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Defining Effective Civil Rights Enforcement in Education

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BOOK REVIEW

DEFINING EFFECTIVE CIVIL RIGHTS ENFORCEMENT IN EDUCATION

EQUALITY AND EDUCATION. By Michael A. Rebell and Arthur R. Block. Princeton NJ: Princeton University Press, 1985. Pp. x, 340. \$28.50.

*Reviewed by Neal Devins**

Federal civil rights enforcement in public education has been without a clear agenda since pre-1970 efforts to eradicate segregation in Southern schools. Issues regarding what constitutes discrimination, appropriate enforcement techniques, the relationship between state and federal government, and the sweep of the nondiscrimination mandate have been viewed differently from administration to administration. The Reagan administration, for example, has taken a nonobstructionist stance, placing great trust in state and local educational policymaking.¹ In sharp contrast, the Carter administration—at the behest of civil rights groups—committed itself to a litany of enforcement procedures.² Given these differences, a longitudinal study of enforcement efforts should prove quite worthwhile. Such a study could reveal whether, on an institutional level, executive enforcement efforts are hampered by changing political agendas and could clarify the values that properly underlie civil rights policy.

Michael A. Rebell and Arthur R. Block's longitudinal review of federal civil rights enforcement in the New York City school system, *Equality and Education*, sets out to examine many of these issues. Specifically, the authors claim that their case study will shed light on how discrimination is defined, the nature of executive decisionmaking, and the effectiveness of executive enforcement efforts. Unfortunately, their work is fundamentally flawed. Insufficient attention is paid to many significant issues, most prominently, the influence of federal desegregation assistance programs on school board action and the impact of the Reagan administration. Yet even if these matters received more substantial treatment, the New York City situation may be too anomalous to yield

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1. See White House, *America's New Beginnings: A Program for Economic Recovery* 25-26 (1981).

2. See Rabkin, *Captive of the Court: A Federal Agency in Receivership*, Reg. May/June 1984, at 16-26.

general conclusions regarding federal civil rights enforcement. In the end, *Equality and Education* serves only the limited purpose of describing specific events surrounding federal efforts to enforce antidiscrimination laws in New York City schools.

I. THE NEW YORK CITY REVIEW

A. Background

1. *The OCR's Uncertain Agenda.* — One decade after *Brown v. Board of Education*,³ Congress set the stage for federal enforcement of the *Brown* mandate by enacting Title VI of the Civil Rights Act of 1964.⁴ Title VI prohibits recipients of federal financial assistance from discriminating on the basis of race. In the field of education, the task of enforcing Title VI fell to the Office for Civil Rights (OCR) of the Department of Health, Education, and Welfare (now the Department of Education). During the mid-1960s, the OCR—armed with the power to cut off federal education funds—was remarkably successful at combatting racial discrimination in education.⁵ In 1965 alone, more actual desegregation of southern schools occurred than in the decade following *Brown*.⁶

But, almost as quickly as they had coalesced, the forces that made the first substantial inroads into the South's segregated school systems were challenged and ultimately dissipated. The Nixon administration opposed expansive school desegregation techniques mandated by the OCR and the courts,⁷ and cautioned against improperly extending federal control over education.⁸ Increasingly disquieting to both elected branches was the extension of desegregation to nonsouthern schools and the prospect of mandatory busing.⁹ By 1974, congressional restrictions on OCR enforcement standards had effectively removed the school desegregation issue from the agencies to the courts. Indeed, the OCR's failure to pursue fund termination proceedings against school systems that refused to adopt comprehensive desegregation plans re-

3. 347 U.S. 483 (1954).

4. Title VI, Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252 (1964) (codified at 42 U.S.C. § 2000d to 2000d-4).

5. See Kirp, *School Desegregation and the Limits of Legalism*, 47 *Pub. Interest* 101, 109-12 (1977).

6. See Devins & Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 *Notre Dame L. Rev.* 1243, 1246 (1984). Between 1963 and 1968, the percentage of black children in all-black schools in the South dropped from ninety-eight percent to twenty-five percent. G. Orfield, *Public School Desegregation in the United States, 1968-80*, at 5 (1983).

