The Law is an Ass

Raymond Wolters, *Right Turn: William Bradford Reynolds, the Reagan Administration, and Black Civil Rights*, Transaction Publishers, 1996, $49.95, 499 pp.

The legal tar baby of "civil rights."

reviewed by Thomas Jackson

Blacks have been at the center of many of America's worst domestic crises: the War Between the States and Reconstruction, the race riots of the 1960s, school busing, and affirmative action. The fact of multi-racialism has been an unending challenge, and perhaps it is for this reason that laws governing race relations have been so complex and volatile. Over the last 40 years, as federal judges have expanded their powers to a point some would call judicial dictatorship, race-related laws and Supreme Court cases have multiplied in ways nothing short of fantastic.

In *Right Turn*, Professor Raymond Wolters of the University of Delaware describes how the Reagan administration tried to restore a semblance of fairness to "civil rights" laws, and he has produced one of the best and most even-handed histories not only of the laws themselves but of their social consequences. In a 1984 book called *The Burden of Brown* (reviewed in AR, July, 1993), Prof. Wolters wrote a compelling and utterly undeceived account of the price American schools paid for court-ordered racial integration. He has now expanded his horizons to include equally incisive treatments of voting rights and employment law. This book is written from the perspective of Ronald Reagan's influential Assistant Attorney General for Civil Rights William Bradford Reynolds, and is both a vindication of an administration that was showered with charges of racism, and a thorough grounding in some of the most important and controversial areas of American jurisprudence.

Voting Rights

Prof. Wolters writes thematically, and the first area he treats is voting rights. Although the Fifteenth Amendment, ratified in 1870, had given former slaves the vote, many southern states restricted the black vote by requiring literacy tests, disfranchising parents of illegitimate children, and insisting on "good character." Despite the notoriety of these practices, they cut black voter rolls by only about half: In 1960, 29.1 percent of voting-age blacks in the South were registered voters as opposed to 61.1 percent of the whites.

In 1965, President Lyndon Johnson ordered his staff to write the "goddamndest, toughest voting rights bill" they could, and Congress voted it into law the same year. It forbade all the discriminatory measures common in the South and, more controversially, put the electoral practices of most of the counties in nine southern states under direct federal supervision. In what was called "preclearance," these jurisdictions had to get permission from either the Department of Justice or the District Court of the District of Columbia before they could make the slightest change to their voting systems. Even small details, such as changing the office hours for voter registration or moving a polling place had to be vetted by federal bureaucrats for possible "racism." The feds also had the right to monitor polling and vote counting.

The Supreme Court's mania to turn equal access into equal outcomes made an unrecognizable hash out of "civil rights" laws.

The law designated the jurisdictions for preclearance with a formula that was not openly anti-southern but had that effect: It targeted all counties that had used literacy tests and where fewer than 50 percent of adults had voted in the 1964 presidential election. Interfering with state electoral procedures was clearly an assault on federalism, so although the ban on discriminatory voting practices was permanent, the preclearance requirement was to be renewed in five years. It has been renewed regularly and is still in effect. Most of the South must still crawl to Washington for permission to move a polling place.

The whole country, however, has been affected by Supreme Court decisions based on the act. Although the law was clearly only about guaranteeing access to the ballot, Chief Justice Earl Warren decided it should guarantee black office-holding, too. The Supreme Court's mania to turn equal access into equal outcomes made an unrecognizable hash out of virtually all "civil rights" laws, and in this case led to court decisions against at-large voting and in favor of wildly gerrymandered black-majority districts.

At-large voting means that a city, for example, is not broken up into geographic wards with a city councilman representing each ward, but requires all candidates to run "at large" and represent the whole city. If blacks are a minority concentrated in a certain part of town, a black candidate might be able to win in a ward system but lose in an at-large election. At-large systems may therefore have the effect of reducing the number of minority office-holders but most were not designed to do that. They are popular because ward-heeling can lead to divisive, pork-barrel politics whereas at-large candidates have to serve the whole city.

