

SYMPOSIUM

PANEL I: WHAT ARE CIVIL RIGHTS AND TO WHOM DO THEY BELONG?

INTRODUCTION: CIVIL RIGHTS POLITICS AS INTEREST-GROUP POLITICS

DANIEL B. RODRIGUEZ*

I am pleased to introduce this symposium panel on "What Are Civil Rights and to Whom Do They Belong?" Because some contributors to this symposium have suggested that the process of enacting civil rights statutes reflects little more than legislative business as usual,¹ I will focus my introduction on the proposition that civil rights politics, however public-regarding its ultimate objectives, is just another form of interest-group politics.

Whether one is troubled by this assertion depends ultimately upon one's normative conceptions of legislation and political choice. One who clings to a decidedly anti-pluralist or "civic republican" conception of legislative decisionmaking,² is likely to view equating the civil rights movement with, say, the National Association of Manufacturers, as cause for alarm. To civic republicans, civil rights is regarded as the province of a special, perhaps even "moral," political process. For them, the struggles of the 1950s and 1960s against Jim Crow and *de jure* segregation, and the subsequent struggle for public and private affirmative action, represent a sort of high politics, character-

* Acting Professor of Law, University of California, Berkeley.

1. See Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century*, 14 HARV. J.L. & PUB. POL'Y 137 (1991); Roback, *The Separation of Race and State*, 14 HARV. J.L. & PUB. POL'Y 58 (1991).

2. For elaborations of modern civic republican (or "neo-republican") conceptions of public law, see *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); and Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). Interesting critiques of neo-republicanism include Fallon, *What is Civic Republicanism and is it Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685 (1988); and Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988).

ized by reasoned debates over great issues of social justice.³

For those less sanguine about the potential of legislative politics to reject self-interested decisionmaking in favor of public-spirited dialogue, treating the civil rights community as one among several competing interest groups does no disservice to the movement. On the contrary, the emergence of civil rights advocates alongside the many other powerful interest groups in the American political process represents an achievement in itself. For those who conceive of political justice as procedural in part, success in accordance with the rules of the legislative game reflects real progress. In this light, considering civil rights politics as ordinary interest-group politics appeals to a familiar normative pluralist conception of political choice.⁴

Furthermore, examining civil rights politics through the lens of contemporary interest-group analysis⁵ raises a number of provocative intellectual questions. Most fundamentally, what explains the recent legislative successes of the civil rights movement? Interest-group analysis suggests that civil rights groups would not only face difficult political barriers but would also be unlikely to form as pressure groups in the first place.⁶ Civil rights are public goods. Accordingly, the civil rights community should face the debilitating collective action problems that Mancur Olson and others have described.⁷ What are the incentives for any subset of the large group benefitting from

3. See, e.g., W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 2-64 (1988). Professors Eskridge and Frickey contrast the Civil Rights Act of 1964, a statute they regard as neo-republican in its creation and orientation, with interest-group statutes such as the Smoot-Hawley Tariff of 1930. "Albeit imperfect in many ways, the Civil Rights Act was a great moment in our community, when public representatives and we ourselves discussed what kind of society we want and how to go about changing attitudes which were immoral." *Id.* at 65. Comprehensive descriptions of the legislative struggle over civil rights at the federal level include H. GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY* (1990); and C. WHALEN & B. WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

4. For a good general description of normative pluralist political theory, see Chapman, *Voluntary Association and the Theory of Pluralism*, 11 *NOMOS* 87 (1969).

5. See, e.g., R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); M. FIORINA, *CONGRESS—KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (2d ed. 1989); M. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981).

6. Starting from the premise that ethnic groups seek political advantage as a means to economic advantage, Professor Jennifer Roback has examined civil rights politics from the perspective of interest-group analysis. See Roback, *Racism as Rent Seeking*, 27 *ECON. INQUIRY* 661 (1989); see also Roback, *supra* note 1.

7. See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); see also R. HARDIN, *COLLECTIVE ACTION* (1982).

civil rights legislation to organize, and to invest resources in reaping these benefits?

