

A RESPONSE TO WILLIAM BRADFORD REYNOLDS: OF STORIES, SCHOLARSHIP AND REALITY

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Most articles published by law reviews are “scholarly.” The author attempts to alter thinking about an area of law by describing its development, unearthing the basic concepts, principles and policy issues, indicating the problems and proposing solutions. Sometimes legal writing is essentially advocacy, seeking to explain by reference to policy and precedent why one of the contending approaches to an area of law is superior to the others. Sometimes it is descriptive, setting forth the boundaries, guiding doctrine and conflicts of an area. Less frequently it is empirical, describing the underlying reality in an area of legal doctrine, and sometimes it is an interdisciplinary exploring of an area of law from the perspective of another scholarly discipline. It is quite common for legal research to combine one or more of these categories.

Mr. William Bradford Reynolds’ article, *The Supreme Court: A Bulwark in the Struggle for Civil Rights*,¹ does not fit into and does not use the basic approach of any of the categories described. It is not scholarly because it does not propose new methods of analysis, concepts, or approaches to the decisions. It is not advocacy because it does not make a serious effort to persuade neutral readers of the wisdom of its preferred approach. It is not descriptive because it does not make a serious effort to set out the basic issues, arguments, decisions or approaches of the area. It is not research because it does not investigate the underlying reality. Lastly, it is not interdisciplinary because it does not use the techniques of non-legal scholarship. Mr. Reynolds’ article can best be described as a “story”; it describes events, cases, and motives from the rise and fall of race conscious remedies from the point of view of someone totally opposed to them.

In the beginning his story is noncontroversial. He, like most current commentators, is contemptuous of *Plessy v. Ferguson*² which he notes was “invented . . . to insure that America would remain . . . racially stratified,”³ and he is lavish in his praise of *Brown v. Board of Education*⁴ which he refers to as one of “the Court’s finest hour[s].”⁵ He is equally enthusiastic in describing the impact of the *Brown* decision on American society.

Brown unleashed in this country all the pent-up emotions. . . . In the next ten years, we experienced dramatic, even breathtaking changes in our understanding of civil rights. . . . As America moved through the 1960s and into

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1. 12 NAT’L BLACK L.J. 89 (1991).

2. 163 U.S. 537 (1896).

3. Reynolds, *supra* note 7, at 89.

4. 347 U.S. 483 (1954).

5. Reynolds, *supra* at 90.

the 1970s, the physical and visible barriers . . . began, one-by-one to fall away. Water fountains, rest rooms, trolley cars, lunch counters, movie theaters, hotel rooms, department stores—and the list goes on—were opened and made accessible to Blacks and whites alike. It was an understandably heady and exhilarating experience for civil rights leaders and politicians who were able to point regularly and often to tangible accomplishments.⁶

The controversial aspect of his story concerns the Courts' efforts to remedy systemic violations of the law with race conscious programs and their reluctant acceptance of quotas and preferences under certain circumstances. This is an approach of which Mr. Reynolds strongly disapproves. "Having extracted itself from the insidious policy of 'separate but equal' with the *Brown* decision, the country sadly ushered in the 1980s drifting steadily toward the equally obnoxious policy of 'separate but proportional.' Separate school buses, separate employment lines, separate contract bid procedures, all were racially inspired. . . ."⁷ He states that the use of race conscious remedies has over time proved to be a counterproductive force that has "too often served to impede, and even defeat, the overarching objective of securing racially free access to educational and marketing opportunities."⁸ He blames its development on civil rights leaders who "[s]uddenly . . . found themselves without a daily, or even a weekly 'success story.'"⁹

Mr. Reynolds also has an explanation for the slowing of civil rights victories when issues of economic equality come to the fore. The problem lay in the inadequate education or qualification of Blacks who "could hardly have been expected to compete effectively with better educated whites for employment."¹⁰ However, he asserted that civil rights leaders, demonstrating their lack of statesmanship, failed to face this issue forthrightly. "What was regarded as necessary was a 'quick fix' without much thought for its long-term ramifications or implications. Therefore, America moved in the mid-1970s to the racial quota, forced busing, and the minority business set-aside."¹¹

The result of this thoughtlessly adopted program was, according to Mr. Reynolds' story, almost totally negative.