7. See G. Orfield, *Must We Bus?: Segregated Schools and National Policy* 243 (1978).

8. See Devins & Stedman, *supra* note 6, at 1250-51.

9. See G. Orfield, *supra* note 6, at 235-42; see also *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) (geographic extension of desegregation mandate); *Swann v. Charlotte-Mecklenburg County Bd. of Educ.*, 402 U.S. 1 (1971) (busing).

sulted in court imposed deadlines for the processing of OCR enforcement actions.¹⁰ Finally, the OCR no longer simply confronted racial segregation in Southern districts. Instead, OCR responsibilities extended to discrimination on the basis of sex, language, and handicap—frequently in northern school systems where segregation had not been legally mandated.

With its wings clipped, its credibility challenged, and facing more complex issues, the OCR sought new ways to define its mission and retain its viability. One of these was the “Big City Reviews” program instituted by the Ford administration. *Equality and Education* is about New York City’s “Big City Reviews” experience. A brief recital of the program’s contours will be useful before turning to Rebell and Block’s analysis.

2. *New York’s “Big City Review.”*—The OCR’s potential and its limitations were fully tested in New York City. Student assignment policies and ability tracking (pp. 114–16) resulted in racially isolated schools. The few minority faculty members tended to be placed in predominantly minority schools (pp. 81–83). Further complicating matters were OCR concerns about inequities in the allocation of educational resources and the application of disciplinary rules (pp. 114–16). But New York law did not mandate the maintenance of separate educational facilities. Instead, the New York City situation had emerged from an unhappy combination of union protectionism, fiscal crisis, haphazard educational policymaking, and—possibly—illegal discrimination.

The OCR—equating statistical disparities with illegal discrimination (p. 113)—challenged teacher hiring,¹¹ student assignment policies,¹² and the distribution of educational resources in New York City.¹³ By 1975, thirty OCR staffers and six consultants were working

10. *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973). OCR’s hesitancy to utilize its Title VI cut-off authority also resulted in greater agency reliance on the Emergency School Aid Act of 1972 (ESAA). Title VII, Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235. Under the ESAA, eligible school districts applied to OCR for desegregation-related funding assistance. OCR then prodded school districts under its authority to determine school district eligibility. See Devins & Stedman, *supra* note 6, at 1252–54.

11. New York City employed a “two track” hiring system (p. 82). Under the first track, teachers who passed the city’s certification exam were listed in order and offered a vacancy on the basis of rank. Under the second track, teachers could be hired either out of order or without passing the certification exam, but could only teach in the city’s lowest ranked schools. The OCR alleged that a disproportionate number of minority teachers were hired under the second track and forced to teach in schools with large majorities of minority students (pp. 82–83).

12. The OCR’s concerns over student assignments focused on New York City’s extensive use of achievement-based tracking. Under this system, the school board engaged in ability grouping for all children above the first grade (p. 126), resulting in the near separation of students along racial lines (p. 119).

13. The OCR, among other things, contended that per-pupil faculty expenditures were lower and the quality of instructional materials were inferior at predominantly minority schools (pp. 114–15).

full-force; over one million dollars was devoted to the purchase of computers and the design of an investigative model (p. 67). In justifying this tremendous expense, the OCR claimed that through the New York City review it would "develop[] a whole new complement of skills . . . [and] . . . procedures and investigative techniques applicable to large city systems" (p. 67). The OCR's director Martin Gerry also intended to use the review to increase the agency's emphasis on what he considered the next battleground in the fight for equal education opportunities—namely, the intradistrict resource allocation issue.¹⁴

After the 1976 elections, the OCR reduced the scope of its review efforts, abandoning, among other things, its efforts to equalize intradistrict expenditures (pp. 118–19). By 1978, however, the OCR had reached settlement agreements with the school board on both faculty hiring and student tracking issues.¹⁵ The force of these agreements was short-lived, however, because the Reagan administration subsequently diluted their effect (pp. 111, 132–33). The Reagan OCR was influenced by numerous factors, including partisan political pressure by New York Republicans (p. 163), a more restrictive view of what constitutes illegal discrimination, and an education policy agenda that emphasized the independence and trustworthiness of local school systems.¹⁶

