CIVIL RIGHTS UNDER REAGAN

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CHAPTER ONE

Introduction

The liberal world has come apart at the seams. The struggle for racial justice, which seemed to be going tolerably well, is at an impasse. There's no reliable way of telling who stands where anymore. Old standards no longer apply; old labels no longer fit. Friends, who once confidently shared a way of seeing the world and reacting to its problems, find themselves at odds—sometimes at bitter odds—over the question of affirmative action.

—John C. Livingston,

*Fair Game? Inequality and Affirmative Action*

This passage first appeared in the introduction to a work published in 1979, and since then the divisive controversy to which it alludes has only intensified. In the following year, 1980, the American presidency was captured by a man whose administration would be staffed in part by policy makers resolutely opposed to affirmative action, as well as to the more general trend toward an increasingly race-conscious, group-oriented jurisprudence, of which affirmative action is a product. This event was virtually without precedent. Previously, even as the theoretical debate over affirmative action was waged in the universities, in the journals of opinion, on the op-ed pages of leading newspapers, and in a few celebrated Supreme Court cases, executive administrations from Nixon's through Carter's uniformly supported the concept and, especially in the case of the Carter administration, expanded and extended its practical impact on the life of the nation.

There was ample reason to suspect that this trend would be reversed under the Reagan administration. One of the preeminent
themes of Reagan's election campaign was encapsulated in the candidate's promise to "get the federal government off the backs of the American people." Reagan spoke to what he believed was a growing sentiment among the electorate that government—especially the federal government in Washington—had become so large, unwieldy, and intrusive that its effect was often to undermine both economic efficiency and personal liberty. Although the precise reasons for Reagan's electoral victory remain obscure in the minds of many political analysts, it is at least plausible to suggest that Reagan's repeated denunciations of "big government" struck a responsive chord among the voters.

To make good his promise to reduce the influence of the federal government in the domestic affairs of the nation, the new president was obliged to alter the scope and direction of many long-standing policies, programs, and procedures. Among obvious targets for reform were tax rates, which, as increased (in effect) by inflation, arguably were hindering economic growth. Another target was the complex regime of federal regulations aimed at minimizing environmental degradation, protecting consumers, and promoting health and safety in the workplace. Still another logical area for reform was federal civil rights policy, particularly its two most controversial features, affirmative action and busing to achieve "racial balance" in the public schools.

Indeed, to characterize affirmative action and school busing as "controversial" fails to capture the magnitude of public opposition to these policies. When the Gallup organization surveyed public opinion on affirmative action in 1977, for example, it found that only 11 percent of its sample agreed with the proposition that "to make up for past discrimination, women and members of minority groups should be given preferential treatment in getting jobs and places in college."1 At the same time, 81 percent agreed with the alternative position that "ability, as determined by test scores, should be the main consideration" for employment or college admission.2 These findings have been supported by subsequent surveys,3 including one conducted in 1985, which disclosed that 77 percent of black Americans rejected the notion that race should be a major criterion.4 As for busing, a 1973 Gallup poll revealed that although a large majority of Americans favored integration of
public schools, only 5 percent (9 percent of blacks and 4 percent of whites) favored busing as a means of achieving integration.5

Given the overwhelming unpopularity of affirmative action and compulsory busing, their continued presence in public law and public policy would seem (at least from the standpoint of political conservatives who supported the Reagan candidacy) to epitomize the worst features of officious, unresponsive “big government,” here seen as attacking such venerated institutions as the merit principle and the neighborhood school. Surely if the Reagan administration were to honor its apparent mandate, it would strive to eliminate such policies. Yet after eight years it was evident that this was easier said than done. A variety of factors constrained the administration’s efforts, and it is clear that no sweeping changes occurred during Reagan’s two terms in office. Affirmative action is still widely practiced by professional schools and employers, both public and private, throughout the nation. Large numbers of schoolchildren are still bused out of their neighborhoods to achieve “racial balance” at some distant school.

