the District Court said that an innocently formulated plan

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that perpetuates past intentional discrimination is unconstitutional. The Court reasoned that this doctrine together with the preponderance of its findings weighed in favor of plaintiffs' allegations and that Mobile's long-standing system of electing its Commision must be scuttled. By failing to replace the at-large system with single-member districts, the State's legislature was guilty of a discriminatory recalcitrance. "There is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as. . . intentional state action." (423 F. Supp. at 398, emphasis in original.) The District Court secured plaintiffs their victory by mandating a mayor-council plan with single-member districts.

The City appealed to the Circuit Court contesting both the lower court's holding as well as its mandated remedy but the Appeals Court affirmed the judgment and the remedy. However, upon appeal to the U.S. Supreme Court, the City prevailed, winning a 6-3 reversal.

Although the City had won its reversal, only a plurality of the Court could agree upon the grounds for granting it. Three justices (Berger, Powell, and Rehnquist) joined Justice Stewart in holding that the lower courts had made a mistake. The plurality argued that the 15th Amendment prohibits government from purposefully disqualifying anyone from voting on grounds of race. To successfully deploy the protections of this Amendment to their advantage, these justices insisted that appellees bore the burden of showing that the City had invidiously denied the franchise to blacks. But they noted that the trial court had found that Mobile blacks are "able freely to register and vote." Therefore the plurality concluded that "the District Court and the Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment (the 5th) in the present case." (*Bolden,* supra, p. 8.) Thus these four justices held that the protections of the 15th Amendment were unavailing to appellees and that the allegation of vote dilution had to be adjudicated under the equal protection of the 14th Amendment.

In dealing with the 14th Amendment challenge, the plurality argued that the right to "equal protection of the laws" in the matter of voting requires that no state violate the right of each person not be districted in such a way that the impact of his vote was mathematically reduced. For example, a citizen, by this standard, would have a *prima facie* claim if the ratio of voters to representatives in his district were, say, 14:1 while the ratio in the neighboring district was, say 9:1. In applying this conception of equality to their start case, these justices reasoned that since Mobile is a unitary electoral district elects its Commission at-large, the system cannot violate the "one person, one vote" standard.

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Therefore, Mobile's electoral system was incapable of "diluting" anyone's vote in a sense which is forbidden by the equal protection clause.

The plurality's interpretation of what equal protection of the right to vote requires, shows clearly that they conceive of the parties to the class action as an aggregation of individuals altogether lacking in corporate standing. On this conception, for the political system to treat eligible voters as possessing a right to be treated as equals means that the only preference which deserves legal protection is the preference to have the mathematical value of one's vote be no less than that of any other voter's. Any preference rooted in a political theory that says that political power should be distributed in proportion to, say, racial, religious, or language group numbers deserves no constitutional protection. If this preference did deserve legal protection, then of course, appellees could have put the City's system in constitutional jeopardy by showing that despite bloc voting in the black community, no black candidates had ever been elected under it. In a long footnote, the plurality raises a host of practical difficulties which they believe vitiate attempts to provide legal protection to the political preference for proportional group representation. ". . .Can only members of a minority of the voting population in a particular municipality be members of a "political group"? How large must a "group" be to be a "political group"? Can any "group" call itself a "political group"? If not, who is to say which "groups" are "political groups"? Can a qualified voter belong to more than one "political group"? Can there be more than one "political group" among white voters (e.g. Irish-American, Italian-American, Polish-American, Jews, Catholics, Protestants)? Can there be more than one "political group" among non-white voters? Do the answers to any of these questions depend upon the particular demographic composition of a given city? Upon the total size of its voting population? Upon the size of its governing body? Upon its form of government? Upon its history? Its geographic location?" (Bolden, supra, at 22).

Justice Stevens' concurring opinion focuses the issue thus, ". . .there is a fundamental distinction between state action inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community." (Stevens' concurring opinion p. 1.) Agreeing with the plurality's judgment that there are no grounds in the instant case to support a complaint of the former sort, Stevens said that the question raised in *Bolden* concerns "a political structure that treats

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all individuals as equals but adversely affects the political strength of a racially identifiable group." (Ibid., at 2.)

In his lengthy dissent, Justice Marshall vehemently disagreed with the plurality's interpretation of both the 14th and 15th Amendments. Arguing that plurality's interpretation of the equal protection of the right to vote secures to the politically powerless nothing more than "the right to cast meaningless ballots," Marshall insisted that a disproportionate impact of racial bloc voting on the electoral prospects of black candidates was made inevitable by Mobile's unitary district and that a showing of this should have been sufficient to invalidate the City's system. He accused the plurality of ignoring an earlier Court holding which ruled that multimember districting violates the Equal Protection Clause if it "in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population." (Dallas County v. Reese, 421 U.S. 477, at 480, 1975.) Marshall acknowledged that multimember districts are not impermissible *per se* but that they are notorious nevertheless for submerging minorities and overrepresenting majorities. "It is obvious that the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting." (Marshall's dissenting opinion, p. 3.)

III

Obviously, many controversial issues emerge in the case under discussion but I shall not attempt to address all of the important ones. Specifically, I will not join the jurisprudencial issue of which side, if any, enjoys an advantage in the light of previously decided cases. I shall be discussing the question whether a political system which secures to its citizens a right to be treated as equals in political affairs discharge its duty to them in the matter of voting by refusing to protect *any* political preference. By political preference I mean a preference about how political power should be distributed among the "various groups that compete for leadership in a democratically governed community". Examples of such preferences might be: the preference that all political power be exercised by property-holding adult males; or the preference that such power be the exclusive province of white, anglo-saxon protestants; or the preference that political power should be distributed to reflect the racial or language speaking composition of the voting population, and so on. Each of these preferences may be grounded in a political theory which gives (or tries to give) justification for them. By saying that the system refuses to protect any

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political preference I mean that it refuses to recognize any complaint about electoral outcomes, because on this view, no one has a *right* that his political preference become a social reality. No one has right that *any* electoral victory match his political preference.