B. Rebell and Block's Assessment of the New York City Review

Rebell and Block evaluate the New York City review from three perspectives: (1) an ideological perspective focused on how competing models of equality (statistically-based equality of results versus process-based equality of opportunity) were played out during the OCR review (pp. 6–8, 139–50); (2) an implementation perspective, explaining why the OCR review did or did not accomplish its stated goals (pp. 8–10, 151–70); and (3) a comparative institutional perspective designed to assess the strengths and weaknesses of each branch of government in the enforcement of civil rights laws (pp. 10–12, 171–96).

The authors have mixed feelings about the OCR's ability to accomplish its enforcement objectives through this review. On one hand,

14. Former OCR director Martin Gerry suggested to Jeremy Rabkin, Assistant Professor of Government at Cornell University, that the intradistrict resource issue was a main thrust of the New York City review. Conversation with Jeremy Rabkin (Jan. 14, 1986).

15. On the question of faculty hiring and assignment, the school board agreed to abolish its "two track" hiring system by merging the two eligibility lists and eliminating rank-order hiring (pp. 101–02). With respect to student services, tracking was to be based on objective nondiscriminatory measures, was not to begin until the third grade, and was to utilize broader groupings of students (p. 126).

16. See generally Devins & Stedman, *supra* note 6 (examining effects of Reagan administration's "New Federalism" on school desegregation in Chicago); Devins, *Closing the Classroom Door to Civil Rights*, 11 *Human Rights* 26 (Winter 1984) (evaluating Regan Justice Department's legal interpretations in the fields of race and education).

they recognize that "compliance lagged far behind the agreed standards, and delays and political intervention eventually led to renegotiation . . ." (p. 200). This leads them to suggest that enforcement would be enhanced if greater reliance were placed on the courts (pp. 182-83). On the other hand, they ultimately view the New York City experiment as an agency success, claiming that it "led to positive changes" (p. 199) and reflected "a process of persuasion and bargaining, that produced two balanced agreements reflecting local program and political realities" (p. 199). In so concluding, Rebell and Block focus their attention on the bargaining process that resulted in the 1978 settlement agreements. Events subsequent to the signing of these agreements are, for the most part, not considered in their work.

The authors amply demonstrate the conciliatory nature of the negotiations between the OCR and the school board (pp. 125-27). New York City agreed both to modify its use of testing and to restructure its faculty assignment structure so as to ensure proportionate racial balance throughout the system (pp. 98-99). The OCR also made concessions: the board was granted "unprecedented flexibility" to meet its objectives (p. 99); the board could justify noncompliance if it resulted from "educationally-based program exceptions" (p. 99); and class-wide ability grouping would be permitted, though to a limited extent (pp. 126-27).

Rebell and Block claim that such a compromise was possible because Congress, when it enacted title VI, failed to choose between the "equality of opportunity" and "equality of results" strands of egalitarian theory (pp. 43-48). Furthermore, they hail this arrangement as an ideological masterstroke, "because it promoted an open dialogue between adherents of the opportunity and result perspectives and allowed the complementary aspects of the ideological strands to merge into two compromise agreements" (p. 140). The authors, however, also recognize that these agreements can be understood as the by-products of politics as usual. They suggest that the Carter OCR—which entered into the settlement agreements—did not want to ruffle the feathers of a city controlled by its own party,¹⁷ and thus limited the scope of its inquiry and granted the school board substantial discretion in attaining agreement objectives¹⁸ (pp. 161-62). In contrast, the authors note that the OCR review grew out of earlier Nixon administration efforts to

17. Another significant factor was the power of the city's teacher's union, the United Federation of Teachers, particularly its national president, Albert Shanker, whose "presence provides the most direct explanation for why New York City's faculty assignment agreement . . . omitted any specific references to mandatory teacher transfers" (p. 163).