Bureaucratic inertia may be partially to blame, but it surely is not decisive in explaining the general failure to make any substantial reformulation of civil rights policy during the Reagan presidency. Key administration officials repeatedly voiced opposition to race- and gender-conscious, group-oriented civil rights policies. Of these, perhaps none was more outspoken than William Bradford Reynolds. As assistant attorney general for civil rights in the Department of Justice, Reynolds was probably better situated than any member of the administration other than the president himself to effect change in the scope and direction of civil rights policy. In a candid interview given in the summer of 1984, he outlined his agenda while acknowledging his failure to implement it:

I think we should bring the behavior of the government on all levels into line with the idea of according equal opportunity for all individuals without regard to race, color, or ethnic background. In my view this means that we should remove whatever kinds of race- or gender-conscious remedies and techniques that exist in the regulatory framework, to ensure that the remedies that are put in place are sensitive to the non-discrimination mandate that is in the laws. We’ve got a ways to go before we get there.6
In terms of constitutional principle, Reynolds's position was a corollary of Justice John Harlan's famous dissent in the 1896 case of *Plessy v. Ferguson*:

Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or his color.7

The administration would thus appear to have had in Reynolds a policy maker with a principled agenda for reformulating civil rights policy. Reynolds had been placed in charge of a division of the Justice Department that has been described as "the Civil Rights backbone of the federal government, [whose] activities and policies set the pace not only for other federal departments, but also for state, local, and private agencies."8 Yet, as noted above, and as conceded by Reynolds himself, the administration was unable substantially to redirect civil rights policy toward its original goal of ensuring equal opportunity to each individual without regard to race, ethnicity, or sex.

The question that this book addresses is Why? Why was a reform-minded administration, backed by overwhelming majorities, unable to modify substantially or eliminate unpopular civil rights policies? More precisely, we want to ask, What factors impeded the administration's efforts? Two basic strategies seem available for attacking this question. One utilizes a kind of "micro" approach, emphasizing the salience of institutional and procedural impediments to policy reform. Here we would stress the significance of the internal structure and organization of the various administrative agencies responsible for implementing civil rights policy, their respective legislative mandates, their relative autonomy, their responsiveness to various interest groups, and other similar factors. Undoubtedly such an approach would have considerable utility when applied to the realm of civil rights policy making. Within the executive branch, four discrete agencies share responsibility for implementing and enforcing civil rights policy pursuant to a series of legislative enactments beginning with the Civil Rights Act of 1964. These agencies are the Civil Rights Division of the Department of Justice, the Office of Federal Contract Compliance Programs (OFCCP), which is a subunit of the Department of Labor, the Office for Civil Rights (OCR) in the Department

Considerable evidence suggests that the Reagan administration's failure to alter civil rights policy substantially was due in part to an inconsistency of purpose among these agencies and their staffs. In September 1985 John Bunzel called attention to "a number of confusions and divisions that have existed within the administration for the past five years." Bunzel contended that

[a] wide gap has existed between rhetoric and action—specifically with respect to what policies to pursue in light of Mr. Reagan's frequently expressed view that race, sex and color are inappropriate tests of an individual's worth and his belief in the colorblind concept of non-discrimination. It is as if there were a certain schizophrenia running through the administration's whole posture.\textsuperscript{10}

At least some of that apparent schizophrenia can be attributed to the differing and occasionally conflicting policy agendas of the Justice Department's Civil Rights Division and the Equal Employment Opportunity Commission. The agencies disagreed, for example, over the issue of numerical goals and timetables for the hiring and promotion of minority and female workers. Thus, when the Justice Department submitted its own internal affirmative action plan to the EEOC as required by law, the EEOC rejected the plan because it did not include numerical goals and timetables.\textsuperscript{11} On another occasion the two agencies clashed over a court case. The Justice Department, supported by the White House, sought to prevent the imposition of a promotion quota for black officers in the New Orleans police department through a consent decree that had been approved by a panel of the U.S. Court of Appeals for the Fifth Circuit. The Justice Department, as intervenor, asked the court to delete the quota from the consent decree, even as the EEOC was filing its own brief urging the court to maintain the quota. Ultimately the White House prevailed upon the EEOC to withdraw its brief,\textsuperscript{12} but the incident nevertheless served to highlight the disunity that evidently existed within the administration with respect to basic civil rights policy issues.

