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Oops! Racism as Mistake: Lessons from Corporate Law

In *Minorities, Shareholder and Otherwise*,[1] Anupam Chander points out that the law treats discrimination by corporate insiders against minority shareholders with suspicion. Yet discrimination against ordinary minorities, in buying or selling a house or applying for a job, for example, receives increasingly lax treatment from color-blind courts uninterested in delving into the thickets of intent, history, and complex causation.[2]

For corporate law, "equal treatment can only be assured by taking minority status into account."[3] Indeed, solicitude toward minority interests "is an ordinary part of corporate life, mandated by law."[4] Outside of this sphere, however, discrimination against racial minorities has become increasingly difficult to redress.[5]

Why is "[o]ppression . . . [a] cause[] of action . . . not in civil rights law, but in corporate law"?[6] Chander argues that "the justifications for corporate law's active intercession on behalf of minorities also pertain to the constitutional realms of education and employment,"[7] and that the former field's concern for minorities should also extend to the latter. Because minority shareholders who suffer harsh treatment at the hands of a control group can

1. Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119 (2003).

2. *Id.* at 119-21.

3. *Id.* at 120.

4. *Id.* at 127.

5. Some of the reasons include heightened requirements of intent, causation, and scope of remedies. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1468-72 (2003).

6. Chander, *supra* note 1, at 123.

7. Chander, *supra* note 1, at 124.

call upon a host of remedies ranging from cumulative voting to appraisal and shareholder derivative suits, similar strategies should be available to minority individuals who suffer discrimination in employment, education, and other areas of life.[8]

This is all well and good. But by treating the two levels of protection (one for minority shareholders, the other for minority schoolchildren, workers, and consumers) as a simple inconsistency, Chander ignores powerful political and historical forces that give rise to the two levels and that will make equalizing them difficult. In treating the difference in law's treatment of the two groups as a mere oversight, he underestimates both what is at stake and the effort it will require to eradicate it.

Consider how African Americans were not "shareholders" in the United States from the very beginning.[9] Brought to this country in chains, forced to work under brutal conditions, and denied rights under the Constitution, they did not receive the right to vote or hold public office for over two centuries. When many Latinos entered the United States as a result of conquest or immigration, they, too, found themselves marginalized and subjected to Jim Crow laws, segregation, and even lynching.[10] And the treatment of Native Americans and Asian Americans was just as harsh, including massacres and removal from ancestral lands, alien land laws, foreign miners' taxes, internal passport requirements, and internment.[11]

Protection of minority interests in the corporate sphere may be necessary to encourage citizens to invest freely in stocks and bonds. But for much of our history, the United States plainly did not want minorities participating in most desirable markets. Instead, society systematically relegated them to inferior schools, neighborhoods, and jobs and, in the case of blacks, made it a crime for whites to intermarry with them.[12]

Another way of highlighting this difference is to notice what drives the changes in domestic racial minority groups' fortunes over time. An emerging materialist view holds that shifts come about not so much from evolving standards of decency but because the self-interest of powerful whites demands them. Derrick Bell and Mary Dudziak demonstrate that *Brown v. Board of Education*, the crown jewel of American civil rights jurisprudence, arrived in

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8. Moreover, protecting racial minorities from discrimination will benefit the national economy. *See* Chander, *supra* note 1, at 159, 170-71.

9. *See, e.g.*, JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 96-162 (2d ed. 2007).

10. *Id.* at 285-384; RICHARD DELGADO, JUAN F. PEREA & JEAN STEFANCIC, LATINOS AND THE LAW: CASES AND MATERIALS (2008).

11. PEREA ET AL., *supra* note 9, at 197-231, 397-462.

12. *See* Loving v. Virginia, 388 U.S. 1 (1967).

1954 when the United States needed a public-relations breakthrough to burnish its image in Cold War competition with the Soviet empire.[13] The highwater mark for Latinos, *Hernandez v. Texas*, may have come about for similar reasons, responding in particular to concern over the spread of communism in Latin America and among Mexican-American workers.[14]

How does a materialist analysis explain Chander's dichotomy? It is easy to see how protecting minority shareholder interests benefits the economy at large. What about legal protection for disempowered minorities in the rental housing market or the search for jobs? The situation here is much less clear—racial discrimination benefits the group able to get away with it by providing a ready source of cheap labor and a scapegoat to keep its own working-class counterparts in line.[15] Even if, as Chander writes, enabling minorities to gain access to mainstream institutions would benefit the economy as a whole, it would not necessarily benefit individual Euro-Americans, many of whom stand to gain when their black and Latino competitors fall by the wayside.

The power vectors in the two situations, then, point in opposite directions. The business community affirmatively wants small shareholders to participate in the market for securities. Society is more ambivalent, however, about what it wants racial minority group members to do. And most of the reasons for this disparity are material, having to do with self-interest and psychic gain, not lack of idealism or a moral conscience.

One sees much the same ebb and flow in literature and popular culture. Studies of stereotypes of the principal minorities show that in each era, their depiction in novels, movies, cartoons, children's stories, and other popular scripts shifts to reflect what the dominant group wants and needs—an excuse for repression, guilt assuagement, or a romantic form of nostalgia being the chief varieties — but is seldom flattering.[16] Yet in the corporate sphere, Horatio Alger stories and myths praise the talented youth who achieves success by hard work, a clever invention, or a wise investment.[17] The tales of corporate actors

13. Derrick Bell, Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

14. *See* Richard Delgado, *Rodrigo's Roundelay:* Hernandez v. Texas *and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23 (2006).

15. The leading spokesperson for this materialist view is Derrick Bell. *See, e.g.*, THE DERRICK BELL READER 25-54, 57-72, 371-77 (Richard Delgado & Jean Stefancic eds., 2005). *See also* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (Lawbook Exchange 2001) (1925).

16. *See* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1259-75 (1992).

17. *See, e.g.*, Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 879, 879 (2007) (book review).

are usually positive, glossing over the misdeeds some of them may have committed on the way to the top. Investment, leadership, invention, even ownership of a small business all carry positive associations in popular folklore. By contrast, ethnic studies, which teaches about the accomplishments of minority groups, enjoys little support and is under siege on many campuses.[18]

Indeed, many critical race theorists (including this one) hold that the law's treatment of investors and racial minorities is not inconsistent at all. Rather, our system routinely greases the wheels for the former and places roadblocks in the way of the latter for essentially the same reasons—majoritarian self-interest, the advancement of capitalism, and the search for profit.

Low scrutiny on behalf of racial minorities but a stricter variety for corporate transgressors, then, serves many of the same ends. The panoply of measures that we have put in place to punish corporate misbehavior shows, as Chander points out, that we could, if we chose, reduce the burden of racism and discrimination that racial minorities now bear. But it would not be profitable to wipe those scourges out entirely, hence we do so only halfheartedly, redressing only the most egregious examples and demonstrating real willpower only when national self-interest demands it.[19]

Differential treatment of the two forms of oppression, then, is entirely understandable. If we treat it as an accident or oversight in an otherwise smoothly functioning system, we will never understand its root, much less come to terms with it.

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18. On the wave of challenges besetting ethnic studies of departments, see, for example, Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275, 276-77 (1997).

19. *See* Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 106 (1990) (positing a Law of Racial Thermodynamics in which law serves as a type of homeostat assuring that our system contains just the right amount of racism: too much would be destabilizing; too little would forfeit valuable pecuniary and psychic profits). Ponder, for example, how readily society acquiesces in norms of racial fairness during wartime, when blacks, Latinos, women, and others are needed to fill slots in the military or factories. Consider, as well, the ready reception of minorities in the fields of entertainment and major league sports.