Professor Wolters describes the landmark cases that doomed at-large voting. The crucial court finding was that *intent* did not matter; if a balloting system had the *effect* of diluting black votes it was discrimination. In 1982, when it extended the preclearance measures of the Voting Rights Act, Congress itself

endorsed the effects test, setting the stage for exotic gerrymandering. Before long, voting districts ceased to have the slightest relationship to organic community boundaries and took on preposterous shapes to create majority-minority constituencies. It was only in the 1990s, after the Reagan administration was out of office but when its appointees had arrived on the Supreme Court, that the justices decided that race could not be the *predominant* factor in redistricting, but the principal of creating majority-minority districts is now firmly established.

Prof. Wolters notes in passing that such districts generally have to be 65 percent black to be considered safe for black candidates. There are three reasons for this. Blacks are younger than whites, so any given black population therefore has a larger proportion of people too young to vote. Blacks are less likely than whites to register, and even if they register, are less likely to vote. The rule of thumb is to add five percent over and above 50 percent for each of these characteristics.

Affirmative Action

The Civil Rights Act of 1964 quickly turned into an equal results law just like the Voting Rights Act. Prof. Wolters notes that this was in part due to the partisan maneuvering of the Equal Employment Opportunity Commission (EEOC), the Commission on Civil Rights, and the offices of civil rights that sprang up in all government departments. These bureaucracies were supposed to stamp out discrimination but from the very beginning were packed with activists who were prepared to discriminate against whites in order to get jobs for blacks. Never, writes Prof. Wolters, was an enforcement bureaucracy so openly subversive of the law it was supposed to enforce.

The Supreme Court was equally subversive. Although the law clearly forbade preferential hiring or what came to be known as "affirmative action," Supreme Court rulings quickly made them necessary. Prof. Wolters tells the story of the notorious *Griggs v. Duke Power* decision, which was handed down just seven years after the Civil Rights Act itself. At issue were the standards the Duke Power Company of North Carolina set for management trainees. Candidates had to be high school graduates and score above a certain level on an intelligence test. These requirements were established well before 1964, at a time when no blacks were admitted into the segregated program, and no one could argue they were a ruse to keep blacks out. What the plaintiffs did argue–and to the court's satisfaction–was that because fewer blacks than whites graduated from high school and fewer could pass the intelligence test, Duke Power's requirements had a discriminatory *effect* on blacks even without discriminatory *intent*.

This effect became known as "disparate impact," and any employer using job standards that had such an effect had to prove the standard was necessary for the job. The effect of *Griggs* was nothing less than to make it illegal for a company to set high standards. Outside of athletics, it is hard to think of any demanding standard that would not have a disparate impact on blacks. Companies that set anything more than minimal standards were therefore practicing discrimination.

Even when a company used tests of minimal standards it still ran into trouble with the EEOC. What were valid tests for welders or housing inspectors or typists? The bureaucrats insisted on an expensive "validation" procedure for each test, and forbade companies from using the same test at different job sites, arguing that conditions could be different at each site. This foolishness forced companies to abandon tests and hire by quota. Some companies, especially Japanese car manufacturers, simply moved their plants to rural areas where the number of non-whites was curiously small.

All equally qualified.

Prof. Wolters argues that the abandonment of many employment tests was a serious blow to the economy. Hiring poorly qualified blacks was the least of the problem; employers couldn't screen whites effectively either. In the 1980s, desperate personnel managers tried to get official permission at least to use one of the government's own job tests, the General Aptitude Test Battery (GATB), which was a Labor Department test used to screen applicants for many kinds of jobs. In 1986 the Reagan administration asked the National Academy of Sciences to validate the test, which it did. However, like all good tests, it had a disparate impact, so the department adopted a Solomonic solution called within-group scoring or "race norming." Rather than get a raw score, an applicant got a percentile score calculated *only within his own race*. Thus, a black who was at the 75th percentile *for blacks* got the same score as a white in 75th percentile *for whites*, even though the black's raw score was considerably lower. The Labor Department didn't tell companies about race norming; it just reported the percentile score.