This lack of agreement is in marked contrast to the experience of previous administrations. According to Drew Days, assistant
attorney general for civil rights during the Carter administration, there had always been under Carter "a unanimity of views on the means to achieve affirmative action. There's a drastic difference now... It appears to be an all-out war." Eleanor Holmes Norton, who chaired the EEOC during the Carter administration, agreed:

The EEOC was usually able to get the changes it wanted. There was no fundamental difference between the EEOC and the Justice Department. Even in previous administrations—with the Nixon or Ford administration—there's no precedent for that.

As the Reagan administration entered its second term in 1985, there was little evidence that its internal confusion over the proper direction of civil rights policy had abated. Earlier the president had nominated Edwin Meese to become attorney general, but now he nominated William Brock to become secretary of labor, who would prove to be Meese's nemesis on civil rights issues. By all accounts Meese was a leading advocate of civil rights policy reform within the administration during the first term. By September 1985 he was presiding over the development of new rules for enforcing the Voting Rights Act that would shift the burden of proof in voting rights disputes from government officials to those alleging illegal voting discrimination, and that would permit changes in local election procedures and in legislative redistricting under some circumstances even if such changes resulted in a "dilution" of minority voting strength. Moreover, Meese had taken to speaking out publicly against the use of racial preferences in employment and school admissions, telling one audience that

[it]he idea that you can use discrimination in the form of racially preferential quotas, goals and set-asides to remedy the lingering social effects of past discrimination makes no sense in principle; in practice, it is nothing short of a legal, moral, and constitutional tragedy.

In spite of this forceful statement, the administration continued to send conflicting signals about its civil rights objectives. The new labor secretary, William Brock, as if to distinguish himself from Meese and Reynolds, told delegates to the NAACP's annual convention in the summer of 1985 that the administration supported the use
of numerical goals “set in different ways to respond to different situations.” As Bunzel later commented, Secretary Brock, far from clarifying administration policy, “merely confirmed that cabinet members march to the beat of different drummers.”

Inconsistency of purpose within the administration was not confined to the executive’s three major players. In addition to the Justice Department, the EEOC, and the Labor Department, civil rights enforcement is also carried out by the Department of Education’s Office for Civil Rights. This agency, which has responsibility primarily for enforcing Title IX of the Education Amendments to the Civil Rights Act, was portrayed by Jeremy Rabkin in 1978 as staffed to a considerable extent by doctrinaire zealots who were given to pursuing their antidiscrimination mandate in aggressively innovative ways. One might have expected this posture to change during Reagan’s tenure, but by May 1985 there was evidence that precious little change had occurred. In that month, the OCR filed a complaint against the University of California, Berkeley, over the presence of “sexist” language in its course catalog. Among the words the agency objected to were “mankind,” “manpower,” “manmade,” and “grantsmanship.” University officials declared themselves to be “astonished that the Office for Civil Rights was able to waste its time and our money on matters of this sort.” The incident did seem to be all the more puzzling because it occurred under an administration pledged to curtailing bureaucratic heavy-handedness.

Undoubtedly the lack of a consistent, comprehensive agenda accounts to a considerable extent for the continuation of a race- and gender-conscious regime of civil rights. If the administration could not, even after five years, speak with one voice on civil rights, it is no wonder that no effort was mounted to persuade Congress to amend the Civil Rights Act to prohibit racial preference and reverse discrimination, or to modify or revise Executive Order 11246, which requires firms under contract to the federal government to practice race-conscious affirmative action in hiring and promotion. A valuable study might thus be undertaken on the sources of internal confusion and inconsistency within the administration—the role of interest groups, civil service holdovers from previous administrations, interpersonal and interagency rivalries, and the like—and would draw its theoretical insights from
the burgeoning scholarly literature on organization theory and policy implementation.