18. The authors also note that the Carter administration OCR, which was "part of a pro-civil rights administration," was concerned with the tremendous amount of agency resources being devoted to the New York review (p. 159).

unearth embarrassing civil rights violations in New York and other northern democratic centers (p. 161).

At the same time, Rebell and Block recognize that there is a world of difference between meaningful reform and political compromise. They claim that unless there is an "[enforceable] mandate for immediate, statistically definable changes," (p. 167), flexible agreements such as New York City's will work only to the extent that both sides have a strong commitment to the bargain. On this score, they note that political resistance led to the failure of the teacher assignment agreement, while political support fostered the successful implementation of the student service provision (p. 169).

Closely tied to their conclusions regarding the formation and implementation of the settlement agreement, Rebell and Block argue that the courts might prove to be a more stable and competent enforcer of antidiscrimination laws in education than the OCR. To support an expanded judicial role, they argue that the continuity provided by judicial enforcement is often more effective than politically vulnerable agency enforcement. They further suggest, pointing to their previous work, *Educational Policy Making and the Courts*,¹⁹ that judicial remedial involvement in school district affairs is "both less intrusive and more competent than is generally assumed" (p. 182). Finally, they conclude that increased reliance on judicial enforcement of title VI should not pose separation of powers problems (pp. 194-95).

II. REVIEWING THE REVIEW OF THE REVIEW

Rebell and Block's suggestion that the New York City experiment produced positive concrete outcomes is remarkable. When one considers the initial scope of the OCR effort and the Reagan administration's subsequent renegotiation of decree provisions, the New York City review would seem, from the OCR's perspective, to be a tremendous failure. The school board's practice of complying only with provisions it found acceptable calls into question the agreements' purported ideological balance. Moreover, it is misleading to attribute school board concessions to OCR authority under title VI. During the course of the OCR review, the focus of agency activity shifted from title VI enforcement to school board eligibility for special desegregation funds and other funds of greater magnitude (p. 187).²⁰ In other words, the process culminating in the 1978 agreements may indicate nothing more

19. M. Rebell & A. Block, *Educational Policymaking and the Courts: An Empirical Study of Judicial Activism* (1982).

20. See *supra* note 10. The authors do recognize that the loss of such government dollars "were more significant in New York City than the remote threat of a Title VI funding termination . . ." (p. 187). They downplay the significance of this conclusion, however, arguing that the threatened loss of such government funding was more significant in other cities than in New York. Although I cannot say that this conclusion is in error, I am troubled by it. The school board vigorously challenged in court the OCR's

profound than that the ability to withhold federal largesse is a potent bargaining tool.

That in this way the carrot may work better than the stick is never fully considered by Rebell and Block.²¹ This omission, however, only reflects a larger problem in *Equality and Education*. The authors, for the most part, limit themselves to an isolated portrayal of the New York City review; differences between OCR efforts in New York and other big cities receive only brief mention, and no explanation is offered of differences between mid-1970s OCR efforts and agency efforts in either the mid-1960s or mid-1980s. These omissions vitiate the ability of *Equality and Education* to speak broadly and with authority on federal civil rights enforcement.

Without adequate discussion of other cities' experiences, it is difficult to ascertain whether the New York City review was genuinely reflective of agency enforcement capabilities or merely a singular phenomenon. The authors' general remarks regarding the comparative strengths and weaknesses of OCR enforcement are thus suspect. New York's size, its 1970s' fiscal crisis, the strength of its teachers' union, and its practices regarding teacher assignments and student services were unique. Also unique was the OCR's reliance on its New York City experiment both as a model for further big city reviews and as a launching pad for agency attacks on intradistrict resource allocation.²²

refusal to extend such government largesse to them. See *Board of Educ. v. Harris*, 444 U.S. 130 (1979).

21. The authors do note that OCR enforcement might be enhanced by "providing the agency with plausible—not theoretical—sanctions" (p. 187), and they do mention that the "carrot" was effective in other big cities. But their analysis ends there. This is unfortunate since most of the OCR's mid-to-late-seventies success is attributable to this approach. As President Carter's OCR director David Tatal commented: "[These statutes] are among the most effective ways of enforcing nondiscrimination provisions of law and ensuring equal opportunities for the beneficiaries and potential beneficiaries of federal financial assistance." J. Stedman, *The Possible Impact of the Education Consolidation and Improvement Act of 1981 on Activities That Have Been Funded Under the Emergency School Aid Act*, Congressional Research Serv. (Jan. 11, 1982), reprinted in *School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 749 (1982).