Perhaps the answer to this question requires a recharacterization of the modern civil rights interest group. Although standard interest-group analysis tends to treat civil rights groups as ordinary rent-seeking entities,⁸ these groups may in fact organize principally for non-economic reasons. Maximizing its utility by securing desirable wealth transfers may represent a crucial component of the typical civil rights group's agenda, but may not reflect its *raison d'être*.

James Madison understood that some factions might arise for non-economic reasons. In *The Federalist Number 10*, he defined faction as "a number of citizens . . . who are united and actuated by some *common impulse of passion*, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."⁹ Ordinary interest groups are the sort of factions most feared; thus, Madison noted that "the most common and durable source of factions has been the various and unequal distribution of property."¹⁰ But economic groups do not exhaust the supply of powerful factions; more ideological factions may persist so long as individuals are united by such common impulses of passion.¹¹ After all, it is not merely the acquisition of material wealth or the structure of government that generates factions; instead, Madison notes that the causes of faction are "sown in the nature of man."¹²

Yet recharacterizing civil rights groups as ideological interest groups rather than economic interest groups blurs the pluralist theoretical picture. Are such groups organized around the "zeal for different opinions"¹³ like the standard, economically motivated interest group described by pluralists, or are they or-

8. See Roback, *supra* note 1.

9. THE FEDERALIST No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961) (emphasis added).

10. *Id.* at 79.

11. For a useful discussion of this type of faction, see D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 59-61 (1984).

12. THE FEDERALIST No. 10, *supra* note 9, at 79. In his extended essay on *The Federalist Number 10*, Professor David Epstein notes that the causes of faction are not completely individualistic or pre-political, but are socially constructed. In particular, they are shaped by the existing governmental arrangement in which the interested individual finds himself. Hence, "the causes of faction seem to be sown not simply in the nature of man but in a political arrangement. . . . Faction is partly the result of the benign government which it endangers." D. EPSTEIN, *supra* note 11, at 72.

13. THE FEDERALIST No. 10, *supra* note 9, at 79.

ganized more as a collective version of the public-regarding civic republicans celebrated by anti-pluralists?

Another question raised by the application of interest-group analysis to modern civil rights politics concerns the civil rights constituency's constitutional status as a protected class. One consequence of the growing success of the civil rights movement in the legislative arena might be an increased reluctance on the part of courts to intervene on behalf of such groups. Courts may come to ask whether civil rights advocates can have it both ways. Can they successfully pursue their legislative aims while maintaining that minorities remain "discrete and insular" in terms of modern equal protection doctrine?¹⁴

Professor Bruce Ackerman has suggested that the protection that *Carolene Products*-based strict scrutiny affords certain groups on the basis of their discreteness and insularity might be misplaced.¹⁵ In reality, notwithstanding the assumptions behind footnote four of *Carolene Products* and the "process-perfecting" constitutional theories spawned by these assumptions,¹⁶ so-called discrete and insular groups may be better situated to protect their interests in the normal political process than other minority groups. In other words, if interest-group pluralism is working as it should, then the rationale for special constitutional protection *on process-based grounds* is correspondingly weakened.¹⁷

Consider, in this light, a passage from the Supreme Court's recent decision in *City of Richmond v. J.A. Croson Co.*¹⁸ In passing on the City of Richmond's claim that reserving a certain per-

14. The "discrete and insular" phrase was originated in *United States v. Carolene Products*, 304 U.S. 144 (1938):

Nor need we enquire [now] whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152-53 n.4 (citations omitted).

15. See Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

16. The most notable explication of a "process-perfecting" theory is J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

17. Professors Farber and Frickey have argued that judicial protection of civil rights has seldom turned on "process-perfecting" rationales. See Farber & Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 78 CAL. L. REV. — (forthcoming 1991).