Race norming was actually the least bad solution to a terrible problem. So long as an employer stuck to the GATB he would not only fill his race quotas, but get the *best* whites and the *best* blacks. Race norming gave employers effective job tests without disparate impact, but it came to a stop when the public found out about it and raised a stink. Without race norming the GATB once again had a disparate impact and had to be junked. Judges and congressmen wanted preferences and de facto quotas but they didn't have the stomach to have things done rationally and in the open.

Eventually, the Supreme Court stripped any remaining fig leaf of respectability from employment law and, in the 1987 case of *Johnson v. Transportation Agency* ruled that it was alright to discriminate against white men simply to increase hiring from an "underrepresented" class, in this case women. There need not have been any prior alleged discrimination to correct; just getting more minorities and women into jobs was reason enough to stiff white men in ways that would have made blacks riot.

The Reagan administration tried mightily to stop the stiffing, and Prof. Wolters describes the administration's attack on some of the more egregious practices. Many employers, for example, had agreed on the basis of a court order–or just negotiation with angry blacks–that they would hire and promote one black for every white. Others ignored seniority clauses in union agreements and fired experienced whites rather than green blacks when budgets had to be tightened.

William Bradford Reynolds had a clear view of preferential policies. He

thought an employer could discriminate against whites only if it had discriminated against non-whites in the past, and he believed remedies should be "strictly tailored" to correct specific wrongs. He was especially opposed to preference programs that traded away the rights of white men who could not possibly be, themselves, guilty of discrimination. He saw people as individuals, not as fungible parts of a racial whole. As he put it, "a person suffering from appendicitis is not relieved of his pain by an appendectomy performed on the patient in the next room, even if the latter is a member of the same race."

Mr. Bradford's legal approach to this problem was to point out that if a court ordered a fire department, for example, to discriminate against whites this violated the rights of whites who were turned away because of the discrimination. He argued that no contract or court order should punish people who had had no representation in the negotiations or court case that brought that contract or court order into existence. Prof. Wolters describes in detail the sequence of cases Mr. Reynolds brought to the Supreme Court in an ultimately successful campaign to make the court understand this.

Prof. Wolters notes that in the long run racial preferences have been a bait and switch game. Activists justify them with the horrific statistics floating up out of the black ghettos, but almost all the beneficiaries are middle-class blacks who left the ghetto a generation ago. Not even the most coercive preferences can get prisoners, drug addicts, gangsters or welfare bums into jobs, but they help above-average blacks sail into Harvard and into high-profile "human resources" jobs. Prof. Wolters quotes Thomas Sowell: "What the masses of blacks get from affirmative action is mainly the resentment of the rest of society."

As the century comes to a close, some of the most abominable affirmative action court decisions have been reversed, but there are no clear principles that establish how far racial preferences can go. As Prof. Wolters points out, the Supreme Court has repeatedly ruled on specific aspects of individual cases without establishing these principles, and it has frequently reversed itself. The recent tendency, however, has been increasing skepticism of anything short of color-blindness.

In fact, black activists are so afraid of a possible definitive anti-preferences ruling that in late 1997 they paid off a white reverse-discrimination plaintiff rather than see her case go to the Supreme Court for a possible death blow to affirmative action. Jesse Jackson helped raise more than $400,000 to "satisfy" Sharon Taxman, a Piscataway, New Jersey, school teacher who was laid off from her job while an equally-qualified black teacher was kept on. If the two teachers had been the same race someone would have flipped a coin, but Miss Taxman got the ax because she was white. This sort of affirmative action is the mildest (and rarest) kind, but black activists were afraid even this could not survive the current Supreme Court.

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Without a definitive ruling, we have a refreshing but no doubt brief resurgence of local variation. Voter initiatives have abolished state-government preferences in California and Washington, and some courts have awarded substantial damages to white plaintiffs. In other areas blatant preferences are still the rule. Congress and state legislatures have, as usual, funked the issue, so America is still waiting for an oracular pronouncement from the high priests of the law.

School Desegregation

The last area of "civil rights" law Prof. Wolters analyzes is school desegregation. Once again, activists pushed a racial agenda well beyond the bounds of either law or decency, and Mr. Reynolds did his best to push things back.

