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The Federal Government and the Promise of *Brown*

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The U.S. Department of Justice has played an important role in the development and enforcement of school desegregation law, by participating in Brown and later cases. From the Truman administration to the present, the thrust of government policy has been to promote unity and vindicate the unmet promise of the equal protection clause. The ambiguity of the Supreme Court's decision in Brown has allowed considerable flexibility in defining and remedying discrimination. Whether Brown failed or succeeded depends on which possible meaning of Brown one accepts. The department now should protect the gains under Brown from retrogressive attacks and should oppose resegregation.

Ten years ago, former U.S. Assistant Attorney General David L. Norman spoke at an observance of *Brown's* thirtieth anniversary. He asked "whether there is a growing subscription to an unwritten amendment to a familiar principle: 'The amount of affirmative action, such as busing, required to overcome the effects of past discrimination is inversely related to the length of time which has elapsed since *Brown*.'" On this fortieth anniversary of *Brown v. Board of Education of Topeka, Kansas*, signs of weariness and forgetfulness persist, but neither the federal government nor the courts have yet succumbed. It is appropriate to retell the reasons for the federal role in the *Brown* decision and its enforcement. The retelling should make evident the importance of renewed vigor in federal support for the promise of *Brown*.

During the pre-*Brown* era the federal government participated in racial segregation in various ways, such as federal financial assistance for separate schools, segregated public housing, and segregated programs for farmers. However, President Truman recognized the harm that racial discrimination wreaked on the nation and began to take steps to combat it. He ordered the military to desegregate. He convened a conference on civil rights. He strengthened federal equal employment opportunity efforts. And he enlisted attorneys of the Department of Justice, who filed *amicus* briefs attacking racially restrictive covenants,² segregated railroad dining cars,³ and segregated public graduate education.⁴ The story is well known

of their filing an *amicus* brief in *Brown v. Board of Education* in December 1952, when President Truman was a lame duck president.⁵ However, it is worth recalling what the federal government was seeking in *Brown*.

The Department of Justice's first brief in *Brown* noted that the federal government has a "special responsibility for assuring vindication of the fundamental civil rights guaranteed by the Constitution."⁶ The brief focused on official race discrimination, observing that it "inevitably tend[s] to undermine the foundations of a society dedicated to freedom, justice, and equality."⁷ Finally, the brief expressed concern that "the existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries."⁸ Thus, the main concern of the federal government was not with private rights, but with national unity, enforcing constitutional norms, and the public interest. President Truman's actions reflected understanding that the racial caste system was shredding the fabric of national life.

We should recognize that these goals may not have been identical to the goals of others involved in the litigation. Some may have sought educational reform and understood that segregation was a fatal shortcoming of American education in 1954. Others may have simply wanted to equalize educational opportunities. The government's goals had to do with unity and vindication of the unmet promise of the equal protection clause.

The United States in *Brown* argued that the plaintiffs could win without overruling *Plessy v. Ferguson*, but that if the Court reached the issue, *Plessy* should be overruled. Children do not enjoy equality when they "know that because of their color the law sets them apart from others, and requires them to attend separate schools specially established for members of their race."⁹ The government concluded that "the Fourteenth Amendment forbids the classification of students on the basis of race or color so as to deny one group educational advantages and opportunities afforded to another."¹⁰ As to relief, the brief recommended that the Court remand to the lower courts "with directions to devise and execute such program for relief as appears most likely to achieve orderly and expeditious transition to a non-segregated system."¹¹ Relief need not occur "forthwith." As justification for this gradual approach, the brief argued that "[a] reasonable period of time will obviously be required to permit formulation of new provisions of law governing the administration of schools in areas affected by the Court's decision."¹²

After hearing initial arguments during its October 1952 term, the Court set the case down for reargument in order to seek the views of the parties as to questions propounded by the Court. It also requested a further brief from the Eisenhower administration. That brief addressed the questions the Court had asked and took no position on the outcome, but at oral

argument Assistant Attorney General Rankin said "it is the position of the Department of Justice that segregation in public schools cannot be maintained under the Fourteenth Amendment, and we adhere to the views expressed in the original brief of the Department in that regard."¹³ As to relief, the United States noted the success of New Jersey in desegregating its schools. It noted various issues of school administration that the state would have to address. It assumed that neighborhood schools would be permissible even if they were substantially of one race.¹⁴ It argued that relief should be entered "as expeditiously as the particular circumstances permit."¹⁵

