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Playing Favorites Favorite Case Symposium

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Playing Favorites

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Dear Editors:

You asked for my favorite judicial opinion. It's *City of Richmond v. J. A. Croson Co.*,[1] the "minority set-aside case."

Are you surprised? Perhaps you thought I would choose *Brown v. Board of Education*, *Metro Broadcasting*, *Gideon v. Wainwright*, *New York Times v. Sullivan*, or one of the other famous liberal breakthrough cases. Crits, though, are funny people. We have unusual criteria. Many of us hold law in less reverence than some. Hence, asking us what our favorite judicial opinion is is a little like asking us what is our favorite pothole. I recently argued that radical reformers ought to think of law much as we think of any other social institution—for example, the highway department—helpful at some times and for certain purposes, but less so at others. Thus to speak about the rule of law in exalted terms (as many do) is a little bit like speaking of the grandeur of highway procedure, one's favorite mixture of asphalt, or one's favorite pothole.

I named this approach legal instrumentalism.[2] If one looks at law and judging in this way, many of the usual criteria do not make sense. Aesthetic criteria, for example, practically drop out. It's satisfying, of course, to read opinions that are elegant, contain no misspellings, and have good transitions from one point to another. But seeing law in instrumental terms, as a means to an end, puts things in a new light. And what of reasoned elaboration or clarity of moral impulse? Again, good things to have going for you, but one quickly remembers the tight reasoning and moral sonorousness of Justice Taney's opinion in *Dred Scott v. Sandford*,

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1. 488 U.S. 469 (1989).

2. Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994).

or how neatly Herb Wechsler's famous article skewers *Brown v. Board of Education*. One lawyer's normative sonorousness (for a fee) can be made to match anybody else's normative sonorousness in the opposite direction: I can puff norm *X* just as piously as you can non-*X*. (I can even puff nihilism, the usual banner under which liberals try to put this normativity critique down. How's this: "Nihilism *really* means asserting banal, predictable homilies that end up being perfectly empty, circular, and self-referential when most of the cruelty that goes on in today's world is perpetuated by faceless bureaucracies that don't care a fig for you and me and are perfectly amoral and profit-oriented.")

You might think, given my embrace of legal instrumentalism, that I would applaud the new theory, legal pragmatism: A case is good if it produces good results. But things are not always that simple. The Crit is apt to think about all those cases that produced only a momentary advance, followed by resounding retreat. *Brown v. Board of Education* caused jubilation among civil rights activists. There were rejoicing, relief, anticipation of better days to come, followed, of course, by regression. The South mounted formidable resistance. Lower-court judges construed the case narrowly. Administrators dragged their feet. Fifteen years later, hardly more black schoolchildren attended integrated schools than did at the time the case was decided. *Brown* may even have made matters worse: Liberals relaxed, believing the battle won ("the Court has spoken") or moved on to other campaigns, such as saving the whales. In the meantime, conservatives redoubled their resistance, believing the Court had given away the store to undeserving minorities.[3]

Crits also have developed the notion of the contradiction-closing case. At various times, the gap between our national ideals (of brotherhood, equality, respect for persons, etc.) and current reality becomes so great that the court system hands down a decision that seems to close the gap, thus stabilizing everything. The right level of racism (for example) is not zero, but a certain medium level. More than that would invite disruption, too little would forfeit important psychic and pecuniary benefits for the empowered group. Law is like a homeostat, assuring that there is just the right amount of racism, classism, and sexism. Thus, even when a seemingly helpful decision is handed down, we Crits ask the systemic questions: How will this decision fit in? What will it mean in the long term?[4]

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3. Richard Delgado & Jean Stefancic, *The Social Construction of* Brown v. Board of Education*: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995).

4. *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993).