There is, however, an alternative (and, to this writer, more interesting) approach to the question we have formulated. Rather than focusing on the factors that seem to have contributed to the Reagan administration's failure to act in ways that one might have anticipated, we plan to concentrate instead on those actions it did take in an effort to reformulate civil rights policy. Our focus will be primarily on the activities of the Civil Rights Division of the Justice Department, for this agency engaged in the most sustained and systematic attempt to reformulate civil rights policy during the Reagan presidency. Yet it achieved few victories for its efforts. The reason lies less in internal disunity (although there was no small amount of this) than in the response to the Justice Department initiatives from politically prominent, strategically influential elites outside the administration. Although the civil rights reforms pursued by the Justice Department were consonant with the results of public opinion surveys and arguably adhered to the letter and spirit of relevant statutory and constitutional provisions, they were strongly opposed by a sizable element of the American intelligentsia, particularly judges, journalists, academics, and virtually the entire organized "civil rights community."

The response of federal judges to the department's proposed civil rights reforms proved to be especially important, since these reforms were pursued largely through the courts. Because of the salience of courts in the civil rights arena, however, other members of the intelligentsia were highly influential as well. The power of ideas and intellectual criticism generally exerts itself more forcefully on the activities of the courts than on those of any other branch of government. This force is particularly felt when courts engage in constitutional adjudication, as is often the case when civil rights claims are at issue. In such circumstances, judges frequently come together with law professors, members of the media, and professional interest group advocates to form what Robert Bork has termed the "constitutional culture." According to Bork, "courts are part of a more general legal-constitutional culture and ultimately are heavily influenced by ideas that develop elsewhere in that culture." The notion of a constitutional culture is paralleled in Richard E. Morgan's discussion of what he terms "the rights industry" in American politics. The introduction to his
recent study of court-mandated social policy is especially pertinent:

My political science training . . . made it clear that studying the [Supreme] Court in isolation was an inadequate way of understanding how civil liberties and civil rights were defined and judicially applied in American society. I came to see the Court as part, albeit the most important part, of a subsystem of constitutional politics in which activist lawyers, academic partisans, interest groups, and media publicists play important roles.23

The central message these writers convey is that, especially concerning law and social policy pertaining to civil rights, the American political system is disproportionately influenced by a relatively small segment of the population whose views are often at considerable variance with those held by popular majorities. In a constitutional system of government, where certain rights and liberties are explicitly codified in a written constitution, the insistence by a small elite upon the formulation of policies that respect and uphold those rights and liberties, even against the will of popular majorities, is vital.24 However, a classic problem in democratic theory emerges when courts become mere conduits for enacting the subjective value preferences of the groups and individuals that make up Bork’s “constitutional culture” or Morgan’s “rights industry.” To the extent that this occurs, representative self-government will gradually be supplanted by oligarchic rule.

It is rarely admitted that what might be called the “civil rights elite” has often used the courts to enact unpopular civil rights policies based, not on some clear statutory or constitutional command, but on their singular attitudes and beliefs. When one does encounter a candid acknowledgment of this phenomenon, it is worth quoting at length. Here is how Richard Neely, Chief Justice of the West Virginia Supreme Court, justifies judicial activism on behalf of unpopular civil rights policies:

Certainly a majority of the educated elite, as reflected by the attitudes of the faculties, trustees, and student bodies at major universities, consider affirmative action, although predatory, morally justifiable. It is just as certain, however, that a majority of Americans disapprove. There is no theoretical justification for continued support of affirmative action other than the elitist one
that the courts know from their superior education that affirmative action is necessary in the short run to achieve the generally applauded moral end of equal opportunity in the long run. That is probably not illegitimate, since judges are social science specialists and have available to them more information and have pursued the issue with more thought and diligence than the man on the street. Courts should probably be accorded as much deference in their decisions over means as medical doctors, professional architects, or plumbers.25

What we learn from this passage is that the civil rights policies preferred by the civil rights elite are superior to alternative civil rights simply precisely because they are the policies the elite prefers.