After *Brown I* ruled for the plaintiffs, the government filed a brief in *Brown II*. In arguing that "the vindication of the constitutional rights involved should be as prompt as feasible," the Department of Justice pointed out that "the 'personal and present' right . . . of a colored child not to be segregated while attending public school is one which, if not enforced while the child is of school age, loses its value."¹⁶ The federal government argued that the "right of children not to be segregated because of race or color . . . is a fundamental human right, supported by considerations of morality as well as law," and that "racial segregation affects the hearts and minds of those who segregate as well as those who are segregated, and it is also detrimental to the community and the nation."¹⁷

Thus, in the *Brown* litigation before the Supreme Court the federal government took a uniform position through two administrations, with varying levels of enthusiasm. This pattern persists to the present day. All presidents since John F. Kennedy have supported the correctness of *Brown*, and positions taken by the Department of Justice in court have echoed that support. However, as is shown below, commitments to enforcement have fluctuated, as have positions as to the operational details, sometimes lessening the extent to which the promise of *Brown* would be kept.

Although the executive branch had participated in *Brown* as *amicus curiae*, Congress had bestowed no enforcement authority on the attorney general.¹⁸ The executive branch did take action to enforce the order to desegregate the Little Rock, Arkansas, schools in the face of defiance by Governor Faubus.¹⁹ Responding to acts of private violence against school desegregation, Congress did make obstruction of federal court orders a crime in 1960.²⁰ However, not until ten years after *Brown* did Congress authorize a strong federal enforcement role: "Congress decided that the time had come for a sweeping civil rights advance, including national legislation to speed up desegregation of public schools and to put teeth into enforcement of desegregation."²¹ From the outset the congressional authorization was hedged. It authorized the attorney general to bring school desegregation suits, but only after receiving a meritorious complaint from

a parent who is unable to maintain appropriate proceedings for relief and only if the attorney general finds that "the institution of an action will materially further the orderly achievement of desegregation in public education."²² Moreover, the Civil Rights Act of 1964 specified that it did not empower any court or official to "issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance."²³ It also authorized the federal government to provide technical assistance for desegregation and banned discrimination in federally assisted programs. The 1964 act thus signaled Congress's desire to bring *de jure* segregation to an end, but to keep the federal government out of *de facto* segregation cases.

In the years that followed, the Department of Justice and the Department of Education (and its predecessor Department of Health, Education, and Welfare [HEW]) did take vigorous steps on three fronts. First, they contributed to the development of the legal standards governing desegregation. HEW promulgated guidelines for desegregation that laid the foundation for judging desegregation plans in terms of their success in actually eliminating racial segregation. The Department of Justice participated as a party or *amicus* in every Supreme Court school desegregation case and many lower court cases. Second, the Departments of Justice and Health, Education, and Welfare developed a joint strategy combining administrative enforcement of Title VI of the 1964 act with Justice Department litigation against large numbers of school systems. The Department of Justice developed the statewide suit as a device for quickly obtaining desegregation decrees of general applicability.²⁴ The Education Section of the Justice Department grew to over thirty attorneys by the mid-1970s. Third, the Department of Education provided a substantial carrot to help school systems desegregate: federal financial assistance for desegregation. The Emergency School Assistance Act, as Orfield has told us, "helped hundreds of districts in teacher training, human relations, and curriculum development work needed to make the transition from segregated to desegregated schools more effective."²⁵

Although the federal government thus has done much to promote the promise of *Brown*, the path has wavered. The definition of that promise was advanced in the Department of Justice *amicus curiae* brief in *Green v. County School Board*.²⁶ There the United States argued that "so-called 'freedom of choice' plans satisfy the State's obligation only if they are part of a comprehensive program which actually achieves desegregation."²⁷ The government identified the continued existence of "all-Negro schools, attended by an overwhelming majority of the Negro children" as the mark of an ineffective desegregation plan. Quoting the Fifth Circuit Court of Appeals, the

United States argued: "Against the background of educational segregation long maintained by law, the duty of school authorities is to accomplish 'the conversion of a de jure segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel.'"²⁸ Further, "the Fourteenth Amendment bars State action which unnecessarily creates opportunities for the play of private prejudice."²⁹