It seemed to matter little—if at all—that the dollars spent on racial transportation drained needed funds from quality education. . . . Nor did those on the racial-proportionality bandwagon heed clear warning signals that the quota remedy was operated more regularly as an employment ceiling than as a floor, allowing a token few Blacks into the workforce to meet statistical requirements but slamming the door on all others. The reality is that the overwhelming majority of American Blacks, including many who were well qualified, derived no benefit whatsoever from these racially inspired programs, cynically labeled "affirmative action." Even those chosen because of their skin color were denied the satisfaction of knowing that they made it on their ability and merit; too often they found themselves carrying the stigma of being "affirmative action" employees.¹²

There is, however, a happy ending to Mr. Reynolds' story. "Once again

6. *Id.* at 90.

7. *Id.* at 91.

8. *Id.*

9. *Id.* at 90.

10. *Id.* at 91.

11. *Id.*

12. *Id.*

the Supreme Court enters to provide the necessary mid-course correction."¹³ Much of Mr. Reynolds' article is taken up by a discussion of the cases that "opened the way to refocus the civil rights agenda on meaningful policies that emphasize education above all else and provide helpful programs to those untrained in the practicalities of the workforce."¹⁴ The decision that most pleases Mr. Reynolds is *City of Richmond v. Croson*.¹⁵ In this case the Court rejected Richmond's minority set aside program in language that cast doubt on the use of racial preference as a way of achieving equality.

Mr. Reynolds is also pleased with several other cases, none dealing directly with quotas but all favorable to defendants or the procedural claims of objecting white employees.¹⁶ Mr. Reynolds considers those decisions to somehow be the moral equivalent of *Brown v. Board of Education* in terms of affirming basic national principles regarding race.¹⁷

What is there to say about Mr. Reynolds' article? First, that it demonstrates the difference between scholarly writing and storytelling. To those familiar with the development of employment discrimination law, Mr. Reynolds' story conveys little except a sense of its own simplicity. It is difficult to comprehend how a person of Mr. Reynolds' experience can attempt to explain something as legally and morally complex as the use of quotas and race conscious remedies and the need of civil rights leaders for surface successes. It is simplistic to equate quotas, set asides and preferences and assume, as Mr. Reynolds apparently has, that each constitutes specially favorable treatment for women or minority employees in an attempt to achieve racial balance or address educational deficits. Mr. Reynolds shows no awareness of the fact that quotas and other race conscious remedies were developed as much to protect the interest of white male employees as they were to aid minorities and women.

Take the case of an employer that, in violation of the law, employed a policy whereby minority employees and women were denied promotion and choice work assignments. How was such an unlawful policy remedied? Placing the victims of discrimination in the position they would have been in but for the illegal conduct would require displacing white males currently occupying those positions. This is an alternative that the courts have rejected. Instead courts have chosen to award the victims money damages, and establish a quota or preferential promotional list for the future. The quota was a promise to the minority employees that their injury would be partly remedied sometime in the future.

Where the unlawful act involved a failure to hire, the situation became more complex because of the increased difficulty in identifying the actual victims. If a hiring quota was employed, the group of benefitted employees might

13. *Id.* at 102.

14. *Id.* at 108.

15. 488 U.S. 469 (1989).

16. Among his list of worthy opinions is *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), in which the Court cut back on the reach of § 1981, limiting its cases to "the making," not the "enforcement" of a contract. From this opinion he draws the principle that "[t]he lesson to be learned from *Patterson* is to pick statutes carefully. . . . For the Court . . . has shown that it will not stretch the law beyond its specific language to accommodate certain discrimination claims brought under the incorrect statute." Reynolds, *supra* note 1, at 107.