Against this background, we may begin to appreciate the profound iconoclasm inherent in the Reagan program. Under Reagan, the Justice Department had departed from the record of previous administrations and repudiated the conventional wisdom that had been handed down by the civil rights elite. It had switched sides, becoming the “man on the street” in direct opposition to the preponderance of judges, media commentators, activist lawyers, and “social science experts.” Throughout the first six years of the Reagan administration, the latter’s reaction to the Justice Department’s defection proved exceptionally vitriolic. A sampling of the frequently ad hominem calumny leveled at the administration generally, and at its principal civil rights policy makers in particular, may serve to indicate the intensity of opposition to the Justice Department’s efforts. Here, for example, is how Ira Glasser, executive director of the American Civil Liberties Union, described Assistant Attorney General Reynolds after reflecting on his record as head of the Civil Rights Division:

Mr. Reynolds is the moral equivalent of those Southern segregationists of a generation ago standing in the schoolhouse door to defend segregation. Today, he stands at the workplace gate, defending discrimination in employment. His efforts disgrace the American dream of equal opportunity.26

The columnist Anthony Lewis, after bitterly declaring that “instead of fighting for the blacks and women who have been the historic victims of discrimination, the Justice Department is now emphasizing the rights of white males,” concluded that Reynolds
was “lawless and heartless” and labeled him a “white man’s lawyer.”

In a similar vein, NAACP director Benjamin Hooks had this to say when, in early 1984, Reagan announced his nomination of Edwin Meese to succeed William French Smith as attorney general:

Mr. Meese has been a key architect in the development of the administration’s conservative ideology and programs. He has proven by everything he has said and done that he is anti-civil rights and an enemy of progressive social policy.

By this action, Mr. Reagan is putting another anti-civil rights devil in charge of the agency responsible for protecting minorities.

Referring to Reagan’s apparently successful attempt to reconstitute the U.S. Commission on Civil Rights by appointing new commissioners thought to be more sympathetic to the administration’s civil rights initiatives than those they replaced, the NAACP, in its annual report for 1985, expressed its resolve to “struggle to prevent the president from turning the Civil Rights Commission into a haven for political and social Neanderthals whose views of the Constitution are clouded by distortions of justice and a social Darwinist theory.” More generally, NAACP board chairman William F. Gibson simply denounced Reagan personally as “basically a reactionary and racist.”

Particularly striking has been the tendency of critics to focus, as in the Lewis quotation above, on the supposed impropriety of “emphasizing”—or even acknowledging—“the rights of white males.” When Reynolds appeared before the House Judiciary Subcommittee on Civil and Constitutional Rights in May 1983, he startled chairman Don Edwards by divulging his intention to officially challenge “those practices that unfairly disadvantage women, Hispanics, and whites.” His inclusion of whites among those who are arguably disadvantaged by certain practices prompted a rebuke from Edwards:

You and I are white male attorneys. We came from families with some money and were educated in the right schools. Unless we behaved very stupidly, the family and institutional support systems guaranteed places for us. We benefited from a racial spoils system.
The sentiments expressed by this view were echoed in 1984 by Mary Frances Berry and Blandina Cardinas Ramirez, two hold-over members of the reconstituted Civil Rights Commission, when they jointly wrote that

civil rights laws were not passed to give civil rights protections to all Americans, as a majority of this Commission seems to believe. Instead, they were passed out of a recognition that some Americans already had protection because they belonged to a favored group; and others, including blacks, Hispanics, and women of all races, did not because they belonged to disfavored groups.32

Among many within the scholarly community, the administration’s willingness to apply the civil rights laws’ protections to white males is accepted as evidence of hostility toward civil rights. Consider, for example, the following passage taken from a recently published textbook for political science courses in constitutional law:

[T]he Reagan administration’s stance on civil rights... is at significant odds with the civil rights positions of the five previous administrations, all of which actively used their discretionary powers to pursue civil rights claims through the administrative process and to press civil rights claims in the courts. In sharp contrast, the Reagan administration has slowed to a near standstill or has actively opposed civil rights actions. For instance, in the 1983 Boston Firefighters Union case, the Reagan administration filed a brief in opposition to the NAACP, and in 1984, it filed a brief supporting the City of Birmingham’s challenge to a 10 percent minority employment and purchasing requirement.33

What is interesting about this passage is that in each of the two cases cited by the authors to substantiate their assertion that the Reagan administration had “actively opposed civil rights actions,” the administration had sided with plaintiffs who alleged that their civil rights had been violated by policies that deliberately discriminated against them on the basis of their race. An essentially identical allegation had been made by the plaintiffs in Brown v. Board of Education; indeed, a “civil rights action” is by definition one in which a plaintiff charges that a particular policy or practice violates the antidiscrimination mandate of the federal
Civil Rights Act or the Fourteenth Amendment’s equal protection clause. This was the argument made by the plaintiffs in each of the cases cited in the passage quoted above, yet the Reagan administration’s decision to involve itself on their behalf is regarded by the authors as direct evidence of opposition to civil rights actions. If this seems paradoxical, it is necessary only to point out that in both cases the plaintiffs represented the interests of white males who believed themselves to be victims of discrimination. What the quoted passage teaches, then, is that a civil rights action brought by white males is no civil rights action at all.

It is obvious that the Reagan administration’s civil rights initiatives generated a debate that revealed more than just raw emotion and passion. Much of the rhetoric that issued from both sides can be understood to reveal stark differences in the way people think about civil rights. Antagonists disagreed not merely about the means to achieve generally agreed-upon ends; they also disagreed fundamentally about what the ends should be, and even about which ends are permissible. Even more fundamentally, they differed in their vision of the society to which civil rights policy is to be applied. This book seeks to explain—at least partially—the inability of the Reagan administration to reformulate national civil rights policy by developing a theory of elite attitudes and beliefs about civil rights. Our argument will be that the civil rights elite in America—a segment of the population that is roughly co-extensive with Bork’s constitutional culture and Morgan’s rights industry—has developed an ideology of civil rights that necessarily demands the creation of a jurisprudence in which different kinds or levels of rights and privileges are allocated to individuals on the basis of their membership in particular social groups, defined according to racial, ethnic, and gender criteria.

We will argue further that the civil rights ideology remains ascendant in public law and policy—even in the face of executive opposition—because of the strategic prominence of its adherents, and because holders of the ideology have, in promoting their views, successfully managed to de-legitimate alternative strategies for securing civil rights based on race- and gender-neutral criteria. To this extent, we shall go beyond making the familiar distinction between the color-blind and color-conscious versions of civil rights by developing a theoretical explanation for the continued prevalence of one version over the other.
The content and sequence of the remaining chapters is as follows: The second chapter examines the intellectual genesis of the race- and gender-conscious version of civil rights, and traces its gradual infusion into public law and policy up to 1980. Chapter 3 presents a detailed analysis of several important court cases in which the Reagan administration challenged the legality of racial preference schemes in the hiring, promotion, and discharge of workers. Chapter 4 examines major legal controversies that arose in the realm of education, including the denial of tax exemptions to allegedly discriminatory private schools. Chapter 5 assesses the extent to which the policy process itself impeded civil rights reform, with particular attention to the controversies surrounding the civil rights commission, the executive order requiring federal contractors to engage in race- and gender-conscious employment practices, and the passage by Congress of an amended version of the Voting Rights Act. The sixth chapter analyzes the content and character of the contemporary civil rights ideology, and explains how the application of ideological principles influenced the outcome of the issues covered in the earlier chapters. Finally, an epilogue analyzes three important cases bearing on affirmative action and employment discrimination that were decided by the Supreme Court in the spring of 1989.