The issue then arose whether the Court's approach in *Green* to desegregation of a rural county would apply as well to a densely populated urban school system in which residential segregation prevailed. In *Swann v. Charlotte-Mecklenburg Board of Education*, the brief of the United States struck a cautious note.³⁰ The brief did embrace *Green*, saying:

We think the right of school children articulated in *Brown* is to attend school in a system where the school board exercises its decision-making powers so as to operate a non-racial unitary school system free from discrimination, and that where this has not been done there is a violation of the rights of such children requiring remedial adjustments which give proper weight to that which is feasible and that which is just. If choices exist which may have a racial impact, they cannot be exercised in a racially neutral manner where to do so is to perpetuate segregation.³¹

Thus, the courts should "require that the governmental decisions affecting racial segregation be so made and implemented, when feasible alternatives are available, as to disestablish the dual system and eliminate its vestiges."³² However, echoing Congress's ambivalence on the matter, the United States also concluded that "the Fourteenth Amendment does not require . . . racial balance in all public schools or integration of every all-white or all-Negro school."³³ Thus, contrary to the prior norm, the government's position in a school desegregation case diverged substantially but not wholly from that of the black plaintiffs.³⁴

In the years that followed *Swann* the government has continued its homage to *Brown*, while sometimes urging the Court to limit *Brown*'s applicability. Thus, on the one hand the government took the position that metropolitanwide remedies could be ordered only where a metropolitan violation has been found.³⁵ On the other hand the government argued that systemwide busing was appropriate in Columbus, Ohio, because the record reflected a systemwide violation. The government argued that a unitary school system is entitled to be released from a desegregation decree, while agreeing that eliminating the vestiges of discrimination is a prerequisite to a unitariness finding.³⁶ To some extent the fluctuations in the government's position have been due to political changes from one administration to the next. Thus, at the Brown Plus Thirty conference, the assistant

attorney general for civil rights stressed cessation of busing and dissolution of desegregation decrees as central themes of the government's program for enforcing *Brown*.³⁷ This represents a change from the position of the Carter administration and one may expect the Clinton administration to reject these themes as well.

Two other changes diminished the role of the federal government in enforcing *Brown* in the 1980s and continue to affect the federal role today. First, the resources devoted to enforcement have been curtailed. Today, the Civil Rights Division's section responsible for enforcing *Brown* employs only thirteen attorneys. That shrunken crew is responsible not only for hundreds of continuing court decrees requiring desegregation of elementary and secondary education, but for higher education and sex and disability discrimination as well. Similarly, in the Department of Education today only 16 percent of the civil rights budget is spent on race discrimination issues.³⁸ Second, the Emergency School Assistance Act program was essentially dismantled and its funds were diverted to general grants, which need not be used for desegregation or heavily minority school districts.³⁹

In considering the future role of the federal government, one may appropriately begin by asking what the successes and failures of *Brown* have been. What has *Brown* accomplished? The structure of official racial segregation in schools has been dismantled, though vestiges remain. States that once required segregation now have the most desegregated schools in the nation. *Brown* served as impetus for integration of public facilities and public accommodations and for nondiscrimination laws governing voting, housing, and employment. The official racial caste system is dead. *Brown* is firmly entrenched in our jurisprudence and our national life and its repudiation would be virtually inconceivable. There is massive consensus, on a very general level, that racial discrimination and segregation are wrong and that government should take steps to eradicate them. Thus, as Kenneth Clark has observed, *Brown* contributed "a simple, direct and eloquent statement of a moral truth."⁴⁰