This sorry story begins with the infamous *Brown v. Board of Education* ruling that even the *New York Times* recognized was not a legal decision but social engineering. Its headline for May 18, 1954 was: "A Sociological Decision: Court Founded Its Segregation Ruling On Hearts and Minds Rather Than Laws." Needless to say, the justices are supposed to let the law, not their hearts, be their guide, but liberal opinion was overwhelmingly in favor of even extra-legal methods to end segregation. The proper thing would have been for Congress to pass legislation to desegregate schools (though even this would never have passed muster under any reasonable interpretation of the powers delegated to the federal government under the Constitution).

Zealots only cheered the court's exercise of raw power. Prof. Wolters cites Jennifer Hochschild of Princeton, who thought most whites were too benighted to comprehend the joys of integration and thought "democracy" should "give way to liberalism." Wise people like her would make rules for the masses, and she even urged that whites not be allowed to patronize private schools if this meant escaping integration. James Liebman of Columbia University Law School thought forced integration of school children was the best way to touch "the malignant hearts and minds of racist white citizens."

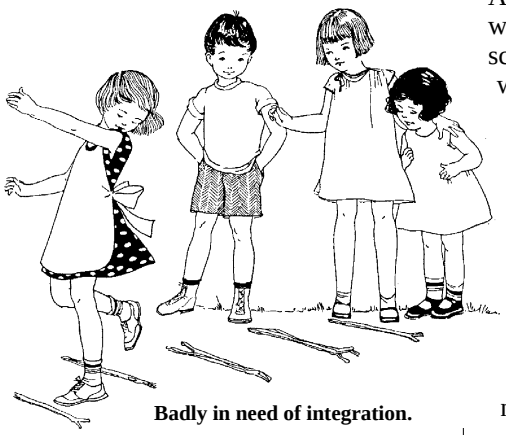
But the initial consequences of *Brown* were not up to the expectations of the zealots. Desegregation meant only that children could not be kept *out* of schools because of race; it did not mean they had to be forced *into* schools because of race. And thus it was that New Kent County, a rural Virginia county with only two schools, did what many other school districts did. It let whites attend the formerly all-black, segregated school if they wanted, and let blacks attend the formerly all-white school if *they* wanted. A handful of blacks decided to go to the white school and no whites went to the black school. No one was denied access to anything because of race, and desegregation was achieved.

This, said Paul Gewirtz of Yale Law School, was no good. He said the blacks and whites of New Kent County didn't rush into each others' arms because they were not really free to choose. They were prisoners of generations of "racism," and could be freed only if the government pushed them together. In 1968, the Supreme Court decided to provide just that helping hand. The people of New Kent County had to mix, like it or not. Prof. Wolters notes that Martin Luther King, Jr. was assassinated the day after the oral arguments in the New Kent case, and that the justices were deliberating during some of the worst riots in American history. Perhaps once again they consulted their hearts rather than the law, but that was the beginning of busing.

At first, people thought this dread remedy was only for southern schools that had practiced legal segregation, but

the court was feeling its oats and soon buses were rumbling all across the country. It made no difference that neighborhood schools were segregated mainly because blacks and whites (and Hispanics) lived in different neighborhoods; the Supreme Court said children would bloody well study together.

Prof. Wolters recounts the many court cases and the tortured interpretations of the law that produced this foolishness, and does not hesitate to describe the costs. First of all, busing was expensive. Second, PTA participation dropped like a stone when parents had to drive across town to a meeting. But most important, whites hated it. They couldn't vote it down with the ballot so they voted with their feet. Between 1968 and 1976–in just eight years–no fewer than *78 percent* of the white students left the Atlanta school system. Prof. Wolters writes that a good rule of thumb was to expect that ten years of busing would drive half the white students out of any public school.



Badly in need of integration.