17. *Id.* at 102-107.

have included some who were not themselves unlawfully denied employment or discouraged from applying. (The identification of the latter group would be virtually impossible.) The use of a hiring quota nevertheless had the function of protecting the interests of employees who benefitted from the discriminatory policies. Their positions, seniority and benefits will be maintained, and most minority employees who are hired as part of the remedial scheme will be employed on a rotating basis when new positions become available.

In some cases an employer may voluntarily adopt such a race conscious program, but only where the employer has good reason to believe that it is vulnerable to a charge of discrimination. As the group discriminated against becomes more difficult to identify, the hiring quota becomes less individually remedial. But the hiring quota in every case must have a remedial justification, and in every case it will represent a compromise. The impact of past discrimination is not immediately or fully rectified and those who benefitted from discrimination are not displaced. Anyone who has followed the development of the law in this area should know that quotas were only adopted or permitted reluctantly by the courts, and only as they came to recognize the impossibility of fully rectifying the impact of discrimination.¹⁸

Mr. Reynolds' factual assumptions are no more compelling than his legal analysis. For example, the conclusion that quotas are used more often as a ceiling than a floor is not supported by citation or explanation. Its validity is far from self-evident. Why, for example, does Mr. Reynolds not cite a case or other authority supporting his proposition that quotas generally act as a ceiling, not a floor, in minority hiring? While it is probably true that the majority of Blacks derived no benefit from these programs, it does not follow that they were worthless, or improperly instituted, or that those who derived benefit from them were either selected on the wrong criteria or permanently stigmatized.

Unlike Mr. Reynolds, I do not believe that the Court's current jurisprudence on racial matters is either sensitive or sensible. It is as confused and divided as the country and the scholars who have dealt with the issue. Mr. Reynolds ignores or overlooks the significance of the *Brown* case in which the Court unanimously articulated a basic principle, one that reflected the common understanding of thoughtful and decent people: segregation is inherently unequal. This conclusion provided a firm standard for subsequent decisions.¹⁹

The current Court, by contrast, cannot find a guiding principle to shape its decisions or even a single approach favored by a majority. There are at the moment three different approaches. Justices Scalia, Rehnquist and Kennedy are "absolutists" who, like Mr. Reynolds, believe that quotas and race conscious remedies are unconstitutional. Justices Brennan, Blackmun and Marshall are "institutionalists" who believe that equality can best be achieved by changing institutions to reflect our country's diversity. Justices O'Connor, Stevens and White are "agonizers" who believe on one hand that color blindness is the basic Constitutional mandate, and on the other, feel it is important that the law be effective, which they recognize will sometimes require them to in-

18. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987) (upholding minority membership goal for a union); *Smith v. Harvey*, 831 F.2d 1068 (11th Cir. 1987) *aff'd*, 648 F. Supp. 1103 (M.D. Fla. 1986).

19. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

clude race or ethnicity in their analysis. In almost all cases the “agonizers” control the balance of votes, but are frequently divided; consequently, no clear guidelines have emerged. This trichotomy is clearest in *City of Richmond v. Croson*.²⁰

Finally, my strongest objection to Mr. Reynolds’ story lies not with his conclusions, but with his lack of empathy, evident in his storytelling, for the victims of discrimination. The story contains neither realization of the power of contrary positions nor understanding of the magnitude or complexity of the issues with which it deals. This is the type of story that is generally confined to adherents of a position, those who are likely to accept it uncritically and conclude that it affirms the rightness of their cause. However, it offers little hope for a dialogue with those of us whose values and perceptions are different. It therefore is most unlikely to persuade doubters, provoke thought among the confused, or help to develop solutions to the difficult problems of racial equality.

20. 488 U.S. 469 (1989). While the basic division is likely to exist for some time, any change in the Court’s makeup over the next few years is almost certain to shift the balance.