Set against these impressive gains is not so much failure as a shortfall in terms of racial justice. Thus, some of the gains under *Brown* are in danger of erosion. The statistics already reflect a modest erosion, and the Supreme Court's decision in *Freeman v. Pitts*⁴¹ could lead additional school districts to seek release from their desegregation obligations.⁴² Moreover, *Brown* has not brought to our children or society all the hoped-for benefits. "The generative power of *Brown* . . . in the realm of equal educational opportunity, has been limited primarily to its ban on racial segregation. Even there, the refusal in *Keyes* to extend the ban to de facto segregation and the refusal in *Milliken* to extend it to interdistrict racial imbalance further confined *Brown*'s reach."⁴³ We now know that law is an imperfect tool of educational

reform. Yet early resistance to *Brown* meant that too great an emphasis had to be placed on litigation and too little on educational issues. This has led to another type of criticism, which I believe is misplaced: "*Brown's* failure . . . lay in its acceptance of a monolithic, color-blind society premised on the continued supremacy of white cultural norms, without regard to the role to be played by African-American cultural norms."⁴⁴ The fact is that while *Brown* referred at one point to education's role "in awakening the child to cultural values," neither the parties nor the Court had occasion to address the issue of cultural norms. Nothing in *Brown* forecloses a claim of discriminatory imposition of white cultural norms. Finally, one's analysis of whether *Brown* failed or succeeded depends on which possible meaning of *Brown* one accepts. "If equal opportunity means the end of racial isolation and the achievement of equal funding or outputs, the Court long ago gave a negative answer. . . . If equal opportunity means freedom from present intentional racial discrimination in the public schools, its future is secure. If it also means freedom from the lingering effects of past discrimination, its future hangs in the balance."⁴⁵

What must be done for the future? We know from the myth of a vengeful and destructive Reconstruction that factual distortion can undermine responsible efforts to achieve racial justice.⁴⁶ A new myth has arisen, that busing is a failed and destructive remedy. As Orfield demonstrates in his remarks in this issue, this too is a false and destructive myth. It is imperative that we not allow the constant drumbeat of the failure of school desegregation to go unanswered. The federal interest in the unity of the country suggests that we should stress the benefits of desegregation for all races and for our society as a whole. A vigorous effort to retain the gains under *Brown* must be mounted both in local communities and in the courts. The federal government, especially the Departments of Justice and Education, should join in that effort. They should renew the carrot-and-stick approach: federal money to encourage voluntary desegregation and assistance to racially impacted school systems combined with more enforcement resources targeted on racial discrimination in elementary and secondary education. The cases leave open the question of whether a former dual system that has become unitary has further obligations with respect to neutralized but not eradicated effects of past discrimination. Stated in non-legalistic terms, may such a system adopt assignment techniques that cause resegregation? The civil rights bar should continue to litigate that issue. The Department of Justice should oppose resegregation. At the same time it should stress flexibility and restraint as to desegregation techniques. Litigants should recognize, as well, that a remedy forged in the political process is more likely to succeed. We should not allow past difficulties to entice us to renewed separatism. We must look to other measures to help

with the goal of achieving racial justice and not rely solely on the equal protection clause and nondiscrimination laws. Efforts to achieve economic equity, fair housing, and educational excellence in all schools are essential components in the quest for equal educational opportunity. Finally, we must emphasize *Brown's* "big tent" affirmation of the Declaration of Independence and the Fourteenth Amendment and thereby maintain the public and legal support for the core values of *Brown*.⁴⁷ We should experiment within the confines of those core values and abjure solutions outside those confines. We should remember that compliance with *Brown* is a necessary condition for equal education, but it is not alone a sufficient condition to ensure equality.

After forty years, the regime of *Brown* has not brought about equal educational opportunity. Many one-race schools remain. Even where schools are integrated, inequalities remain. School finances are unequal. Graduation rates are unequal. Other inequalities persist. Do these facts indict *Brown*? Or do they signify that the magnitude of the task is greater than we thought in 1954? Should we give up on *Brown's* promise? The question calls to mind that several millennia have passed since we received the Ten Commandments. "Thou shalt not kill" remains a worthy aspiration. I believe the aspirations of *Brown* are similarly correct, and that our task is to rededicate our efforts—which have flagged in recent years—to achieve equal educational opportunity. The federal government's role in those efforts is as important as ever and should also be rededicated.

Notes

1 David L. Norman, "The Strange Career of the Civil Rights Division's Commitment to *Brown*," *Yale Law Journal* 93 (1984): 983.

2 *Shelley v. Kraemer*, 334 U.S. 1 (1948).

3 *Henderson v. United States*, 339 U.S. 816 (1950).

4 *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).

5 See Richard Kluger, *Simple Justice* (New York: Vintage Books, 1977), pp. 558–60; and Philip Elman, "The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History," *Harvard Law Review* 100 (1987): 817.