As whites left, standards dropped, and "progressive" teachers circled like vultures. They got rid of ability grouping, which was just another form of segregation. They fell upon "multiculturalism" with shouts of joy. They pushed "sensitivity" rather than academic rigor, and in some cases went more or less certifiably insane. It was a matter of faith that if white teachers were disciplining black students it was because of cultural insensitivity, and one school administrator explained in courtroom testimony in New Castle, Delaware, that "when one group expresses its frustrations by fighting and another group does not, it's unfair to make a rule that disciplines only the fighters." In a Yonkers, New York, court case, on the other hand, there was testimony that teacher-saboteurs were deliberately letting blacks run wild and terrorize whites so as to foment "resistance to desegregation." All sorts of nuttiness was let loose upon the land.

Prof. Wolters notes that Mr. Reynold's answer to busing was magnet schools. He was not prepared to let children go back to neighborhood schools, since that would lead to resegregation, and during the Reagan years the number of magnet schools increased four fold to more than 5,000.

The idea of magnets was to build schools in black neighborhoods that were so whiz bang they would tempt white children in from the suburbs. Aside from the question of whether it was moral or legal to starve some schools and fatten others just to bribe whites to go to school with blacks, white students refused to behave like iron filings. Once they left the cities they didn't usually go back.

However, school administrators soon discovered they could ask for all sorts of snazzy improvements in the holy name of integration. As Prof. Wolters writes, "the ingenuity of school officials bordered on venality," as bureaucrats added gleaming new magnet schools to their empires.

The ultimate test and most humiliating failure of magnets was the well-known case of Kansas City, Missouri. Beginning in 1985, federal judge Russel Clark ordered the city to keep spending money on gold-plated schools until whites came back and black performance improved. What particularly galled the city was that Judge Clark unilaterally raised property and local income taxes to pay for improvements voters would never have approved. Over the years, Judge Clark poured more than *one billion* dollars into "desegregation," building brand new schools and equipping them with such things as a planetarium, greenhouses, a temperature-controlled art gallery, a Russian fencing master, and athletic facilities that looked like Olympic villages. One high school even ended up with a model UN General Assembly, complete with wiring for simultaneous interpretation in seven languages. School bureaucrats gloried in their new palaces of learning. But even these astonishing schools at best only slowed the flow of whites to the suburbs; they certainly did not reverse it, and the racial gap in academic achievement remained as great as ever.

Finally in 1995, Judge Clark's dictatorship came to an end, when the Supreme Court, over the objections of the Clinton administration, ruled that he had overstepped his power in ordering tax increases, and that the racial performance gap was no excuse for more "integration" spending. (Dissenting justice Ruth Bader Ginsberg was the only one who thought everything Judge Clark had done was just fine.)

Prof. Wolters concludes that there will probably be no more new cases of forced busing. The justices have finally realized that school segregation results from residential segregation, not wicked white teachers, and that it is crazy to punish schools for something not their fault. Many blacks are also disillusioned with busing. However, Prof. Wolters warns there are still many busing programs run by entrenched fanatics and that they are likely to go on for years. There have been a few well-publicized cases of cities giving up on busing, but this does not revive the schools that busing killed.

Right Turn contains a fascinating appendix about something else that caused a fuss during the Reagan administration: the Bob Jones University case. This case was so widely misreported and misunderstood at the time that it is worth reviewing. Bob Jones University of Greenville, South Carolina, had enjoyed tax-exempt status as an educational institution since its founding in 1927. It taught that God wants the races to be separate, and refused admission to non-whites. In 1970 it lost its tax-exemption when the IRS decided that racial discrimination disqualified an institution for 501 (c) (3) status.

Bob Jones therefore began admitting non-whites in 1971 but forbade interracial dating. In 1977 the IRS sued Bob Jones for $489,679 in back taxes. The university convinced a federal district court that its racial policies were based on "genuine religious beliefs," but an appeals court found for the IRS. Bob Jones appealed, and in 1981 the Supreme Court agreed to hear the case.

Mr. Reynolds did not approve of racial discrimination but he thought the IRS had acted improperly in 1970 when it decided discrimination was grounds for lifting tax exemptions. He pointed out that *Brown* applied only to public schools, and that when Congress passed section 501 (c) (3) of the tax code it said nothing about prohibiting segregation.