18. 488 U.S. 469 (1989) (striking down a city ordinance that required contractors awarded city contracts to subcontract at least 30 percent of the dollar amount of each contract to minority business enterprises).

centage of city contracts for minority subcontractors was necessary to protect minorities from majoritarian prejudice or indifference, the Court noted that "blacks comprise approximately 50% of the population of the city of Richmond [and that five of the nine seats on the City Council are held by blacks."¹⁹ From these observations, the Court concluded that "[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case."²⁰ Similarly, in his concurrence, Justice Scalia pointed out that Richmond had enacted a set-aside "clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group."²¹

To the *Croson* court, then, the political power of contemporary civil rights interest groups militated against special judicial protection. Such decisions may place civil rights advocates in a predicament. Must they now calculate at what point legislative advantage results in the surrender of judicial advantage? Is participation on fair terms in the legislative arena worth sacrificing salutary judicial protection, or is there real political value in being considered "discrete and insular"?²²

Another set of interesting questions raised by viewing civil rights politics as interest-group politics involves the interpretation of civil rights statutes. As difficult interpretive issues arise under these laws, courts must choose among different methods of statutory construction. Here again, many argue that civil rights warrant a special approach. Accordingly, certain legal scholars contend that however powerful notions of legislative supremacy and judicial restraint may be in construing "ordinary" statutes, civil rights laws require courts to employ creative and dynamic methods of construction to further the goals of racial justice expressed in those laws.²³

19. *Croson*, 488 U.S. at 495.

20. *Id.* at 496.

21. *Id.* at 524 (Scalia, J., concurring in judgment).

22. The premise of this question may over-simplify reality. Few believe that the contemporary legislative process is completely open and equal. Hence, current arguments between and among pluralists and their critics begin from the assumption that the American political process is imperfect. See R. DAHL, *DEMOCRACY AND ITS CRITICS* 176-92 (1989); C. LINDBLOM, *POLITICS AND MARKETS* 170-200 (1977); Dahl, *Pluralism Revisited*, 10 *COMP. POL.* 191 (1978).

23. See, e.g., R. DWORKIN, *A MATTER OF PRINCIPLE* 316-31 (1985); Eskridge, *Dynamic*

The Civil Rights Act of 1990²⁴ mirrors this attitude. Its sponsors have inserted a section that instructs courts and agencies that “[a]ll federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies.”²⁵ In the House and Senate Committee reports accompanying the bill, supporters stressed that this section would merely codify the well-established principle that civil rights statutes, like other remedial statutes, should be construed broadly.²⁶

The strength of such an injunction rests in large part on the traditional conception of the civil rights movement as a disadvantaged group. This conception does not imply merely that the class of individuals for whom the civil rights movement speaks is disadvantaged—this is hardly a controversial assertion—but that the movement itself is disadvantaged in comparison to other groups vying for political support. As civil rights interest groups wield more political power, however, the case for what amounts to affirmative action in statutory construction diminishes.

Whatever the direction of future civil rights legislation, integrating the civil rights movement and what might be called the modern civil rights interest group into our present understanding of how democratic politics works, warts and all, represents progress. There is nothing sinister or subversive about characterizing civil rights politics as interest-group politics. Civil rights politics can be simultaneously ordinary, as part of the normal processes of political change, and special, as part of an

Statutory Interpretation, 135 U. PA. L. REV. 1479 (1987). Both authors start with a skeptical attitude toward judicial reliance on statutory history and legislative intent. See, e.g., R. DWORKIN, *LAW'S EMPIRE* 313-17 (1986); Eskridge, *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989). Professor Daniel Farber reaches a similar conclusion concerning the proper scope of contemporary civil rights laws. Focusing in particular on the legality of affirmative action programs under Title VII, Farber argues that such programs are based on (relatively) discernable and constitutionally binding legislative intent. See Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989).

24. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

25. H.R. 4000, 101st Cong., 2d Sess. § 11 (1990); S. 2104, 101st Cong., 2d Sess. § 11, 136 CONG. REC. at S1020 (daily ed. Feb. 7, 1990).

26. See S. REP. NO. 315, 101st Cong., 2d Sess. 36-37, 57-58 (1990).

evolving national consensus on how best to protect the rights of all Americans and eradicate the profound harms associated with decades of discrimination and prejudice.