22. Furthermore, as David Kirp demonstrated in his study of the desegregation experiences of five San Francisco communities, thinking about racial justice solely in terms of uniformity is inappropriate. D. Kirp, *Just Schools* (1982); see also Devins, *Integration and Local Politics*, 73 *Pub. Int.* 175 (Fall 1983) (reviewing D. Kirp, *supra*) (agreeing that uniform solutions to the segregation problems of varying communities are inadequate). This conclusion certainly extends to the OCR. Take for example, the Carter OCR's efforts to enforce title VI in Chicago. This enforcement effort was complicated by presidential politics. The Carter administration, in order to secure city support for its 1980 election campaign, flip-flopped on its initial demand of numerically-based equality and agreed to a settlement decree that provided only for "the establishment [at the discretion of the school board] of the greatest practicable number of stably desegregated schools." Consent Decree at 4, *United States v. Board of Educ.* No. 80-C-5124 (N.D. Ill.

More striking than Rebell and Block's inadequate exploration of OCR efforts in other cities is their failure to contrast mid-1970s' issues with either current or early agency concerns. The New York review was time-specific. When the OCR was developing plans for the review, nationwide opposition to expansive court-ordered desegregation had intensified. The OCR sought to reclaim its role as pacesetter for equal education opportunity by pursuing relatively novel issues like intradistrict resource allocation. Although the OCR's pursuit of such remedial techniques is certainly an important chapter in its history, it is improper to judge the agency's institutional competence on the basis of such endeavors isolated from that historical context. In the 1960s, the OCR demonstrated its effectiveness in challenges to simple segregation in southern school systems. Today, the OCR's laxity, rather than being an index of agency ineptness, may well reflect the Reagan administration's "new federalism" in education.²³ Consequently, OCR performance should be measured both by the agency's adherence to its ideological mission and by the nature of reform that it seeks to accomplish during a particular period.

Rebell and Block's study, although longitudinal in nature, never considers these issues. Instead, the authors, focusing on the period leading up to settlement agreements in New York City, emphasize that "[a]n administrative agency like OCR lacks . . . staying power" (p. 185) and that "a court, as compared with OCR, is better able to monitor compliance on a long-term basis and to respond to unforeseen developments that arise during the implementation process" (p. 185). This concern about changing political agendas, aside from being short sighted, ignores separation of powers principles, title VI's amorphous language, and congressional restrictions on title VI enforcement.

Rebell and Block do not consider that, under our tripartite system, Congress is free to grant substantive discretion to the administering agency to advance what it considers to be the public interest.²⁴ In the case of title VI, neither Congress nor the courts (until 1983),²⁵ provided meaningful guidance as to what constituted illegal discrimination. The OCR thus had great leeway in defining its statutory mission. Moreover, the all-or-nothing nature of the fund termination sanction severely limited the OCR's ability to enforce that statute sensibly. Consequently, what Rebell and Block consider inherent defects in adminis-

Sept. 24, 1980). See generally Devins & Stedman, *supra* note 6 (examining the effects of Reagan administration's "new federalism" on school desegregation in Chicago).

23. See *supra* note 1 and accompanying text.

24. Rabkin & Devins, *Constitutional Limits on the Enforcement of Settlements with the Federal Government* 16-25 (manuscript in progress) (draft on file at the offices of the Columbia Law Review).

25. In *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983) (plurality opinion), the Supreme Court ruled that proof of intentional discrimination was intended by the framers of title VI but that executive agencies were empowered to enforce title VI through statistically-based proofs of discrimination.

trative enforcement ability reflect instead the interplay of poor legislative drafting and constitutionally protected executive functions.