6 Brief of United States as amicus curiae, 2.

7 *Id.* at 3.

8 *Id.* at 6.

9 *Id.* at 18.

10 *Ibid.*

11 *Id.* at 27.

12 *Id.* at 29.

13 Kluger, *supra* at 675.

14 Brief of the United States on reargument, 184.

15 *Id.* at 188.

16 Brief of United States on Relief, 4–5.

17 *Id.* at 6.

18 Theoretically, the attorney general might have brought criminal prosecutions against school officials who willfully violated *Brown*. See 18 U.S.C. 242. However, the ambiguities of *Brown* might have made it difficult to prove the requisite specific intent to deny a constitutional right (see *Screws v. United States*, 325 U.S. 91 [1945]). Moreover, it was believed that the right to jury trial would have led to jury nullification even if adequate proof had been presented. Finally, the government had primarily used section 242 to prosecute crimes of violence and fraud. Thus, 242 was available but exceedingly awkward. See Norman, *supra*, at 984. Judge Norman notes that there is "only one reported case in which a public school official was prosecuted under [§242]. See *United States v. Buntin*, 10 F. 730 (C.C.S.D. Ohio 1882)." *Id.*, note 4. Although the case preceded *Plessy v. Ferguson*, 163 U.S. 537 (1896), in *Buntin* the issue presented to the jury was whether the black school in an adjoining district was equal to the white school from which the defendant had excluded a black child.

19 *Cooper v. Aaron*, 358 U.S. 1 (1958). See Kluger, *Simple Justice*, p. 754.

20 18 U.S.C. 1509.

21 This characterization appears in Judge Wisdom's seminal panel opinion in *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1956). Although the opinion was later replaced by an *en banc* opinion, it laid the foundation for the later Supreme Court decision in *Green v. County School Board*, 391 U.S. 430 (1968). See, e.g., Andrew Kull, *The Color-Blind Constitution* (Cambridge: Harvard University Press, 1992), p. 181.

22 Civil Rights Act of 1964, Sec. 407 (a).

23 *Ibid.*

24 Norman, *supra* at 987.

25 Gary Orfield, with the assistance of Sara Schley, Diane Glass, and Sean Reardon, *The Growth of Segregation in American Schools: Changing Patterns of Separation and Poverty Since 1968* (Alexandria, Va.: National School Boards Association, 1993), p. 28.

26 391 U.S. 430 (1968).

27 Brief of the United States as amicus curiae, 3.

28 *Id.* at 4.

29 *Id.* at 15.

30 402 U.S. 1 (1971).

31 Brief of United States as amicus curiae, 7-8.

32 *Id.* at 16.

33 *Id.* at 17.

34 The first case of such disagreement was *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), where the government agreed that the doctrine of all deliberate speed should be abandoned, but argued that a delay of one semester in the desegregation of the defendant school districts was permissible. The Court gave short shrift to the government's position and ordered desegregation "forthwith."

35 *School Board of City of Richmond v. State Board of Education*, 412 U.S. 92 (1973); *Milliken v. Bradley*, 418 U.S. 717 (1974).

36 *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991).

37 Wm. Bradford Reynolds, "The Role of the Federal Government in School Desegregation" in *Brown Plus Thirty*, ed. LaMar P. Miller (New York: Metropolitan Center for Urban Education, 1986).

38 This figure was supplied at the conference by Beverly P. Cole, Director of Education & Housing, National Association for the Advancement of Colored People, and confirmed by Judith A. Winston, General Counsel, United States Department of Education.

39 Orfield, at 28.

40 Kenneth B. Clark, "Racial Justice in Education: Continuing Struggle in a New Era," *Harvard Law Journal* 23 (1980): 93.

41 112 S.Ct. 1430 (1992).

42 See Brian K. Landsberg, "Equal Educational Opportunity: The Rehnquist Court Revisits *Green* and *Swann*," *Emory Law Journal* 42 (1993): 848-55.

43 *Id.* at 828.

44 Alex M. Johnson, Jr., "Why Integrationism Fails," *California Law Review* 1401 (1993): 1431.

45 Landsberg, *supra* at 861.

46 See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988).

47 I use the "big tent" metaphor to suggest that *Brown's* core values are sufficiently general to win the allegiance of persons within a broad spectrum of opinion.