Political preferences contrast with personal preferences.[3] Personal preferences are pair-wise choices between alternative states of affairs for the self. I will assume that each person prefers that his vote have a greater marginal impact in determining electoral victories than that of his fellow citizens. Now the construction I shall put on the Plurality's view is that a political system treats its citizens as equals when it secures legal protection to the personal preference of each about voting consistent with identical protection for all by seeing to it that no one is districted in such a way that the marginal impact of his vote is less than anyone elses. It is clearly impossible for any political system (let alone one committed to treating its citizens as equals), to protect the preference each has that the marginal impact of his vote exceed that of his fellows. Given the plurality's conception of the system's commitment to equality, the most protection he can expect for his personal preference about voting is the guarantee that the marginal impact of his vote will be at least as great as anyone else. Must a system committed to treating its citizens as equals in the matter of voting guarantee any more than this?

I want now to consider a forceful objection to this conception, to what it permits, together with a sketch on of a counter-conception. Many might object that in isolating the preference for marginal personal advantage in voting as the one it is appropriate to assume people have, the conception is excessively individualistic. It has become a commonplace for social theorists to complain that such an individualistic assumption is one of the most objectionable features of liberal political theory for it serves to artificially isolate people from each other by undermining the personal preference for relationships which relect the natural sympathy and fellow feeling people commonly have for one another. In the experience of most of us, this preference for bonding over isolation is enhanced by the fact that we have been socialized to be ashamed of thoughts that we are morally better than others and hence more deserving of a greater measure of life's good things. So why think that this individualistic assumption is the correct one? Doesn't this assumption guarantee a very thin recognition of the

[3] I shamelessly appropriate this terminology from Ronald Dworkin's "What is Equality? Part 1: Equality of Welfare" in *Philosophy and Public Affairs,* Vol. 10, No. 3, (Summer 1981), p. 197. He does not define these terms in the way that I do.

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right to be treated as an equal? In fact worse. By failing to forbid the indulgence of some political preferences, it permits the possibility that a political preference for having, say, whites only exercise political power will become a social reality if a majority has and votes this preference. Constitutional indifference to all political preferences constrained only by a thin theory of equality has the effect of treating the political preferences of some with contempt because such a theory secures to the politically powerless, the insular minorities, the right to cast mere "meaningless ballots". Equality in such theory is a fraud.

An adequate recognition of the right to be treated as an equal [the objection continues] would reflect the historically verified fact that people have certain vulnerabilities which are likely to be exploted unless legal protection prevents them from being totally fenced out of the political process. Certain social wrongs can be detected only if one's political theory directs him to attend to data about how *groups* are comparatively situated. Racial discrimination in political affairs, for example, is a wrong which it is all but impossible to detect unless attention is focused on data about group performance. Why a black individual has not done well in an electoral contest can be explained away nearly always without any mention of race but when no black individual has done well then all but the blind must suspect that racial discrimination is present. Now the right-minded individualist would treat such evidence as creating a rebuttable presumption that a social wrong exists. But devious recists may well bear their burden of defeating this presumption, as they seem to have done in *Bolden* where a wrong result was reached because a defective conception of what treatment as an equal was accepted.

To avoid such misfiers [the objection concludes], a group right to proportional representation would shield individual vulnerabilities most effectively. This theory's conception of equality would not accept as an argument a claim to black representation by an individual pressed on his own behalf but it would accept as an argument a claim to *proportional representation* on behalf of the black group. This would not eliminate the vulnerabilities of this minority but in would preclude their explotation in a way one would expect for an adequate conception of political equality.

IV

I want to conclude by doing two things. First, I want to say some things in defense of the individualistic conception of the equal protec-

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tion of the right to vote. Second, I want to raise some puzzles, not necessarily insoluable, for the defender of group rights.

In charging that the individualistic conception is fraudulent because it treats the political preferences of some citizens with contempt, the objector confuses a policy of indifference with one of contempt. By refusing to secure legal protection and enforcement to any political preference it does not make a judgment about the comparative worthiness of various political preferences. If a system secured legal protection to white supremist political preferences then it would thereby disrespect other political preferences because only complaints about dangers to white supremacy would be honored with legal action. Since the individualistic conception of equality is indifferent to all political preferences it can be contemptuous of none. If anyone enjoys a legally protected advantage of his political preference it must be those who share the "thin" individualistic conception of equality. There is an air of paradox about this. No matter which conception is secured legal protection, even a thin egalitarian conception, the result will be unequal advantage to those who favor it over those who do not. Does this give the disadvantaged grounds to complain and so to press for compensation? I don't think so, but I cannot argue it here.

Adherents to individualistic theories make rights the original moral property of persons, mortal centers of experience who can rationally deliberate about the relative merits of competing life plans, have memories, can be happy, etc. The moral ontology of the defender of group rights is more complicated. Just how complicated will depend upon the clarity of his criteria for individuating groups. The questions that arise on this score have already been mentioned above. There is also the question whether the defender of group rights can legitimately appropriate the theoretical work which was done over the past 250 years or so. Rights and individualism were born and grew together. Are they perhaps inseparable siamese twins, neither of whom can survive without the other? Some detractors have thought so and have argued for a double funeral.

Finally, in what ways will social life be morally better or more just by putting in a place a structure of rights which creates incentives to become more aware of and press for claims on the basis of properties which liberal theory has traditionally held to be morally irrelevant, viz., race, sex, and ethnicity?

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