The IRS was right when it said "public policy" did not now countenance segregation, but Mr. Reynolds pointed out that plenty of tax-exempt institutions went against "public policy:" single-sex colleges, for example, and churches that opposed nuclear weapons. He argued that Congress had the right to revise the tax code against discriminators if it wanted to, but that the IRS's job was to enforce the code as written. Congress had denied tax exemptions to social clubs that discriminated, so if it wanted to do the same with schools, it clearly knew how. Mr. Reynolds therefore persuaded the Reagan administration to support Bob Jones before the Supreme Court.

It is not hard to imagine the shrieking that resulted. Hardly anyone understood that the issue was not discrimination but whether the IRS had quasi-legislative powers. For liberals, the case was smoking-gun proof of the administration's naked racism. It only made things worse when the Supreme Court ruled against Bob Jones, eight-to-one. Mr. Reynolds later acknowledged he had been naïve to think the press would report the case accurately rather than bellow about racism.

Wasted Effort

The reader arrives at the end of this long, carefully-researched book with a sense of dismay at the tremendous amount of legal huffing and puffing as well as the terrible damage to society that has come from abandoning one ancient principle and one simple truth. The ancient principle is that of freedom of association. As a matter of long tradition, except for a few exceptional matters like age of consent or age of majority, government has not poked its nose into private contracts. Free men can hire, fire, patronize, or do business with whomever they want–for good reasons, bad reasons, or no reason at all. They need answer to no one. This freedom had long been violated in certain parts of the South, where racial *separation* was required by law, but the Civil Rights Act of 1964 stripped the entire country of its freedom. What began as an obligation not to discriminate against blacks became an obligation to discriminate against whites. The power to vet private contracts for "discrimination"–against more protected classes all the time–is immense, unprecedented power. 1964 marks one of the great defeats in the unending war to protect our freedoms.

At the same time, the simple truth on which we have turned our backs is that the races are not equal in ability. Some of the harm in giving up freedom of association would have been mitigated if the country had understood from the outset that blacks and whites do not perform at the same level. Widespread insistence that differences in achievement are caused by "racism" rather than differences in ability has led to recrimination, injustice, and incalculable social and economic damage.

The mere fact of multi-racialism causes friction. Neither Japan nor Iceland have ever had to subvert society or the law in the ways Prof. Wolters describes, and if their leaders are wise they will never have to. But to combine multiracialism with the abandonment of rights and blindness to the obvious is to mix a poisonous brew that could some day prove fatal. Ω

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reviewed by Jared Taylor

There is a tremendous amount of information collected about the people living in the United States. Every ten years, the Census Bureau makes a detailed survey, and in between there are many government estimates and private surveys. Much of this information is available on the Internet, but by packing it onto a single compact disk, *CensusCD+Maps* makes it much easier to find and use.

This CD includes hundreds of different information categories, from estimated annual family expenditure on shoes to average number of vehicles per household to number of Yiddish or Laotian speakers in an area. These information categories are in turn available by different geographic areas like state, county, city, zip code, Congressional district, and even Indian Reservation. Not *all* of the information is available in *every* geographical location. For example, crime figures are tabulated only at the county level, so you cannot get finer detail, nor can you get estimates of shoe (or alcohol) purchases on Indian reservations, but most of the information can be sorted according to the most obviously useful categories. The smallest area that can be examined is the census tract, which usually has about 1,100 people or 400 families in it.

For how much longer?

Two features of *CensusCD+Maps* that make it much more useful than Internet or printed data are that it lets you make calculations with the data and draw maps. For example, it is easy to find racial population data for states, counties, or census tracts, but this information is usually given in raw numbers. If you want to know the *percentages* of particular races you have to divide by the total population. *CensusCD+Maps* lets you write formulae to compute percentages and compare different areas.

For example, by entering a formula for Fairfax County, Virginia, where AR is located, we find that the population is 7.74 percent black. We can also have *CensusCD+Maps* draw a map of the 191 separate census tracts in the county and use different colors to indicate different densities of black population. One tract leaps off the page: Census Tract 4222 has an unusually large population of 6,267, and 96.3 percent of its residents are black. Not one of them is in poverty, yet only six are employed, three in "health services" and three in "educational services." Ninety-four percent are