One thing[5] most Crits agree is desirable is that everyone—law students, professors, legal academics, judges—acquire a radical critique of how the legal system works. Not only is it fun to do, it's intellectually respectable; and for progressive practitioners it provides, I believe, a kind of psychic armoring against the inevitable disappointment when: conservative judges treat you rudely; cases that should win, lose; cases that should lose, win; clients lie to you; and the system changes the rules just when you thought you were starting to get somewhere. The goal of achieving a stone-cold sober understanding of how things work also helps you guard against judge-worship, opinion-worship, and getting overly comforted and seduced by nice noise.

My choice, then, is *Croson*, a messy, fragmented 1989 opinion that struck down a minority set-aside program requiring prime contractors to award a certain percentage of construction contracts to minority-owned businesses in a city that was heavily black but had a history of white domination in the construction industry. *Croson* is an exemplary opinion because it shows readers how power works, and also which way the country's winds are starting to blow. In reversing *Fullilove*[6] with little explanation on a very similar point, the Supreme Court foreshadowed what it would do in a host of later cases regarding minority redistricting, seniority plans, employment tests, highway construction contracts, and a host of other issues. It reintroduced tropes and moves we thought had passed into history—the innocent white victim, neutral principles, the requirements of intent and a direct link between victim and perpetrator. A radical departure in tone, reasoning, and result from Warren Court decisions, *Croson* serves as a bellwether for what we may expect in the future. It provides a quick glimpse of the iron fist in the velvet glove. It tells us (if we did not know already) that the heyday of civil rights is over.

Though law usually lags a little behind society, with *Brown v. Board of Education* the Supreme Court went out a little ahead of the time's social consensus. And with *Croson*, the Court entered the anti-affirmative action battle a little ahead of the conservative rush that was to come. As with *Brown*, it led, but in the opposite direction, foreshadowing by a few years *Adarand*, the California Civil Rights Initiative, the California Regents action, rulings challenging race-based scholarships, and bills currently in Congress cutting back or eliminating preferences based on race, even if they have a specifically remedial purpose. *Croson* not only served as an indication of things to come, it also enabled the Left to begin asking a more troubling question: Why are conservatives trying to eliminate affirmative action entirely, instead of merely cutting it back (as they have

5. Here comes my criterion!

6. Fullilove v. Klutznick, 448 U.S. 448 (1980).

been doing, for example, with women's procreative liberties)? Affirmative action provides steady and substantial benefits for the Right. It infuriates working-class whites, reliably delivering votes to the conservative cause. It lets them mobilize the troops, as well as beat up on liberals, who struggle to articulate a defense for it. It enables conservatives to appear more principled than liberals. Yet measures like the California initiative and cases like *Croson* and *Adarand* suggest that conservatives are now out to destroy the program completely.

Why kill the goose that lays the golden egg? One would think that a program that serves the conservative cause so well would be protected at all costs. Here's one possibility: on some level, conscious or unconscious, conservatives are trying to goad blacks until they react. How else explain cutbacks in welfare, the spate of recent books impugning black intelligence, the rise of Aryan supremacist groups, the demonization of the black family, rollbacks in campus scholarships and diversity programs, the assaults on the non-Western canon and on black voting rights? Sometime next century, the population in the United States will shift; there will be more black and brown people than whites. Logically, power ought then to shift from whites to nonwhites, a situation that conservative leaders must view with alarm. But perhaps blacks and other minorities can be prodded into an outbreak of civil unrest. They could then be met with overpowering force. But this time, unlike the Sixties, suppression will not be followed by beneficent but repressive legislation. Martial law will be made easier; new legislation will make police searches and stops easier to justify; even more jails will be built; white communities will be guarded by walls and watchtowers. The United States will sail into the next century a little like South Africa under the old regime, a minority of whites keeping control over a growing, but largely impotent, majority of blacks and latinos—essentially the high tech Indian reservation that Murray and Herrnstein describe in the final pages of *The Bell Curve*.[7] Provoking one's opponent, then slapping him down is one of the oldest strategies of bullies everywhere.

In putting us on notice that we need to ask this "Why now?" question, *Croson* is thus a sobering, exemplary opinion. But, as I mentioned, I have unusual criteria.

Sincerely,
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7. RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 526 (1994).