The authors' failure adequately to acknowledge separation of powers concerns is also reflected in their conclusion that title VI enforcement would be enhanced if greater reliance were placed on "the courts in monitoring the implementation of agreements emerging from the administrative process" (p. 201). Courts simply do not have the institutional authority to administer such agreements—unless, of course, those agreements are a byproduct of litigation. The executive's constitutional power to enforce the laws should not be hamstrung by the policy preferences of a previous administration.²⁶ With respect to the OCR, civil rights groups, and the executive, in a case now titled *Adams v. Bennett*,²⁷ have battled for fifteen years over OCR enforcement of title VI.²⁸ Under *Adams*, the OCR was required to follow court-approved criteria governing the administration of title VI complaints.²⁹ Despite this interminable litigation, OCR has never been able to comply with the time frames established in *Adams*. In the end, as Jeremy Rabkin argues, "the *Adams* litigation has left OCR in many ways a less effective and less trusted civil rights guardian than it was at the outset."³⁰

Even if these analytical criticisms were put aside, *Equality and Education* would still fail, for the authors are unwilling to reveal their perceptions regarding the appropriate scope of federal civil rights enforcement. In a curious footnote at the end of the text, they reveal their internal disagreement regarding the need for their work to reflect a policy position. Arthur Block, pointing to "the slackening of federal

26. See Rabkin & Devins, *supra* note 24, at 7–9.

27. This case, originally captioned *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), modified, 480 F.2d 1159 (D.C. Cir. 1973), is the remand of *Women's Equity Action League v. Bell*, 743 F.2d 42 (D.C. Cir. 1984) (joined with *Adams v. Bell*), the latest in this series of dispositions. It is now pending before the District Court for the District of Columbia under the caption *Adams v. Bennet*, because in actions against federal agencies, the name of the defendant changes with the change of department heads.

28. See Rabkin, *supra* note 2, at 23–25. *Adams v. Richardson* too might have played some role in spurring the OCR to reach an agreement in New York, for the agency was anxious to demonstrate the adequacy of its compliance review procedures. The authors acknowledge this (p. 156); but they do not consider other court cases that might have influenced board-agency action. Board hiring practices were subject to judicial scrutiny in *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972), and student service practices were challenged in *Hart v. Community School Bd. of Educ.*, 512 F.2d 37 (2d Cir. 1975), and *Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F.2d 705 (2d Cir. 1979). Finally, the school board and OCR were actively engaged in litigation regarding OCR distribution of desegregation-related funds. *Board of Education v. Harris*, 444 U.S. 130 (1979). Some of these cases are mentioned in the book, but the authors never explore the possible impact of these cases on either the settlement or implementation process.

29. The *Adams* litigation may end in the near future. The D.C. Circuit recently suggested that the plaintiffs in *Adams* lack standing. *Women's Equity Action League v. Bell*, 743 F.2d 42 (D.C. Cir. 1984).

30. Rabkin, *supra* note 2, at 26.

civil rights enforcement," claims that the book's findings "need to be seen in a broader historical perspective" (p. 202 n.*). In contrast, Michael Rebell asserts that it is neither "necessary [n]or appropriate to relate the book's research findings and recommendations, which stand on their own, to political developments occurring at any particular time" (p. 202 n.*). Mr. Rebell won the battle but lost the war; for the book is vacuous on such emotional issues as what constitutes illegal discrimination, how far the reach of federal enforcement is, and what constitutes an appropriate civil rights agenda. In short, the authors never disclose whether they view the New York City experiment as a worthwhile enterprise.

CONCLUSION

Equality and Education promises much, but offers little. The authors' conclusions regarding the OCR extend only to its New York City review, which, considering the anomalous nature of that experiment, is not very far. In fact, considering the authors' failure to give adequate space to Reagan-era action in their study, even the narrowest of Rebell and Block's conclusions are questionable. Finally, their insensitivity to constitutionally protected executive authority as well as to the dimensions of Congress' grant of title VI authority undercuts both their assessment of OCR effectiveness and their recommendations regarding judicial enforcement of laws prohibiting discrimination in education. To anyone who is not a dedicated student of New York City politics or federal civil rights enforcement, this book is of limited value.